



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

November 21, 2023

Via SecureRelease Portal

U.S. Customs and Border Protection
90 K ST NE MS 1181
Washington DC 20229

Re: Freedom of Information Act Request to U.S. Customs and Border Protection –
FERM Implementation

Dear FOIA Officer:

The American Immigration Council and the American Immigration Lawyers Association (together referenced as “Requesters”) submit the following Freedom of Information Act (“FOIA”) request for records regarding U.S. Customs and Border Protection (“CBP”) implementation of the Family Expedited Removal Management (“FERM”) program. Requesters seek a waiver of any applicable fees pursuant to 5 U.S.C. § 552(a)(4)(A) and 6 C.F.R. § 5.11(k) because the information requested will contribute to the public’s understanding of CBP’s implementation of FERM. We expect a response to this request within twenty working days in accordance with 5 U.S.C. § 552 (a)(6)(A)(i), unless otherwise allowed by the statute.

I. REQUEST FOR INFORMATION

Requestors seek records prepared, received, transmitted, or maintained by CBP relating to the agency’s implementation of the FERM program. ICE announced implementation of the FERM program on May 10, 2023, to confirm family units apprehended at the southwest border comply with credible fear interview appointments and immigration judge review requirements.¹ The FERM program serves as an alternative to detention and places certain conditions, including electronic surveillance and an overnight curfew, on asylum-seeking families while they wait for their credible fear interview appointments. Customs and Border Protection plays a crucial role in the FERM program because families in CBP custody are selected for enrollment in the FERM program. The restraints on migrants’ liberty and the rapid expansion of the FERM program contribute to the urgent need for details about the program’s implementation and efficiency. In the first three months of implementation, the program grew from four initial cities to eighteen cities. At present, we believe that FERM is operating in forty cities.

Despite the FERM program’s nationwide reach, DHS’ information about the program is extremely limited. The agency has failed to provide details on the nationalities eligible for placement into FERM, the cities

¹ U.S. Immigration and Customs Enforcement, *ICE announces new process for placing family units in expedited removal* (May 10, 2023), <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal>.

where FERM is currently operating, how FERM has impacted credible fear interview screening rates, and how FERM program participants can access legal counsel.

Accordingly, Requesters seek the following records:²

Records relating to policies and guidance:

1. Records relating to CBP's implementation of the FERM program, including but not limited to agency procedures to implement the FERM program and instructions or training received by CBP officers screening potential FERM program participants.
2. Records relating to CBP's criteria used to determine families' eligibility for the FERM program.
3. Records relating to how the agency determines where families enrolled in FERM must report for check-ins.
4. Records relating to how the agency determines which family member will be designated as "Head of Household" for FERM purposes.
5. Documents given to families enrolled in the FERM program by CBP or its assignees with information about the FERM program, including but not limited to enrollees' rights during the expedited removal process, consequences of violating the conditions of enrollment in FERM, and legal resources. This includes presentations shown or given to FERM participants during FERM participation in video or any other formats.
6. Records relating to biographic and biometric data collected of all FERM participants such as DNA, photographs for facial recognition, fingerprints, and voice recognition.
7. Records relating to CBP's budget allocations and funding received by the agency to assist with the administration of the FERM program.

Data relating to individuals enrolled in the FERM Program, as of the date the agency performs the search

1. The number of family units CBP referred to ICE for enrollment in the FERM program.
2. The number of individuals CBP referred to ICE for enrollment in the FERM program. We request that the agency provide this data broken down by:
 - a. Country of origin of FERM program participants;

² For purposes of the Request, unless otherwise specified, the term "records" includes but is not limited to all communications, correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, spreadsheets, charts, rules, manuals, technical specifications, training materials, and studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications, including text messages, and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

- b. Location of FERM program participants;
- c. Participants' primary language;
- d. Participants' indigenous identity; and
- e. Adults vs. juveniles.

II. FORMAT OF PRODUCTION

Requestors seek responsive electronic records in a machine-readable, native file format, with all metadata and load files. We request that any data be provided in a workable format, such as Microsoft Excel or comma-separated values (CSV) files. If terms or codes are not in the form template and/or publicly defined, please provide a glossary or other descriptive records containing definitions of acronyms, numerical codes, or terms contained in data responsive to this request. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits.

III. FEE WAIVER REQUEST

Requestors seek a fee waiver because the information sought 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 [requesters]...” 5 U.S.C. § 552(a)(4)(A)(iii).

1. *Responsive documents to the request will significantly contribute to the public's understanding of the FERM program.*

The public interest criteria is satisfied when (1) the request concerns operations or activities of the government; (2) disclosure is likely to contribute to an understanding of government operations or activities; (3) disclosure contributes to an understanding of the subject by the public at large; and (4) disclosure is likely to contribute significantly to such understanding. 6 C.F.R. § 5.11(k)(2).

