



July 28, 2021

VIA ELECTRONIC MAIL – [FDAFOIA@fda.hhs.gov](mailto:FDAFOIA@fda.hhs.gov)

Director, Office of the Executive Secretariat  
U.S. Food and Drug Administration  
5630 Fishers Lane, Room 1050  
Rockville, MD 20857

### **FDA Freedom of Information Act Appeal**

Dear FOIA Appeals Officer:

This is an appeal under the Freedom of Information Act regarding the denial of an expedited processing request for FOIA control number 2021-4770.

On July 16, 2021, America First Legal Foundation requested documents from the Food and Drug Administration (FDA) under the Freedom of Information Act and requested expedited processing. FDA assigned the request identification number 2021-4770 (“Request”). On July 26, 2021, we received a denial of our request for expedited processing in a letter signed by Sarah Kotler (“Denial”). We now appeal the denial of our expedited processing request.

The Denial’s stated determination that our request has not “demonstrated that there exists an urgency to inform the public concerning actual of alleged Federal Government activity” is not correct.

First, the subject of our request is not even an *alleged* activity. The White House Press Secretary admitted the subject of our request was occurring during an official press conference from the White House Press Briefing Room.<sup>1</sup> Nor was this a one-off occurrence as she came back the next day and elaborated further on the government’s

---

<sup>1</sup> The White House, *Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy, July 15, 2021*, <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021/> (last visited July 28, 2021).

activity.<sup>2</sup> Thus there is an “actual...Federal Government activity” that has been confirmed by the White House Press Secretary.

Moreover, the urgency to inform the public should be self-evident. The activity described involves the federal government engaging in content moderation and viewpoint discrimination, with the help of the largest online companies in the world. This is a blatant attack on the heart of the rights protected by the First Amendment to the United States Constitution and a matter of intense public interest. Indeed, on the same day that FDA sent its Denial to AFL, nine United States Senators wrote a letter to the President of the United States on this very topic.<sup>3</sup>

Aside from the media coverage and interest from public officials, as a matter of law the protection of constitution rights is in the public interest. In fact, the U.S. Court of Appeals for the D.C. Circuit has said, “[t]he public interest favors the protection of constitutional rights.” *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 335 (D.C. Cir. 2018). The U.S. Court of Appeals for the Sixth Circuit has put an even finer point on it, saying, “it is always in the public interest to prevent violation of a party’s constitutional rights.” *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Other Courts of Appeals have agreed. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997) (“[T]he public interest clearly favors the protection of constitutional rights.”); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (“[U]pholding constitutional rights surely serves the public interest.”).

Thus, based on a misapplication of the law and the facts, the FDA has improperly denied AFL’s request for expedited processing. We request that this determination be reversed and AFL’s request for expedited processing be granted, and the documents requested be produced in a timely manner.

Thank you,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation

---

<sup>2</sup> The White House, *Press Briefing by Press Secretary Jen Psaki, July 16, 2021*, <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021/> (last visited July 28, 2021).

<sup>3</sup> Letter from Ron Johnson, Mike Lee, Rand Paul, Mike Braun, Roger Marshall, Kevin Cramer, Rick Scott, James Lankford, Tommy Tuberville, United States Senators, to Joseph R. Biden, President of the United States (July 26, 2021) available at <https://www.ronjohnson.senate.gov/services/files/877ADC77-2B30-4F31-BC92-78B35310237D> (last visited July 28, 2021).