July 7, 2021

VIA U.S. MAIL

Small Business Administration
Office of Hearings and Appeals
Attention: Oreoluwa Fashola, FOIA Office
409 3rd Avenue, SW – 8th Floor
Washington, D.C. 20416.

Freedom of Information Act Fee Waiver Appeal

Dear FOIA Appeals Officer:

This is an appeal under the Freedom of Information Act.

On May 20, 2021, America First Legal Foundation requested documents from the Small Business Administration (SBA) under the Freedom of Information Act and requested a fee waiver. SBA assigned the request identification number SBA-2021-011608, which is enclosed with this appeal as Exhibit 1. On June 4, 2021, we received a denial of our request for a fee waiver in a letter signed by Eric S. Benderson, which is also enclosed with this appeal as Exhibit 2. We now appeal the denial of our fee waiver.

The SBA denied our request for waiver of search, review, and duplication fees, disputing our assertion that we are a qualified public education and news media requester and our assertion that disclosure is in the public interest. The SBA also denied our request based on the existence of ongoing litigation between AFL and the SBA.

These determinations are incorrect. We appeal this denial and the determinations that supported it. And further, we object to the process the SBA has established for FOIA appeals, as the SBA's Office of Hearings and Appeals is led by an individual not appointed consistent with the Appointments Clause of the United States Constitution.

1. **Representative of the News Media**

The relevant analysis for fee waivers based on being a representative of the news media focuses on the nature of the organization seeking a fee waiver, not the FOIA

request for which the fee waiver is requested.[1] The Small Business Administration, the federal courts, and the text of the Freedom of Information Act 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."[2]

AFL meets these three criteria. The fact that we are requesting these documents from the agency tends to show that we gather information of potential interest to the public.[3] Further evidence of the fact that AFL generally engages in this type of activity can be found by browsing the news section of our website.

The SBA must consider whether we create "distinct works" using the materials we gather. Addressing this element, the D.C. Circuit has said "if an entity . . . issues substantive press releases concerning the documents it uncovers, or even if it simply provides editorial comments on those documents in interviews with newspapers, such a gloss on the underlying materials could satisfy this element of the definition."[4] Despite its dismissive tone, the SBA denial letter itself admits that we publish information and also provide comments on the published material.[5] This satisfies the *Cause of Action* standard. Distribution of this material occurs on our website, but also through the appearances our team makes on various cable networks and their presence on social media. Proof of ability to disseminate the information widely is not required.[6] Mere proof that a requestor distributes information to an audience is all that is required.

Under the relevant standards, as laid out by the D.C. Circuit and the text of the Freedom of Information Act, AFL is a representative of the news media, and is thus entitled to a waiver of fees under FOIA. We respectfully request that the SBA correct its mistaken determination that we are a "general public" requester and reclassify us as a news media requester.

2. Public Interest

Turning to our second claim for exemption from fees, the SBA acknowledges that "[d]isclosure is in the public interest when it is likely to (1) contribute significantly to

---

[1] *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1122 (D.C. Cir. 2015).
[2] *Cause of Action*, 799 F.3d at 1120. *See also*, 5 U.S.C. § 552(a)(4)(A)(ii)).
[3] *Cause of Action*, 799 F.3d at 1118.
[4] *Cause of Action*, 799 F.3d at 1122.
[5] "[U]nder the tab "News" AFL simply posts a summary of the lawsuits or FOIA requests it has filed and a link to court filings or the FOIA request with a brief statement from AFL President Stephen Miller."
[6] *Cause of Action*, 799 F.3d at 1116.

public understanding of the operations or activities of the government and (2) is not primarily in the public interest of the requester."[7]

a. Contribution to Public Understanding

The SBA contends that AFL's request would fail to further "the contribution to an understanding of the subject by the general public likely to result from the disclosure." According to the SBA's denial letter, to determine "whether disclosure will contribute significantly to public understanding of the operations or activities of the government, an agency should consider: (1) the subject of the request; (2) the informative value of the information to be disclosed; (3) the contribution to an understanding of the subject by the general public likely to result from the disclosure; and (4) the significance of the contribution to public understanding."[8] The SBA denial letter only argues that AFL fails to meet the third factor.[9]

The SBA says it must consider "the contribution to an understanding of the subject by the general public likely to result from the disclosure," but D.C. Circuit precedent states something quite different. "The statute requires only that the disclosure be likely to contribute significantly to public understanding . . . [it does not] require a requester to show an ability to convey the information to a broad segment of the public."[10] As an example, the DC Circuit explained that academic papers which interest relatively few individual readers can still contribute significantly to public understanding, despite not having a broad or general audience.