The first prong of the public interest element is clearly satisfied by this request. The records sought specifically concern CBP's role in the implementation of the FERM program. CBP is an agency of the U.S. government.

Records responsive to the request will contribute to the public's understanding of the role CBP plays in the operation of the FERM program. ICE published two statements about the program: one on May 10, 2023, and a second on August 24.³ The August 24 statement announced ICE's plan to rapidly expand the program. ICE's limited information fails to answer basic questions about the program such as the eligibility criteria, including the nationalities of potential participants or cities where the program is active. Neither statement mentioned CBP's role in the implementation of the FERM program, even though families are placed in the FERM program while in detention at the border.

The lack of information on the FERM program has led to service providers and the public to rely on media reports to obtain more information. One of the first media reports on ICE's implementation of the FERM

³ Immigration and Customs Enforcement, *supra* note 1; U.S. Immigration and Customs Enforcement, *Statement regarding the Family Expedited Removal Management Program* (Aug. 3, 2023), <https://www.ice.gov/news/releases/statement-regarding-family-expedited-removal-management-program>.

program stated that ICE would place asylum-seeking families who headed to Newark, NJ; Baltimore; Washington, D.C.; and Chicago in the program.⁴ Since its implementation, media reports suggest that ICE told advocates about FERM's expansion to thirteen locations in August and cite unnamed sources who reported that FERM would reach 40 cities by the end of September.⁵ On a September 20 factsheet, the U.S. Department of Homeland Security announced it had "expanded the FERM program nationwide" but failed to provide any further details.⁶

The list of destinations where FERM is active is not the only aspect of the program lacking transparency. Neither DHS nor ICE has provided publicly available information about the credible fear process for FERM participants. The DHS factsheet states that FERM's purpose is to quickly remove families without a lawful basis to remain in the country,⁷ deemphasizing the role of the credible fear interview in this process. CBP's role in assigning families to the FERM program remains a mystery.

Non-profit service providers have had to inform their communities about the credible fear aspect of FERM based on limited engagement opportunities provided by ICE and their own experiences assisting FERM participants in light of the dearth of information from the agencies. For example, Americans for Immigrant Justice released a report in September 2023 with a credible fear timeline for FERM participants based on information ICE provided to stakeholders but did not make this information publicly available.⁸ ICE engagement with community groups often is scheduled within days of the FERM program being activated in cities, leaving advocates with limited time to prepare for these meetings and less time for ICE to respond to concerns.

The limited information about the credible fear process also has led to concerns about access to legal counsel for FERM participants during this process.⁹ The National Immigrant Justice Center ("NIJC") attests that FERM participants face difficulties in finding legal counsel to assist during their credible fear interviews and their immigration court reviews, leaving the few participants who find attorneys with an inadequate amount of time to prepare for this important step in the asylum process.¹⁰ In one case, NIJC encountered a FERM family less than 48 hours before the family's scheduled removal.¹¹ The documents sought in this FOIA request will help the public understand how CBP assists ICE in operating the FERM

⁴ Hamed Aleaziz, *New ICE program will put families under home curfew, deport those who fail asylum screenings*, LOS ANGELES TIMES (May 10, 2023), <https://www.latimes.com/politics/story/2023-05-10/ice-family-detention-curfew-gps-monitoring>.

⁵ Elliot Spagat, *US expands curfews for asylum-seeking families to 13 cities as an alternative to detention*, ASSOCIATED PRESS (Aug. 4, 2023), <https://apnews.com/article/asylum-seekers-curfew-border-screening-biden-Oece872be2799443feda68a834db8f95>.

⁶ U.S. Dept. of Homeland Security, *Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act* (Sept. 20, 2023), <https://www.dhs.gov/news/2023/09/20/fact-sheet-biden-harris-administration-takes-new-actions-increase-border>.

⁷ *Id.*

⁸ Cindy S. Woods, Americans for Immigrant Justice, *THE FAMILY EXPEDITED REMOVAL MANAGEMENT PROGRAM (FERM): A THREE-MONTH ASSESSMENT* (Sept. 7, 2023), <https://aijustice.org/wp-content/uploads/2023/10/FERM-Report-Americans-for-Immigrant-Justice-2023.pdf>.

⁹ National Immigrant Justice Center, *POLICY BRIEF: ICE'S FAMILY EXPEDITED REMOVAL MANAGEMENT (FERM) PROGRAM PUTS FAMILIES AT RISK 2* (Aug. 2023), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-08/NIJC-policy-brief-FERM-August-2023-FINAL.pdf>.

¹⁰ *Id.* at 2 – 3.

