



June 24, 2021

VIA E-MAIL - MRUFOIA.Requests@usdoj.gov

ATTN: Bobak Talebian
Office of Information Policy
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Freedom of Information Act Request: Information Regarding Judicial Nominations

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. 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.

I. Introduction

One of the many duties tasked to the Executive Branch by Article II of the Constitution is the nomination of Article III judges for Senate approval. For four years, prominent members of the House and Senate and the media decried the previous Administration’s lawful use of this authority as radical attempts to reshape the judiciary.¹ Ironically, as the current Administration exercises the same authority,

¹ See, e.g., Press Release, Senate Democrats, *Schumer Statement on Pres. Trump’s Updated List Of Potential Radical Right-Wing SCOTUS Nominees* (September 9, 2020) available at <https://www.democrats.senate.gov/newsroom/press-releases/schumer-statement-on-pres-trumps-updated-list-of-potential-radical-right-wing-scotus-nominees>; Sahil Kapur, *After Trump, Democrats Set Out on a Mission to ‘Repair the Courts’*, NBC NEWS (January 30, 2021), <https://www.nbcnews.com/politics/politics-news/after-trump-democrats-set-out-mission-repair-courts-n1256174>; Dahlia Lithwick and Mark Joseph Stern, *Democrats Won the Senate. Can They Fix the Courts Now?: Biden is Inheriting a Crisis in the Federal Judiciary*, SLATE (January 8, 2021), <https://slate.com/news-and-politics/2021/01/biden-fight-for-courts-crisis.html>; Charles Davis, AOC

the same commentators and lawmakers are silent. Thus, to ensure that a similar measure of oversight and scrutiny is applied to the Biden Administration's judicial nominations, AFL requests the following documents within 20 business days:

II. Requested Records

1. All versions of the form used to obtain a subject's consent to authorize the Federal Bureau of Investigation (FBI) to conduct a background investigation for purposes of a potential judicial nomination. In the prior administration, this form was identified as "DOJ-OLP-1/12/10".
2. All versions of the form used to obtain a potential judicial nominee's consent to authorize the FBI to disclose that subject's background information file to the Senate Judiciary Committee Chair, Ranking Member, other members, or staff.
3. Office of Management and Budget-approved control numbers for all responsive records to Requests No. 1) or 2), *above*.
4. All communications with the Office of Management and Budget (OMB) concerning the applicability of or approval under the Paperwork Reduction Act to any form responsive to Requests No. 1) or 2), *above*.
5. All laws, regulations, guidance, or other documents relied upon by the Department of Justice or its components for authorizing disclosure of judicial nominee background information files to Congress. For purposes of interpreting this request, any agreement that directs or otherwise authorizes the Department of Justice or the FBI to disclose a judicial nominee's background information file to Senate Judiciary Committee Chair, Ranking Member, other members, or staff should be considered responsive.
6. Any memorandum of understanding or other agreement with the current White House which relates to background investigations of potential judicial nominees.

Considering Impeachment, Schumer Weighing Supreme Court Expansion in Wake of Mitch McConnell's 'Blatant, Nasty Hypocrisy', BUSINESS INSIDER (September 20, 2020), <https://www.businessinsider.com/aoc-schumer-unite-to-condemn-mitch-mcconnells-blatant-nasty-hypocrisy-2020-9>; Matt Stevens, *Trump Has Reshaped the Judiciary. Here's How the 2020 Democrats Would Address That.*, NEW YORK TIMES (Feb. 8, 2020), <https://www.nytimes.com/2020/02/08/us/politics/democrats-courts-trump.html>; Elie Mystal, *Donald Trump and the Plot to Take Over the Courts*, THE NATION (July 15, 2019), <https://www.thenation.com/article/society/trump-mcconnel-court-judges-plot/>; James Warren, *Donald Trump is Rapidly Reshaping the Nation's Courts*, VANITY FAIR (August 4, 2017), <https://www.vanityfair.com/news/2017/08/donald-trump-is-rapidly-reshaping-the-nations-courts>.

