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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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January 3, 2023

VIA ONLINE FOIA E-PORTAL

FOIA Officer

U.S. Customs and Border Protection
90 K Street, NW
9th Floor, Mail Stop 1181
Washington, D.C., 20229

RE: Freedom of Information Act Request

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.

The United States Customs and Border Protection (CBP) is responsible for enforcing the country's federal immigration laws, which can require the temporary separation of family units or those claiming to be a family unit.

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

1. The total number of family units, or those claiming to be a member of a family unit, separated by CBP, from and including January 1, 2022 up to and including December 31, 2022.
2. The total number of minors separated from a relative or other alleged family unit by CBP, from and including January 1, 2022 up to and including December 31, 2022.

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). It 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) and its components 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* 5 U.S.C. § 552(a)(4)(A)(ii)(II).

1. The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.” The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.
2. The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions 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 a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public’s understanding.
3. The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.” 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 and 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.
4. The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgements about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

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” 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 waiver provision in “an objective manner and should not rely on their own, subjective view as to the value of the information.”

FAIR easily satisfies each of the factors in the DHS regulation. First, the information responsive to our request will significantly contribute to public understanding of the operations and activities of the government regarding nationwide activities.

Second, the requested information is “likely to contribute” to an increased public understanding and awareness of the family separation policy under the Biden administration.

Third, the disclosure will contribute to the 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 public and disseminate to the general public the records obtained pursuant to this FOIA request through news articles, press releases, action alerts, studies, and reports. Notably, FAIR has a special expertise in the subject matter of this FOIA request as the largest immigration reform organization in the United States that for more than thirty-five years has public and disseminated information to the public about immigration-related current events through the various media forms discussed below.

Fourth, the disclosure is likely to contribute “significantly” to public understanding of government operations or activities for the aforementioned reasons.

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’s committed to protecting the 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 the United States Court of Appeals for the Ninth Circuit has noted, “Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters.’” 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. FAIR intends of disseminating its analysis of the requested information through its regular channels, discussed below. FAIR thus satisfies this element.

FAIR is entitled to a complete waiver of fees because FAIR 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.*” Moreover, the FOIA statute itself, as amended in 2007, explicitly defines “representative of the news media” – a term previously undefined in the statute – to specifically include organizations, such as FAIR, that regularly publish and disseminate online periodicals,

e.g., newsletters. 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*, 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.”

FAIR easily qualifies for “representative of the news media or news media requester” status. FAIR is the largest immigration reform organization in the United States and for more than thirty-five years has published and disseminated information to the public about immigration-related current events through various media forms. For instance:

- FAIR maintains a frequently visited website at <http://www.fairus.org/> that contains numerous news articles, action alerts, polls, press releases, studies, and reports authored by FAIR staff members.
- FAIR publishes a newsletter called the “FAIR Immigration Report,” which is the nation’s most widely read U.S. immigration reform newsletter, packed with immigration reform facts and news regarding the activities of federal and state courts, legislatures, and executive officials.
- FAIR disseminates information via YouTube, Facebook, and Twitter. FAIR’s YouTube videos have more than 16 million views to date, FAIR’s Facebook page currently registers more than 1.6 million likes, and FAIR’s Twitter feed has more than 140,000 followers.
- FAIR spokespersons regularly give interviews and disseminate information on MSNBC, CNN, ABC, NBC, CBS, FOX, C-SPAN, among other TV stations, and hundreds of radio stations.
- FAIR spokespersons regularly 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 annually hosts a conference in Washington, D.C., entitled “Hold Their Feet to the Fire.” It is the nation’s largest annual immigration-media event where nearly fifty radio hosts from around the country have broadcast their shows live from the event while interviewing members of Congress, law enforcement officials, state lawmakers, experts, journalists, activists, and citizens regarding immigration-related issues.
- FAIR staff members regularly testify before congressional and state legislative committees as experts on immigration-related issues.

Moreover, other agencies of the federal government have granted FAIR “representative of the news media” category status. See, e.g., FOIA Request No. 12-00455-F (U.S. Immigration and Customs Enforcement), news media status granted on Oct. 19, 2015; FOIA Request 15-FI-HQ-01975 (Department of Housing and Urban Development), news media status granted on October

30, 2015; FOIA Request COW2016000114 (U.S. Citizenship and Immigration Services), news media status granted on Feb. 10, 2016; FOIA Request 16-00374-F (Drug Enforcement Administration), news media status granted on Mar. 4, 2016. As the United States Court of Appeals for the District of Columbia noted in *Oglesby v. United States Dep't of Army*, agencies should grant news media requestor status other agencies have done so because of “the need for uniformity among the agencies in their application of FOIA.” 920 F.2d 57, 66 (D.C. Cir. 1990).

FAIR will use its combined multi-decades of experience in policy analysis, investigative reporting, government oversight, and federal 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 DHS regulations.