¹¹ *Id.* at 2.

program to ensure participants' rights are protected and service providers are better equipped to advise participants of the process.

Disclosure of the requested records also will significantly contribute to the public's understanding of CBP's role in the implementation of the FERM program. Elected officials have expressed concerns about FERM's expansion based on the reports of issues encountered by families placed in the program. U.S. Rep. Pramila Jayapal recently issued a statement expressing her concerns about FERM's participants' access to resources such as attorney representation and interpreters.¹² Further, a group of congressional leaders sent a letter to the Biden administration asking the U.S. Department of Homeland Security to provide a briefing with data and more details on the program.¹³ Congressional interest in the FERM program is a significant sign that the public is ill-informed about the FERM program's implementation.

Media reports on FERM have focused on the program's curfew provisions, leading to a lack of public understanding of the FERM program as a whole and particularly CBP's role in it. For example, one article described the program as a curfew designed to stay in effect until the outcome of credible fear interviews.¹⁴ Other media reports described the FERM program as placing participating families' heads of household on an alternative to detention, such as a GPS ankle monitor, and subject them to a curfew.¹⁵ The media's emphasis on the program's restrictions on migrants' liberty, albeit important, have distracted the public's attention from FERM's stated purpose, i.e. implementing a system so that families who have not been able to articulate a credible fear may quickly be removed from the country.¹⁶ The requested records and data will contribute to the public's understanding that the FERM program's goal is to remove families and not to simply place them in an alternative to detention program.

The Requesters are particularly well-positioned to disseminate information on the details of this program. The American Immigration Council ("the Council"), a non-profit organization, regularly publishes information obtained from FOIA requests through publications such as fact sheets and reports available on the Council's website. This information reaches a wide audience, which includes varied segments of the U.S. public. Like other responses to FOIA requests, the Council intends to provide information received in response to this FOIA request on its publicly accessible website. In 2023, the Council has received more than 2.2 million pageviews from more than 1.3 million unique visitors. The Council also regularly shares information with national print and news media and plans to distribute information obtained from these FOIA disclosures to interested media. In keeping with its track record of synthesizing or otherwise publishing information on governmental operations shared in responses to FOIA requests, the Council intends to provide information received in response to this FOIA request on its publicly accessible website.

The American Immigration Lawyers Association ("AILA") also widely disseminates information to its members and the public in the form of continuing legal education materials, information, and resources,

¹² Press Release, U.S. Rep. Pramila Jayapal, *Jayapal Statement on New Administration Immigration Actions* (Sept. 22, 2023), <https://jayapal.house.gov/2023/09/22/jayapal-statement-on-new-administration-immigration-actions/>.

¹³ Letter from U.S. Rep. Pramila Jayapal, et. al to U.S. Dept. of Homeland Security Sec'y, Alejandro Mayorkas (Oct. 12, 2023), <https://jayapal.house.gov/wp-content/uploads/2023/10/FERM-Letter-Final.pdf>.

¹⁴ Spagat, *supra* note 5.

¹⁵ Priscilla Alvarez, *Biden administration to roll out new tracking measures for migrant families*, CNN (May 10, 2023), <https://www.cnn.com/2023/05/10/politics/migrant-families-tracking-biden-administration/index.html>.

¹⁶ U.S. Dept. of Homeland Security, *supra* note 6.

primarily through its website, <https://www.aila.org/>. Those who visit AILA's website include immigration attorneys and their individual and employer clients, media representatives, U.S businesses, foreign nationals, law students, elected officials, government employees, and other interested members of the public. Moreover, information posted to AILA's website is often linked to the websites of other organizations and immigration law firms. AILA also disseminates the information through its newsletters, social media, and other print and electronic publications.

Disclosure of the records sought will help Requesters disseminate information about FERM to the public and service providers. Without the requested records, the public will continue to misunderstand the details and requirements of the program. The requested records will significantly contribute to the public discourse of how ICE implements and expands FERM.

2. Disclosure of the information is not in Requesters' commercial interest.

Requesters have no commercial interest in the records requested, and this request aims at furthering public understanding of the government's implementation of the FERM program.

The Council, as a not-for-profit organization, has no commercial interest in the present request. This request furthers the Council's work to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. As with all other reports and information available on the Council's website and frequently disseminated to the public via electronic newsletters, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, policymakers, and other interested members of the public free of charge.

AILA plans to make disclosures obtained through this request available to AILA's audience, which includes attorneys, non-profit organizations, and legal scholars in collaboration with the Council. As FOIA's fee-waiver requirements must be liberally construed in favor of waivers for noncommercial requestors, a waiver of all fees is justified and warranted in this case.

Thank you for your attention to this request. If you have any questions regarding this request, please do not hesitate to contact us.

Very truly yours,

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on behalf of Requesters