7. To the extent the FBI's Privacy Act records systems notices, Records Retention Plan, and Disposition Schedule are referenced within any records responsive to Request No. 6), *above*, please produce all laws, regulations, or guidance relied upon by the Department of Justice authorizing disclosure of Privacy Act-protected information to the Senate Judiciary Committee Chair, Ranking Member, other Committee members, or Committee staff.
8. All records reflecting disclosure to potential nominees that their information is "being collected" or "to be used" by the Senate Judiciary Committee Chair, Ranking Member, other Committee members, or Committee staff for purposes of evaluating the nominee's qualifications, fitness, or otherwise clearing the potential nominee for a confirmation hearing.
9. All records reflecting the Department of Justice's determination that disclosure of a nominee's background investigation information to any or all of the Senate Judiciary Committee Chair, Ranking Member, other Committee members, or Committee staff is considered a "routine use" disclosure or a 5 U.S.C. § 552a(b)(2) disclosure in response to a request from a duly authorized Committee of Congress.
10. To the extent the Department of Justice considers FBI-002, the FBI Central Records System, or any related statement of records notice, to be responsive to Request No. 9), *above*, disclose all records reflecting the Department's interpretation or application of its determination that "[i]nformation contained in this system, may be made available to a Member of Congress or staff acting upon the member's behalf when the member of staff requests the information in behalf of and at the request of the individual who is the subject of the record."²
11. To the extent the Department of Justice considers Notice No. DAG-10 to be responsive to Request No. 9), *above*, disclose all records reflecting the Department's interpretation or application of its determination that "[a]fter a candidate is nominated and his nomination is pending Senate confirmation, the background investigation is routinely provided to [the] Chairman of the Senate Judiciary Committee."
12. For all records responsive to Requests No.'s 5) or 6), *above*, all records reflecting information concerning the timing of disclosures to Congress.
13. All communications, whether written, text, email, or verbal between any DOJ staff in the Office of Legal Policy or the Office of Legislative Affairs and any Senator or staffer of the Senate Judiciary Committee related to Judicial

² 63 FR 8659 (February 20, 1998) *available at* <https://www.fbi.gov/services/information-management/foipa/fbi-privacy-act-systems/63-fr-8659>.

nominations. For purposes of this request a staff member of the Senate Judiciary Committee is a party whose email address ends with “judiciary.senate.gov” or that DOJ’s Office of Legislative Affairs knows to be a member of the Senator’s personal staff who supports the Senator’s position on the Judiciary Committee. The time frame for this request is January 20, 2021, until the date the records request is processed.

14. All communications, whether written, text, email, or verbal, between Joe Gaeta and any Senator or Senate staffer. The time frame for this request is January 20, 2021, until the date the records request is processed.
15. All communications, whether written, text, email, or verbal between any DOJ staff in the Office of Legal Policy or the Office of Legislative Affairs and any person affiliated with Senate Majority Leader Chuck Schumer’s personal or leadership office related to judicial nominations. The time frame for this request is January 20, 2021, until the date the records request is processed.
16. All OMB-approved forms used by the FBI to collect information from individuals other than the potential judicial nominee for purposes of conducting a background investigation.
17. All records reflecting disclosures, or policies concerning such disclosures, by the FBI to individuals other than a potential judicial nominee who are interviewed for purposes of a background investigation that apprises those individuals of their right not to provide information to the FBI as well as the fact that the information provided would be routinely disclosed to the Senate.³
18. Concerning the FBI’s background investigation process for potential judicial nominees, all records reflecting how the FBI “make[s] reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes”⁴ given the FBI’s acknowledgment that the records are used for non-agency purposes, namely disclosure to the Senate Judiciary Committee Chair, Ranking Member, other members, or staff.⁵

³ 5 U.S.C. § 552a(e)(3), §§ (e)(3)(B), (e)(4)(C), & (e)(4)(D); *Covert v. Harrington*, 876 F.2d 751, 755-756 (9th Cir. 1989) (“Under the plain terms of the statute, a collecting agency is under a duty to inform the individuals from whom it is collecting information of the routine uses to which that information may be put. The statute gives the agency no discretion not to discharge this duty”).

⁴ 5 U.S.C. § 552a(e)(6).

⁵ *Waters v. Thornburgh*, 888 F.2d 870, 873-875 (D.C. Cir. 1989) (“in the context of an investigation that is seeking objective, unalterable information, reasonable questions about a subject’s credibility cannot relieve an agency from its responsibility to collect that information first from the subject. . . . [the Privacy Act] is fundamentally concerned with privacy. It supports the principle that an individual should, to the greatest extent possible, be in control of information about him [or her] which is given to the government . . . a principle designed to insure fairness in information collection which should

19. All provisions of the Domestic Investigations and Operations Guide (DIOG) which apply to background investigations of potential judicial nominees.
20. All non-superseded provisions of the Manual of Investigative Operations and Guidelines (MIOG) which apply to background investigations of potential judicial nominees.
21. All records reflecting the continuing validity of the MIOG version referred to, as well as any statement made in, the 1983 Report to the Attorney General entitled “Departmental Study Committee: Special Inquiries on Presidential Nominees” which stated, “if derogatory information is received, the FBI Manual of Investigative Operations and Guidelines contains instructions that such information be thoroughly investigated and resolved. Allegations should be traced to their original source. Such allegations are scrutinized at all levels of review to ensure that every effort has been made to verify or disprove the allegation” and which also stated that the FBI, to preserve its role “as an impartial, nonpartisan investigator” should “not be asked to provide SPIN information directly to the Senate” and “should not be drawn into this essentially political dispute.”⁶

III. Redactions

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 NASA 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, NASA 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,

be instituted whenever possible.”); *Dong v. Smithsonian Inst.*, 943 F. Supp. 69, 72 (D.D.C. October 31, 1996) (same).

⁶ Available at <https://www.reaganlibrary.gov/public/digitalibrary/smof/counsel/roberts/box-025/40-485-6908381-025-010-2017.pdf>

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. Request for Expedited Processing

President Biden has announced several federal judicial nominees and it is obvious that several potential nominees are currently under consideration. To the extent records responsive to this request reflect that the FBI or the White House is collecting information on potential nominees for the purpose of disclosing that information to the Senate, such conduct may violate the Paperwork Reduction Act or the Privacy Act, thus entailing the loss of substantial due process rights for current or future judicial nominees. Further, American First Legal is an organization primarily engaged in disseminating information to the public and the information is urgently needed to inform the public, including the appropriate oversight committees of Congress, concerning federal government activity that may violate the law. Lastly, given current media interest in the federal judiciary and the fact that the information sought involves possible questions about the government's integrity which affect public confidence, this request is of widespread and exceptional media interest.

V. Fee Waiver Request

We request a waiver of all applicable fees. 5 U.S.C. § 552(a)(4)(A)(iii) provides that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁷ Similarly, DOJ’s regulations on the matter provide that, “Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁸

In this case, a fee waiver is appropriate because of the public’s right to obtain clarity as to the compliance by the administration with the Paperwork Reduction Act and the Privacy Act.⁹ To date, the information requested has not been released in any form to the public; its release in response to this request will therefore contribute significantly to public understanding of the operations of the government.

Additionally, AFL is a non-profit, tax-exempt organization as defined by the Internal Revenue Code. As such, it has no commercial interest in making this request and is a qualified non-commercial public education and news media requester. Although AFL is a new organization, it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive

⁷ 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

⁸ 28 C.F.R. § 16.10

⁹ *See e.g., Am. Oversight v. United States HHS*, 380 F. Supp. 3d 45, 48 (D.D.C. 2019).

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.

VI. Record Preservation Requirement

We request that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁰

VII. 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 14th Street NW, 5th Floor, Washington, D.C. 20005.

¹⁰ See 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

VIII. 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 info@aflegal.org. Finally, if AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Andrew J. Block

Andrew J. Block

America First Legal Foundation