



September 23, 2021

VIA EMAIL – FOIA@acf.hhs.gov

ATTN: Celeste Smith, Chief FOIA Officer
Administration for Children and Families, FOIA Office
330 C Street, SW, 4th Floor
Washington, DC 20201

**Freedom of Information Act Request: Data and Statistics on
Unaccompanied Alien Children**

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.

I. Background

An unprecedented number of Unaccompanied Alien Children (UAC)¹ are entering the United States along the southern border, with over 132,000 encounters so far in Fiscal Year 2021.² In July 2021 alone, U.S. Customs and Border Protection (CBP) recorded 18,962 encounters with UAC—a population larger than many towns across the United States. And CBP encountered another 18,847 in August.³ In fact, CBP encountered more UAC in these two months than they did in the entire previous Fiscal Year.⁴

This surge in arrivals brings to the fore problems that have existed for years in the immigration system. This includes the simple fact that—after a flawed and

¹ UAC has the meaning given to it by 6 U.S.C. § 279(g)(2), that is a child under the age of 18, with no lawful status in the United States who does not have a parent or legal guardian with them or in the United States able to care for them.

² See Southwest Border Land Encounters, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited September 16, 2021).

³ *Id.*

⁴ *Id.*

insufficient sponsor background check process—the Department of Health and Human Services has no idea what happens with the UAC it places with sponsors. Other than a cursory 30-day check-in after placing a UAC with a sponsor, which may or may not occur, HHS does nothing to ensure the UAC’s safety after placement.⁵ And HHS does nothing to ensure that the sponsors or the UAC comply with their other obligations under the law, such as ensuring that the UAC attends immigration court hearings.⁶ And U.S. Immigration and Customs Enforcement (ICE) does not, either.

Overwhelmingly, sponsors of UAC lack lawful status themselves—and oftentimes are the very same people who paid to have the UAC illegally brought to the United States.⁷ HHS’s placement of those UAC with those sponsors simply completes the last stage of a smuggling cycle by substituting the United States for the smuggling organizations.⁸ And those sponsors have, by the tens of thousands, failed to bring UAC to their immigration court hearings.⁹

Additionally, in other cases, UAC are placed with sponsors who are affiliated with human traffickers, as documented by a January 2016 Senate Report and new media reporting.¹⁰ HHS’s failure to ensure the safety of UAC is particularly egregious in this context.¹¹ This all results in HHS failing to account—even for 30 days—over 30,000 children since January of this year.¹² Yet HHS continues the same practices and largely does not keep ICE informed of any meaningful updates, leaving the

⁵ Stef W. Kight, *Exclusive: Government Can’t Reach One-in-Three Released Migrant Kids*, AXIOS (Sept. 1, 2021), <https://www.axios.com/migrant-children-biden-administration-a597fd98-03a7-415c-9826-9d0b5aaba081.html>.

⁶ *Id.* According to Axios, an HHS spokesperson told them, “While we make every effort to voluntarily check on children after we united them with parents or sponsors and offer certain post-unification services, *we no longer have legal oversight once they leave our custody.*” (Emphasis added).

⁷ John Roberts & Adam Shaw, *Migrant Encounters Over 200,000 Again in August, As Border Surge Continues*, FOX NEWS (September 15, 2021), <https://www.foxnews.com/politics/migrant-encounters-august-border-surge-continues>.

⁸ *Id.*

⁹ U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *In Absentia Removal Orders*, available at <https://www.justice.gov/eoir/page/file/1107711/download>.

¹⁰ U.S. Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, *Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement*, STAFF REPORT (Jan. 28, 2016), <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf>.

¹¹ As a result of HHS’s failure, they have, again, released UAC to “sponsors” who are human traffickers who take the UAC to serve as child labor in the United States. Ben Penn & Ellen M. Gilmer, *U.S. Probes Trafficking of Teen Migrants for Poultry-Plant Work*, BLOOMBERG LAW (Aug. 19, 2021), <https://news.bloomberglaw.com/daily-labor-report/u-s-probes-trafficking-of-teen-migrants-for-poultry-plant-work>.

¹² Since February 2021, CBP has encountered 97,301 UAC. Based on Axios reporting that HHS fails to contact one in three UAC, that means the Biden Administration has lost over 32,000 UAC who have entered the country under the Biden Administration’s open border policies.

enforcement arm of the government blind to real-time information another government agency possesses.

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. 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) For UAC who have come into HHS-ORR care since January 20, 2021, records sufficient to show the number of 30-day post-release check-ins or updates completed by ORR, broken down by month and the method by which the check-in was conducted (i.e. in person, telephone, video conference, etc.).
- B) For UAC who have come into HHS-ORR care since January 20, 2021, records sufficient to show the number of check-ins or follow-ups completed after the 30-day check-in.
- C) For UAC who have come into HHS-ORR care since January 20, 2021, records sufficient to show the number of cases in which HHS has provided ICE with an updated address, location, or contact information for a UAC or their sponsor.
- D) For UAC who have come into HHS-ORR care since January 20, 2021, records sufficient to show the number of UAC that ORR has placed with sponsors who lack legal status in the United States.
- E) For UAC who have come into HHS-ORR care since January 21, 2021, the number of children who have tested positive for COVID-19 while in HHS-ORR care, to include the care of a grantee organization, broken down by month.
- F) All records of communications with the Department of Justice's Executive Office of Immigration Review (EOIR) mentioning or referring to UAC appearance rates for court proceedings. The time frame for this request is January 20, 2021, to the date this records request is processed.
- G) All communications with ICE in which HHS alerted ICE that they placed a UAC with a sponsor who lacked lawful status in the United States. The time frame for this request is January 20, 2021, to the date this request is processed

III. Construction and Redactions

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 HHS 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, HHS should produce email and calendar 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 45 C.F.R. § 5.54, AFL requests a waiver of any and all applicable fees. This statute and regulation provide that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹³

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.

Second, in this case, a fee waiver is appropriate because of the public's right to know what is happening to underage children arriving at the southwest border. The public has always been interested in the treatment of children in refugee or mass migration

¹³ 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

situations, and in particular, how they are treated here in the United States. That does not change simply because there has been a change in political leadership and Administration. The public also has a right to know how the government is treating these children, whether it is following, or is able to follow, its own laws and regulations, and who in the government is responsible for tracking children in the country illegally. To date, the information requested has not been released in any form to the public; its release in response to this request will therefore contribute significantly to public understanding of the operations of the government. In addition, as American First Legal is a non-profit, tax-exempt organization as defined by the Internal Revenue Code, it has no commercial interest in making this request.

V. Record Preservation Requirement

We request that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁴

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, 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.

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.

¹⁴ See 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

Thank you,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation