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*Founded in 1986, the Immigration Reform Law Institute (IRLI) is a nonprofit legal organization defending the rights and interests of Americans.*

*IRLI is a supporting organization of the Federation for American Immigration Reform (FAIR).*

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February 14, 2024

Dear FOIA Officer:

I write on behalf of the Federation for American Immigration Reform (FAIR), a national, nonprofit public interest, membership organization of concerned Americans who share a common belief that our nation's immigration policies must be reformed to serve the national interest.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, FAIR hereby requests that you produce the following records:

1. The number of apprehensions and encounters made by Customs and Border Protection (CBP) along the New York-Canada border in the 2023 calendar year, broken down by month.
2. The number of apprehensions and encounters made by CBP along the Vermont-Canada border in the 2023 calendar year, broken down by month.
3. The number of apprehensions and encounters made by CBP along the Maine-Canada border in the 2023 calendar year, broken down by month.

For fee purposes, FAIR requests that search, review, and production fees for this request be waived because of FAIR's public interest purpose and non-profit status. FAIR is entitled to a complete waiver of fees because of its public-interest purpose. FOIA's fee waiver provision is contained at 5 U.S.C. § 552(a)(4)(A)(ii)(II). This states as follows:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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.

The Department of Homeland Security (DHS), of which Customs and Border Protection is a component, will consider certain factors when deciding whether the disclosure of the requested information is in the public interest for purposes of a waiver (or reduction) of fees. See 6 C.F.R. § 5.11(k), which provides in pertinent part:

(1) Records responsive to a request shall be furnished without charge or at a reduced rate below that established under paragraph (c) of this section, where a component determines, on a case-by-case basis, based on all available information, that the requester has demonstrated that:

(i) 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; and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) In deciding whether 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, components will consider the following factors:

(i) The subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as his or her ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent. However, components shall not make value judgments about whether the information at issue is “important” enough to be made public.

(3) To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, components will consider the following factors:

(i) Components shall identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.

FAIR easily satisfies each of the factors in the regulation. First, disclosure of the information responsive to our request “concern[s] identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.”

Second, the disclosure “is likely to contribute” to an increased public understanding of a reasonably broad audience of persons interested in the subject, as opposed to FAIR’s individual understanding, as FAIR intends to use its analytical and editorial skills to publish and disseminate to the general public the records obtained pursuant to this FOIA request through news articles, press releases, studies, and reports. Notably, FAIR has a special expertise in the subject matter of this FOIA request it has disseminated information to the public about immigration-related current events through the various media forms discussed below.

The law does not require a FOIA requester who qualifies for a fee waiver to spell out to the government in exacting detail how the disclosed information will significantly contribute to the public’s understanding of the government’s operations. Instead, a requester needs to merely “pinpoint the type of government activity he is investigating”<sup>1</sup> and describe with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities. Also, agencies should administer the fee provision in “an objective manner and should not rely on their own, subjective view as to the value of the information.”<sup>2</sup>

Finally, the disclosure would not be primarily in the commercial interest of FAIR. FAIR is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code and does not seek this information for any commercial benefit. FAIR is committed to protecting the

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<sup>1</sup> *Jarvik v. CIA*, 495 F. Supp. 2d 67, 73 (D.D.C. 2007).

<sup>2</sup> 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

public's right to be aware of the immigration-related activities of government agencies and to ensuring the lawful and appropriate use of government funds by those agencies.

As multiple United States Courts of Appeals have noted, "Congress amended FOIA to ensure that it is 'liberally construed in favor of waivers for noncommercial requesters.'"<sup>3</sup> Of the information requested, there is no possibility, let alone plans, of pursuing profit-making opportunities. The information will be used to further the knowledge of interests of the general public. IRLI intends of disseminating its analysis of the requested information through its regular channels, discussed below. IRLI thus satisfies this element.

FAIR is entitled to a complete waiver of fees because FAIR undeniably qualifies as a "representative of the news media, or news media requester" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). This provision defines "representative[s] of the news media" broadly to include organizations like FAIR that disseminate news through electronic communications, including "publishers of periodicals ... who make their products available for purchase by or subscription by or free distribution to the general public." The statutory definition unequivocally requires that organizations which electronically disseminate information and publications via "alternative media shall be considered to be news-media entities."

What is more, in *National Security Archive v. U.S. Dep't of Defense*,<sup>4</sup> the United States Court of Appeals for the District of Columbia Circuit noted FOIA's legislative history demonstrates that "it is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected... In fact, any person or organization which regularly publishes or disseminates information to the public...should qualify for waivers as a representative of the news media."<sup>5</sup>

For instance:

- FAIR maintains a frequently visited website at <http://www.fairus.org/> that contains numerous news articles, press releases, studies, and reports authored by FAIR staff members;
- FAIR disseminates information via YouTube, Facebook, Twitter, Instagram and Rumble;
- FAIR staff members regularly give interviews and disseminate information on MSNBC, CNN, ABC, NBC, CBS, FOX, C-SPAN, among other TV stations, and hundreds of radio stations;

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<sup>3</sup> *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1311 (D.C. Cir. 2003) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

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<sup>4</sup> 880 F.2d 1381 (D.C. Cir. 1989).

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<sup>5</sup> Id. at 1386 (citations omitted).

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- FAIR staff members give interviews for news articles and author news pieces that appear in the New York Times, USA Today, Washington Post, and hundreds of other newspapers, magazines, and websites;
- FAIR staff members have testified before congressional and state legislative committees as experts on immigration-related issues.

FAIR will use its staff's multi-decades of combined experience in policy and legal analysis, investigative reporting, government oversight, and public interest litigation to turn the documents request in this FOIA request into distinct works that will disseminate through the aforementioned media outlets. Based on these extensive publication activities, FAIR qualifies for a fee waiver as a "representative of the news media or news media requester," under FOIA and the regulations.

Finally, for the reasons set forth above, it is self-evident that the requested information constitutes "news" for purposes of FOIA.

If you have questions about this request, please contact me by e-mail at [foia@irli.org](mailto:foia@irli.org) or by phone at 202-792-1081.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Jason Hopkins".

Jason Hopkins

Investigations Manager