As to the public interest served by this disclosure, that is quite clear. The public has an interest in knowing how taxpayer funds are being distributed via aid grants, and why the government has chosen the methods it has. A more specific class of individuals are interested in this information as it will inform their decision to either apply for these grants, or refrain from applying. There is clearly public interest in this information, and disclosure serves that interest.

b. Primary Interest Standard

The SBA elaborates on their belief that AFL's request fails to qualify as a public interest request by saying it must look to "(1) the existence and magnitude of a commercial interest and (2) the primary interest in disclosure." This is simply an incorrect statement of the governing law.

This formulation has been incorrect since the 1986 FOIA amendments eliminated the "not primarily in the interest of the requester" requirement from the statute. "Now

---

[7] *See* Exhibit 2.
[8] *Id*.
[9] *Id*.
[10] *Cause of Action*, 799 F.3d at 1116 (internal quotations omitted).

the text requires only that the disclosure be 'likely to contribute significantly to public understanding.'"[11] "[I]t no longer matters whether the information will also (or even primarily) benefit the requester. Nor does it matter whether the requester made the request for the *purpose* of benefiting itself."[12]

Our interest in these documents is primarily the education of the public about the activities of the government, and the pursuit of good governance. However, the entire inquiry into the "why" of our request is misplaced and has no bearing on the merits of our public interest fee waiver. We believe that when a government agency is handing out taxpayer dollars, the public at large has a right to know what methods the agency uses to prioritize those grants, and why they picked those methods. We seek to provide the public with that information.

c. Public Interest

Under the relevant standards, as laid out by the D.C. Circuit and the text of the Freedom of Information Act (as amended), AFL's request falls under the public interest fee exemption, and is thus entitled to a waiver of fees under FOIA. We respectfully request that the SBA correct its mistaken determination, reclassify this request as a public interest request, and waive all fees.

3. Litigation Objection

SBA also purports to deny our request for a fee waiver due to our ongoing litigation against the agency. The mere fact that AFL is in litigation with the SBA does not transform a request for records into one motivated by profit.

If AFL was merely seeking records to use in litigation, it could do so through discovery motions. Here, AFL seeks to educate the public about what the SBA is doing, and why the SBA is doing it. Further, "'information helpful to [litigation] furthers a requester's interest in compensation or retribution, but not an interest in commerce, trade, or profit.'"[13] Thus, even if the information sought here was being sought partly for use in litigation, that would not be a commercial purpose under the controlling precedent.

Further, litigation and FOIA are entirely separate processes, with separate goals and requirements. Being involved in litigation against an agency in no way impacts the rights of a FOIA requester, and any claim otherwise by the SBA is in direct conflict

[11] *Cause of Action*, 799 F.3d at 1118 (quoting the Freedom of Information Reform Act of 1986, codified at 5 U.S.C. § 552(a)(4)(A)(iii)).
[12] *Id.* (emphasis original).
[13] *Cause of Action*, 799 F.3d at 1118 (quoting *McClain v. U.S. Dep't. of Justice*, 13 F.3d 220, 220 (7th Circuit 1993)).

with Supreme Court precedent.[14] Any denial of a fee waiver based on this rationale is thus unlawful.

4. The Office of Hearing and Appeals Lacks Leadership Appointed Consistent with the SBA Acts, the FOIA Improvements Act, and the Constitution

The SBA Acts place an Associate Administrator as the Chief Hearing Officer and that Chief Hearing Officer oversees the FOIA process handled by the Office of Hearings and Appeals.[15] Under the FOIA Improvements Act,[16] and the Supreme Court's decision in *Lucia v. S.E.C.*,[17] the Chief Hearing Officer—who exercises authority such to the extent that he or she must be considered an Officer of the United States—must be appointed consistent with the Appointments Clause. However, there is currently no Associate Administrator in charge of the Office of Hearings and Appeals. Rather, the Office is led by Kim McLeod, an Assistant Administrator.[18]

AFL will challenge any decision rendered by Ms. McLeod denying our request for a fee waiver with litigation challenging the placement of anyone other than an official properly appointed in the position of the Associate Administrator for the Office of Hearings and Appeals.

Thank you for your consideration of this appeal.

Sincerely,

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

---

[14] "This is not to suggest that respondent's rights are in any way diminished by its being a private litigant, but neither are they enhanced by respondent's particular, litigation-generated need for these materials." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 167 n.10 (1975) (an entity's "rights under the Act are neither increased nor decreased by reason of the fact that it claims a[] [litigation] interest").
[15] *See* 15 U.S.C. § 633(b)(1); 15 U.S.C. § 634(i)(1)(C).
[16] *See* 5 U.S.C. § 552(j)(1).
[17] 138 S. Ct. 2044 (2018).
[18] *See* U.S. Small Business Administration, *SBA Leadership*, https://www.sba.gov/about-sba/organization/sba-leadership (last visited June 29, 2021).