



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

October 15, 2021

Reed D. Rubinstein
America First Legal Foundation
FOIA@aflegal.org

Re: FOIA Tracking No. FY22-003

Dear Mr. Rubinstein:

This letter acknowledges receipt of your October 7, 2021 Freedom of Information Act (“FOIA”) request to the Office of Legal Counsel (“OLC”), among others, in which you sought nine categories of records regarding “(1) the [October 4, 2021] Garland Memorandum, (2) the NSBA, (3) the NSBA Letter, [and/or] (4) the National Education Association and/or the American Federation of Teachers.” We received your request on October 7, 2021, and it has been assigned tracking number **FY22-003**. For your information, consistent with 28 C.F.R. § 16.4(a), we construe your request as seeking records from September 15, 2021, to the date a search is begun. Based on our preliminary review of your request, and pursuant to 28 C.F.R. § 16.5(b), your request has been tentatively assigned to the “complex” processing track. If you would like to narrow your request so that it can be transferred to the “simple” track and processed more quickly, please contact Melissa Golden at the address and phone number provided below. We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

I have determined that your request for expedited processing under 28 C.F.R. § 16.5(e)(1)(ii) should be denied. While you have stated that the “AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it,” you have not established that the AFL is “primarily engaged in disseminating information.” Courts have held that to qualify under this standard, an organization must be “primarily, and not just incidentally, engaged in information dissemination.” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 276 (D.D.C. 2012). Put another way, information dissemination must be “the main activity” of the requestor, and not merely “a main activity.” *ACLU of N. Cal. v. DOJ*, No. 04-4447, 2005 WL 588354, at *14 (N.D. Cal. Mar. 11, 2005). Accordingly, courts have upheld the denial of requests for expedited processing from such legal policy advocacy organizations as the American Civil Liberties Union of Northern California and the Landmark Legal Foundation. *See Landmark Legal Found.*, 910 F. Supp. 2d at 275-76; *ACLU of N. Cal.*, 2005 WL 588354, at *14. As described in your letter, the AFL “works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.” In addition, a review of the AFL’s public statements about its mission and work indicate that, like those other organizations, its primary activity is legal policy advocacy and not

information dissemination. *See, e.g., America First Legal, What We Do*, <https://www.aflegal.org/about> (last visited October 14, 2021) (describing the AFL as “a team of some of the nation’s best legal, political, and strategic thinkers [that will] . . . use every legal tool at [y]our disposal to defend [y]our citizens from unconstitutional executive overreach. . . . [and] will also stand up against corporations that restrict free speech and violate [y]our citizens’ civil rights”). Therefore, because information dissemination is not the AFL’s main activity, you have not satisfied this standard.

You also requested expedited treatment of your request under 28 C.F.R § 16.5(e)(1)(iii), which requires expedited processing for a request that involves the “loss of substantial due process rights.” Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. Courts only grant expedited processing if a requester can show (1) “that [he or she] is facing grave punishment [in a criminal proceeding], and (2) that there is reason to believe information will be produced to aid the individual’s defense.” *Freedman v. DOJ*, No. 92-0557, slip op. at 4 (D.D.C. Oct. 2, 1992). You have not satisfied these requirements.

Finally, you requested expedited treatment of your request under 28 C.F.R § 16.5(e)(1)(iv). On October 7, 2021, we referred your request to the Director of the Office of Public Affairs (“OPA”), who determines whether a request pertains to “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 28 C.F.R § 16.5(e)(1)(iv); *see id.* § 16.5(e)(2). On October 13, 2021, we were informed that OPA has denied your request for expedited processing under standard (iv) because, in the judgment of the Director of OPA, the topic of your request is not a matter “in which there exist possible questions about the government’s integrity that affect public confidence.” *Id.* § 16.5(e)(1)(iv). Accordingly, your request for expedited processing has been denied under this standard.

Because of the considerable number of FOIA requests received by OLC prior to your request, we likely will be unable to comply with the twenty-day statutory deadline for responding to your request. Please also be advised that due to necessary operational changes as a result of the national emergency concerning the novel coronavirus disease (COVID-19) outbreak, there may be some additional delay in the processing of your request. I regret the necessity of this delay, but I assure you that your request will be processed as soon as practicable. In the meantime, if you have any questions or wish to discuss your request, you may contact Melissa Golden, OLC’s FOIA Public Liaison, at usdoj-officeoflegalcounsel@usdoj.gov, (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5511, Washington, DC 20530.

Additionally, you may contact the Office of Government Information Services (“OGIS”) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy (“OIP”), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP’s FOIA STAR portal by creating an account following the instructions on OIP’s website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.”

Sincerely,

A handwritten signature in black ink, appearing to read "Jacob Kaprow". The signature is fluid and cursive.

for Paul P. Colborn
Special Counsel