



June 29, 2021

VIA EMAIL - [EDFOIAappeals@ed.gov](mailto:EDFOIAappeals@ed.gov)

Appeals Office  
Office of the Executive Secretariat  
U.S. Department of Education  
400 Maryland Avenue, SW, LBJ 7W106A  
Washington, DC 20202-4500

## **Freedom of Information Act Fee Waiver Appeal**

Dear FOIA Appeals Officer:

This is an appeal under the Freedom of Information Act.

On May 28, 2021, America First Legal Foundation (“AFL”) requested documents from the Department of Education (hereafter “Department”) under the Freedom of Information Act (“FOIA”) and requested a fee waiver. The Department assigned it FOIA Request No. 21-01761-F, which is enclosed with this appeal as Exhibit 1. On June 2, 2021, we received a denial of our request for a fee waiver in a letter signed by Elise Cook, which is also enclosed with this appeal as Exhibit 2. We now appeal the denial of our fee waiver.

The Department denied our request for waiver of search, review, and duplication fees on the basis that AFL is not a qualified public education and news media requester, and that disclosure is not in the public interest. We are appealing this denial and the determinations that supported it.

### **1. Representative of the News Media**

AFL filed a fee waiver request on the basis that AFL is a representative of the news media, and thus entitled to a waiver of search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii), and 34 C.F.R. § 5.32(b)(1)(ii).<sup>1</sup> The Department denied the waiver without addressing this portion of the request.<sup>2</sup> The Department’s regulations

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<sup>1</sup> The original request and reply from the Department cite to 34 C.F.R. § 5.64, that is in relation to the section now contained in 34 C.F.R. § 5.32 and § 5.33.

<sup>2</sup> Exhibit 2.

governing FOIA fee waivers require it to grant of fee waivers to a “representative of the news media.”<sup>3</sup> Further, FOIA expressly grants the right to fee waivers to qualified representatives of the news media.

In determining what requestors qualify as a representative of the news media, the federal courts and the text of the Freedom of Information Act state 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.”<sup>4</sup> This is precisely what AFL does. Upon receiving the relevant documents, AFL will post these documents for the public to view, will use them to further shape the debate in the media about the Department’s policies, and to further the discussion regarding education policy more broadly through both written material like press releases and opinion pieces, and potentially through other media appearances on news programs or other media outlets.

Thus, under the standards, as articulated by the D.C. Circuit and the text of the Freedom of Information Act (as amended), AFL is a representative of the news media, and is entitled to a waiver of fees under FOIA. We respectfully request that the Department correct its mistaken determination that we are a “all other use” requester and reclassify AFL as a news media requester.

## **2. Public Interest**

AFL's second claim for a fee waiver was based on disclosure being in the public interest. To this point, the Department responded, “justification has not been provided to explain how the requested records would contribute significant information to the public’s understanding of the Department’s operations. The Department has not provided any evidence demonstrating public interest in the documents.”<sup>5</sup>

Disclosure of the information is likely to be meaningfully informative because the public is largely in the dark about the Department’s policies and how it makes certain decisions. Accordingly, AFL has sought emails, email attachments, transcripts of meetings and phone conversations, and agency notes (among other things) that relate to the implementation of CRT type curriculum and training. This information is not currently public, and thus will meaningfully inform the public about these decisions upon publication.

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<sup>3</sup> 34 C.F.R. § 5.32(b)(1)(ii).

<sup>4</sup> *Cause of Action*, 799 F.3d at 1120. *See also*, 5 U.S.C. § 552(a)(4)(A)(ii); 34 C.F.R. § 5.32-33; Exhibit 2.

<sup>5</sup> *See* Exhibit 2.

Further, the public has great interest in knowing how taxpayer funds are being used to influence the education of America's children. A recent Gallup poll found that in the 2020 election, 83% of Americans said that education was a "very important" or "extremely important" issue for them.<sup>6</sup> Additionally, 66% said that race relations were "very important" or "extremely important" to them.<sup>7</sup> As CRT in education functions at the intersection of race relations and education policy, a sizable majority of the public is interested in this subject. However, the standard applied by the DC circuit on this factor is far lower, stating "[t]he 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."<sup>8</sup> As an example, the court 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.<sup>9</sup>

We thus respectfully request that the Department reconsider our request for a waiver, classify AFL as a news media requester entitled to fee waiver, and this individual request as a public interest request entitled to a fee waiver.

Thank you for your consideration of this appeal.

Sincerely,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation

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<sup>6</sup> Zach Hrynowski, *Several Issues Tie as Most Important in 2020 Election*, GALLUP (January 13, 2020), <https://news.gallup.com/poll/276932/several-issues-tie-important-2020-election.aspx>.

<sup>7</sup> *Id.*

<sup>8</sup> *Cause of Action*, 799 F.3d at 1116. (internal quotations omitted).

<sup>9</sup> *Id.*