



April 5, 2022

VIA ONLINE PORTAL

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009

Freedom of Information Act Request: Agency Memoranda and Related Directives for Prosecutorial Discretion in Immigration Enforcement

Dear Sir or Madam:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

I. Custodians

- A. Michael P. Davis
- B. Kerry E. Doyle
- C. Steve K. Francis
- D. Jason Houser
- E. Tae D. Johnson
- F. Christopher S. Kelly
- G. Patrick J. Lechleitner
- H. Corey A. Price
- I. John D. Tresvina
- J. Claire Trickler-McNulty
- K. Any other full-time employee, part-time employee, or detailee working in the Office of, or for or with, the Director, the Senior Official Performing the Duties of the Deputy Director, the Enforcement and Removal Operations Directorate,

the Homeland Security Investigations Directorate, or the Office of the Principal Legal Advisor

II. Records Request

The timeframe for each request is October 1, 2021, to the date this records request is processed.

- A) An **unredacted** version of the April 3, 2022, memorandum from Kerry E. Doyle, Principal Legal Advisor, ICE, entitled “Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion” (Doyle Memorandum).¹
- B) The April 3, 2022, memorandum from Jonathan E. Meyer, General Counsel, DHS, entitled “Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law” (Meyer Memorandum), which is referenced in footnote 2 of the Doyle Memorandum.
- C) All records citing, mentioning, or otherwise referencing the contents, priorities, and/or publication of the Meyer Memorandum and/or the Doyle Memorandum. For this request, Priorities means Priority A, B, and C as described on pages 2 and 3 of the Doyle Memorandum.
- D) All records containing the terms “prosecutorial discretion” and/or “PD.”
- E) All records of the processing of this request.

III. Processing and Redactions

ICE must comply with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines.² This means, among other things, the following:

- ICE may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.
- Information that might technically fall within an exemption should not be withheld from AFL unless ICE can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail.

¹ AFL notes that it is highly unusual for a federal agency to preemptively include FOIA exemptions in an internal directive prior to a FOIA request.

² U.S. Dep’t Just. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

- If ICE determines that it cannot make full disclosure of a requested record, then the FOIA requires that it consider whether partial disclosure of information is possible and take reasonable steps necessary to segregate and release nonexempt information.
- ICE must properly apply the foreseeable harm standard. That means it must confirm and demonstrate to AFL that it has considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.
- Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then ICE must disclose the entire record, as a single record cannot be split into responsive and non-responsive bits. Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please give full effect to all applicable authorities and broadly construe our request and your obligations to provide responsive records.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move records to official systems within a certain time. AFL has a right to records in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all available tools to conduct a complete and efficient search for potentially responsive records. Many agencies have adopted the National Archives and Records Administration ("NARA") Capstone program or similar policies. These provide options for searching emails and other electronic records in a manner reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in

.PST files, outside of network drives, in paper format, or in personal email accounts.

- If some portions of the requested records are properly exempt from disclosure, then please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted before our requests are processed. If potentially responsive records are subject to potential deletion, including on a scheduled basis, please prevent deletion by instituting a litigation hold or other appropriate measures.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest. This has previously been recognized by the Departments of Defense, Education, Energy, Interior, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

V. Request for Expedited Processing

AFL requests expedited processing of this request. In support thereof, AFL certifies its compelling need for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e), which provides in relevant part:

- (e) *Expedited processing.* (1) Requests and appeals will be processed on an expedited basis whenever the component determines that they

involve: ... (ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information; ... or (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

As the Department of Homeland Security, and other federal agencies, have acknowledged in granting AFL expedited processing, AFL is primarily engaged in disseminating information. Additionally, there is an urgency to inform the public regarding the circumstances surrounding the government's planned systematic closure of cases as a means of circumventing the Immigration and Nationality Act and the rule of law. This is a matter of pressing national importance as once it is done, it cannot be undone.

Our request also meets the Department's regulatory test for expedited processing based on a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence. As already discussed, both requirements are met here, because there has been extensive public interest in the border, and because the government's ability to maintain a sovereign border as required by law clearly impacts the confidence of the public in the government's integrity. The government's deliberate choices to throw the border open and its refusal to enforce the law as written drastically undermine the confidence of the public in the integrity of the government. This request seeks to expose these circumstances to public inspection, before irreparable harm is done to the nation's interests, in violation of the law.

AFL is an organization engaged in gathering, analyzing, and disseminating information, and there is great urgency to inform the public concerning events of intense public interest. Moreover, the allegations at hand go directly to public confidence in the government's ability to remain a sovereign. For these reasons, our expedited processing request should be granted.

VI. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

VII. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at FOIA@aflegal.org. Finally, if AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Sincerely,

/s/ Reed D. Rubinstein
Reed D. Rubinstein
America First Legal Foundation