



June 24, 2021

VIA ONLINE PORTAL

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NE
FOIA Division
Washington, DC 20229

Freedom of Information Act Request: Removal of Career Officials from Leadership Positions

Dear FOIA Officer:

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. AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, to educate the public.

I. Introduction

The Biden-Harris Administration has taken actions that have created a crisis that has led to unprecedented levels of illegal immigration along the southwest border of the United States. They have done this by suspending policies that act as deterrents and welcoming, even at times encouraging, aliens to come to the border. Indeed, U.S. Customs and Border Protection (“CBP”) reports that encounters of illegal aliens more than doubled from 69,165 in November 2020, to 172,011 in May 2021.¹

¹ U.S. Customs and Border Protection, *Southwest Border Land Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (selecting FY 2021 as the Fiscal Year, and Title 8 as the Title of Authority and UC as the Demographic) (last visited June 15, 2021).

Amidst this self-created crisis, the Administration is replacing the Chief of the Border Patrol—the very entity charged with enforcing immigration between ports of entry.² Such a move is entirely confounding. The Administration has created a crisis that has enticed hundreds of thousands of illegal aliens to cross the border in recent months and is now changing leadership in the middle of that crisis.

Law enforcement should not be politicized. The men and women who make up U.S. Customs and Border Protection are highly trained, law enforcement professionals who have one of the hardest jobs in government. They work long hours in remote locations, are subjected to intense scrutiny by a media and politicians who think that the United States should not have borders, and they do this for little pay and with the utmost respect for everyone they encounter. Chief Scott rose to lead the Border Patrol with nearly three decades of service to the agency.³ Now, he is being removed to pave the way for political allies of the Biden Administration, who do not believe in border security. This also comes on the heels of a recent report that CBP Deputy Commissioner Robert Perez was forced out by the Administration.⁴ The career law enforcement professionals at CBP, and the American people, deserve better. They deserve someone in charge who believes in the mission of the agency they are tasked with leading.

Given the magnitude of the crisis on the border, AFL seeks records to shed light on these inexplicable leadership moves of the Administration for the American people. Therefore, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, AFL hereby requests the following records within twenty business days.

II. Requested Records

- A. All records, including but not limited to electronic mail, texts, memoranda, and handwritten notes, of, regarding, referring, or relating changes in leadership for the position of CBP Deputy Commissioner and Chief of Border Patrol. The timeframe for this request is January 20, 2021, to the date the records request is processed.
- B. All communications related to changes in leadership for the position of CBP Deputy Commissioner and Chief of Border Patrol from, to, or in the possession of any of the following components at CBP:
 1. Office of the Commissioner
 2. Office of the Deputy Commissioner

² Adam Shaw, *Border Patrol Chief Stepping Down After Biden Administration Moves to Replace Him*, FOX NEWS (June 23, 2021), <https://www.foxnews.com/politics/border-patrol-chief-stepping-down-biden-replace-rodney-scott>

³ *Id.*

⁴ Anna Giaritelli, *Biden Pushing Out Second-Highest US Border Official*, WASHINGTON EXAMINER (May 14, 2021), <https://www.washingtonexaminer.com/news/biden-pushing-second-highest-border-official-out>

3. Office of the Assistant Commissioner, Office of Public Affairs
4. Office of the Assistant Commissioner, Office of Congressional Affairs
5. Office of the Executive Director, Intergovernmental Public Liaison
6. Office of the Executive Director, Policy
7. Office of the Executive Director, Privacy and Diversity Office
8. Office of the Chief Counsel
9. Office of the Chief of Border Patrol
10. Office of the Executive Assistant Commissioner of Office of Field Operations
11. Office of the Executive Assistant Commissioner of Air & Marine Operations
12. Office of the Executive Assistant Commissioner of Trade
13. Office of the Executive Assistant Commissioner of Enterprise Services
14. Office of the Executive Assistant Commissioner of Operations Support

The timeframe for this request is January 20, 2021, to date the records request is processed.

- C. All communications related to changes in leadership for the position of CBP Deputy Commissioner and Chief of Border Patrol from, to, or in the possession of any of the following custodians:
1. Troy Miller
 2. Robert Perez
 3. Any person who has held the role of CBP Chief of Staff
 4. Any person who has held the role of CBP Deputy Chief of Staff
 5. Any person who has held the role of Deputy Chief, Border Patrol
 6. Any person who has held the role of Chief of Staff, Border Patrol
 7. Any person who has held the role of Deputy Chief of Staff, Border Patrol
 8. Any political appointee at CBP.

The timeframe for this request is January 20, 2021, to date the records request is processed.

- D. All communications related to changes in leadership for the position of CBP Deputy Commissioner and Chief of Border Patrol between any person at CBP and the Executive Office of the President. For this request, responsive records will include any communications with any email address ending in “who.eop.gov” relating to personnel or staffing at CBP. The timeframe for this request is January 20, 2021, to date the records request is processed.

- E. All communications between any political appointee at CBP related to changes in leadership at CBP. The timeframe for this request is January 20, 2021, to date the records request is processed.

III. Definitions Redactions

“Political Appointee” shall mean any person serving at CBP who holds a position—in a permanent, acting, or in a “performing the duties of” capacity—that is any of the following: 1) requires Presidential Appointment and Senate Confirmation (PAS) position; 2) is a Presidentially Appointed (PA) position; 3) in a non-career Senior Executive Service (SES) position; 4) a Schedule C employee; 5) in an administratively determined position; 6) in a position that was filled by coordination with, or through, the White House Liaison or Presidential Personnel Office “PPO”; or 7) a career SES official who has been detailed to CBP since January 20, 2021.

Redactions are disfavored as the FOIA’s exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then DHS must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; *see also Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, DHS should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- 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 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 such information to official systems within a certain period of time; AFL has a right to records contained 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 tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is 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, 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 by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11, 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.

The Department of Homeland Security, the federal courts, and the text of the Freedom of Information Act (as amended) all agree that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”⁵ AFL meets these three criteria.

Second, waiver is proper because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.” The Department of Homeland Security under the Biden Administration has created a crisis at the southwest border and has now decided to further complicate the situation by changing leadership and causing further instability in the agency responsible for securing the border. Understanding the rationale and reasoning for these actions is certainly within the public interest.

V. 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, please provide responsive 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, 600 14th Street NW, 5th Floor, Washington, D.C. 20005.

VI. 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 info@aflegal.org. Finally, if AFL’s request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Gene P. Hamilton
Gene P. Hamilton
America First Legal Foundation

⁵ *Cause of Action v. FTC*, 799 F.3d 1108, 1120 (D.C. Cir. 2015). *See also*, 5 U.S.C. § 552(a)(4)(A)(ii); 6 C.F.R. § 5.11.