FAIR will use its analytical and editorial skills to publish and disseminate the requested records to the general public through news articles, press releases, action alerts, studies, and reports; and (4) not be in the commercial interest of FAIR, primarily or otherwise, because FAIR is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code and does not seek the information for any commercial benefit. There is no possibility, let alone plans, that FAIR will use the requested information to pursue profitmaking opportunities. Instead, as discussed below, FAIR intends on disseminating the requested information to further the knowledge and interests of the general public.

For fee waiver purposes, FAIR also is undeniably a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). “[A] representative of the news media”

Means 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.... [T]he term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are ... *publishers of periodicals* (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public.¹

The statutory definition in FOIA requires that organizations which electronically disseminate information and publications via “alternative media shall be considered to be news-media entities.”² FOIA’s legislative history demonstrates “[i]t 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*

¹ 5 U.S.C. § 552(a)(4)(A)(ii)(III) (*emphasis added*).

² 5 U.S.C. § 552(a)(4)(A)(ii)(III). *See generally Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (noting the well-established proposition that, as used in statutes, the word “shall” is generally imperative or mandatory).

*or organization which regularly publishes or disseminates information to the public... should qualify for waivers as a 'representative of the news media.'"*³

FAIR is one of the largest immigration reform organizations in the United States. For more than forty years, FAIR has published and disseminated information to the public about immigration-related current events through various media forms, including through online periodicals (e.g., newsletters).⁴ By way of further additional examples:

- FAIR maintains a frequently visited website at <http://www.fairus.org/> that contains numerous news articles, action alerts, polls, press releases, studies, and reports authored by FAIR staff members.⁵
- FAIR publishes a newsletter called the "FAIR Immigration Report," which is the nation's most widely read U.S. immigration reform newsletter, packed with immigration reform facts and news regarding the activities of federal and state courts, legislatures, and executive officials.⁶
- FAIR disseminates information via YouTube, Facebook, and Twitter. FAIR's YouTube videos have more than 46 million views to date, FAIR's Facebook page currently registers more than 2 million likes, and FAIR's Twitter feed has more than 280,000 followers.⁷
- FAIR spokespersons regularly give interviews and disseminate information on MSNBC, CNN, ABC, NBC, CBS, FOX, C-SPAN, among other TV stations, and hundreds of radio stations.⁸
- FAIR spokespersons regularly 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.⁹
- FAIR annually hosts a conference in Washington D.C. titled, "Hold Their Feet to the Fire," which is the nation's largest annual immigration-media event where over sixty radio hosts from across the country have broadcast their shows live

³ *National Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), *quoting* 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (emphasis added).

⁴ See, e.g., <https://fairus.org/news/newsletters>.

⁵ See, e.g., published opinion pieces (<http://www.fairus.org/media/published-opinion-pieces>); press releases (<http://www.fairus.org/media/press-releases>); polls (<http://www.fairus.org/facts/post-election-polls>); studies and reports (<http://www.fairus.org/issues>).

⁶ See <https://fairus.org/news/newsletters>.

⁷ See YouTube (<http://www.youtube.com/user/fairfederation?feature=watch>); Facebook (<https://www.facebook.com/FAIRImmigration>); and Twitter (<https://twitter.com/fairimmigration>).

⁸ See, e.g., https://www.youtube.com/playlist?list=PLUW5ip06MQAx5yQ6qP0Ud54C_tQE0hUji.

⁹ See, e.g., <http://www.fairus.org/media/published-opinion-pieces>.

from the event while interviewing members of Congress, law enforcement officials, state lawmakers, experts, journalists, activists, and citizens regarding immigration-related issues.¹⁰

- FAIR staff members regularly testify before congressional and state legislative committees as experts on immigration-related issues.¹¹

FAIR will use its combined multi-decades of experience in policy analysis, investigative reporting, government oversight, and federal public interest litigation to transform the records requested in this FOIA request into distinct works that FAIR will disseminate through various media outlets.

What is more, other agencies of the federal government have granted FAIR “representative of the news media” category status. *See e.g.*, FOIA Request 16-00374-F (Drug Enforcement Administration), news media status granted on Mar. 4, 2016; FOIA Request COW2016000114 (U.S. Citizenship and Immigration Services), news media status granted on Feb. 10, 2016; FOIA Request 15-FI-HQ-01975 (Department of Housing and Urban Development), news media status granted on Oct. 30, 2015; and FOIA Request No. 12-00455-F (U.S. Immigration and Customs Enforcement), news media status granted on Oct. 19, 2015. Agencies should grant news media requestor status when other agencies have done so because of “the need for uniformity among the agencies in their application of FOIA,”¹²

Moreover, 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 or by phone at 202-792-1081.

Thank you for your attention to this matter.

Sincerely,



Jason Hopkins

Investigations Manager

¹⁰ *See* <https://fairus.org/fair-radio-row-2017>.

¹¹ *See, e.g.*, <https://fairus.org/about-fair/impact/congressional-testimony>.

¹² *See Oglesby v. United States Dep't of Army*, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (citation omitted).