



August 10, 2021

VIA ELECTRONIC MAIL – [FOIA@sba.gov](mailto:FOIA@sba.gov)

Chief, Freedom of Information/Privacy Acts Office  
U.S. Small Business Administration  
409 Third St. SW, Eighth floor  
Washington, DC 20416

## **Freedom of Information Act Request: Handling of AFL Requests**

Dear FOIA Officer:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. 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.

### **I. Introduction**

AFL has submitted three FOIA requests to the SBA this year:

1. The first was on May 20, 2021, regarding documents related to the SBA’s distribution of Restaurant Revitalization Fund money on discriminatory basis. This FOIA was given the workflow number SBA-2021-011608.
2. Second, AFL filed a FOIA on June 23, 2021, related to data on fee waivers granted by the SBA. This was assigned the workflow number SBA-2021-013216 and was completed with a production of relevant documents on July 22, 2021.
3. Third, AFL filed a FOIA related to political leadership and personnel and ethics information on July 9, 2021. This was given the workflow tag SBA-2021-014233.

For all of these requests, AFL requested a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 13 C.F.R. § 102.8, and explained how AFL is a news media requestor and how the documents sought are in the public interest. For the first (SBA-2021-011608) and third (SBA-2021-014233) requests, SBA denied AFL’s fee waiver request. In its rationale for denying the fee waiver request with respect to political

leadership, SBA cited its own denial of AFL's first FOIA request, which AFL had since appealed.

SBA's treatment of AFL's FOIA requests is concerning. First, AFL filed FOIA requests identical to SBA-2021-014233 with every other major department and agency and has already received full fee waiver grants from three departments. No other department has outright denied AFL's request for a fee waiver on this topic. Second, as the documents produced to AFL under SBA-2021-013216 demonstrate, SBA has granted other organizations requests for fee waivers at a very high rate. Indeed, American Oversight and Accountable U.S., two groups similar in structure to AFL, each were granted fee waivers 17 times during 2020, totaling 34 times where SBA granted a fee waiver or made a "not billable" determination to an outside, government oversight group.

Based on this information, AFL is concerned that SBA is not applying the FOIA statute and its regulations consistently across requestors that it perceives to have different political ideologies or missions.

AFL's mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, to educate the public. Therefore, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, AFL hereby requests the following records within twenty business days.

## **II. Requested Records**

- A. All records regarding, referring, or relating to SBA's processing of FOIA Request SBA-2021-011608, including any communications related to AFL's request for a fee waiver.
- B. All records regarding, referring, or relating to SBA's processing of FOIA Request SBA-2021-014233, including any communications related to AFL's request for a fee waiver.
- C. The final disposition of all fee waiver requests submitted by Austin Evers and/or American Oversight, Derek Martin and/or Accountable U.S., or Nikhel Sus and/or CREW for FOIA requests filed between January 20, 2017, and January 20, 2021.

## **III. Redactions and Search Terms**

Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass 'n v. Exec. Office for Immigration*

*Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then SBA must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; *see also Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, SBA should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still

necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

#### **IV. Fee Waiver Request**

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 13 C.F.R. § 102.8, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government." The public has a significant interest in the enforcement of its laws, especially here where, it seems, SBA may be engaged in constitutionally prohibited racial discrimination. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether and to what extent the Small Business Administration and/or the White House comply with the Constitution, applicable statutes and judicial decisions, respect the rule of law, and protect the civil liberties of all citizens of the United States.

## **V. Production**

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis.

If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 600 14<sup>th</sup> Street NW, 5<sup>th</sup> Floor, Washington, D.C. 20005.

## **VI. Conclusion**

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at [FOIA@aflegal.org](mailto:FOIA@aflegal.org).

Thank you,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation