



October 12, 2021

**Via Online Portal and Email**

Hirsh D. Kravitz, FOIA, Records, and E-Discovery Office  
Civil Division, Department of Justice  
Room 8314, 1100 L Street, NW  
Washington, DC 20530-0001  
Email: [Civil.routing.FOIA@usdoj.gov](mailto:Civil.routing.FOIA@usdoj.gov)

Douglas Hibbard, Chief, Initial Request Staff  
Office of Information Policy, Department of Justice  
6th Floor, 441 G Street, N.W.  
Washington, D.C. 20530-0001

Arla Witte-Simpson, FOIA Public Liaison  
Executive Office for U.S. Attorneys, Department of Justice  
175 N Street, N.E., Suite 5.400  
Washington, DC 20530-0001

**Freedom of Information Act Request: Motion to Disqualify AFL in *State of Texas v. Biden*, Civil Action No. 4:21-CV-579-P (N.D. Tx.)**

Dear Mr. Kravitz, Mr. Hibbard, and Ms. Witte-Simpson:

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

“Case” means *State of Texas v. Joseph R. Biden, Jr., et al.*, Civil Action No. 4:21-CV-579-P (N.D. Tx.)

“Department” means any person in the Office of the Attorney General, the Office of the Associate Attorney General, the Civil Division, and the United States Attorney for the Northern District of Texas.

“Motion” means Defendants’ Motion to Disqualify, Document 87, filed 10/06/21 in Case No. 4:21-cv-00579-P (N.D. Tx.).

“Records” has the meaning given at 44 U.S.C. § 3301(a).

## **II. Requested Records**

A. All records concerning, referencing, or regarding the disqualification of attorney Gene Hamilton in the Case. This Item does NOT include the Motion. The relevant time is April 22, 2021, until this Item is processed.

B. All records sufficient to show the name of each person who (1) authorized and/or directed preparation of the Motion; (2) researched and/or drafted the Motion; (3) reviewed, edited, and/or approved the Motion; and (4) authorized and/or directed Assistant U.S. Attorney Brian W. Stoltz to file the Motion.

C. All records of communications between any person and the Department regarding the Case and/or its subject matter. This Item does NOT include the Department’s communications with any of Plaintiff’s counsel in their professional capacity, including but not limited to Mr. Hamilton. The relevant time is April 22, 2021, until this Item is processed.

D. All records of (1) communications within the Department and (2) between any person with an email address containing “dhs.gov,” “hhs.gov,” or “eop.gov” and the Department referencing or regarding attorney Gene Hamilton, attorney Mathew Whitaker, and/or any other person believed to be employed by or representing America First Legal Foundation. Except for the Motion, this Item does NOT include pleadings and related records in ongoing litigation matters. The relevant time is April 22, 2021, until this Item is processed.

## **III. Custodians**

- A. The Office of the Attorney General
- B. The Office of the Deputy Attorney General
- C. The Office of the Associate Attorney General
- D. The Department of Justice Civil Division
- E. The United States Attorney for the Northern District of Texas
- F. Assistant U.S. Attorney Brian W. Stoltz and his supervisor

## **IV. Redactions**

FOIA requires the Department to disclose records freely and promptly. The department must liberally construe AFL’s requests and make a good faith effort to search for requested records using methods “which can be reasonably expected to produce

the information requested.” At all times, FOIA must be construed to carry out Congress’s open government mandate according to the ordinary public meaning of its terms at the time of its enactment.<sup>1</sup>

Redactions are disfavored as the FOIA’s exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then the department must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. Consequently, the department 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” broadly, giving full effect to applicable law, including 44 U.S.C. 3301(a).
- 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 records to official systems within a certain time. AFL has a right to records 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 available tools to conduct a complete and efficient search for potentially responsive records. Many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program or similar policies. These provide options for searching emails and other electronic records in a manner 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

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<sup>1</sup> 5 U.S.C. §§ 552(a)(3)(A), 552(a)(6)(A); *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989); *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

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, then 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 before our Items are processed. If potentially responsive records 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.

## V. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10, AFL requests a waiver of all search and duplication fees.

Fees should be waived “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.” AFL’s request concerns identifiable operations or activities of the government, and the information requested is likely to contribute significantly to the public understanding such activities. The department and the United States Attorney are representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, is not that it shall win a case, but that justice shall be done.<sup>2</sup>

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. 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. As a nonprofit organization primarily engaged in the dissemination of information to educate the public, AFL does not have a commercial purpose and the release of the information requested is not primarily in AFL’s financial interest. Our status as a qualified non-commercial public education and news media requester previously has been acknowledged and recognized by this department and by the Departments of Defense, Education, Energy, Interior, Health and Human Services, and Homeland Security, and the Office of the Director of National Intelligence.

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<sup>2</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

## VI. Expedited Processing

The department must grant expedited processing to requests involving an urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.<sup>3</sup> By this test, AFL should be granted expedited processing on Items A, B, and D. First, the department and other federal agencies have acknowledged AFL is primarily engaged in disseminating information. Second, the department's litigating position, especially with respect to the disqualification of counsel for the State of Texas in a high-profile immigration case, is assuredly a matter of "actual or alleged Federal Government activity." Third, the common public meaning of "urgency" at the time of § 552(a)(6)(E)(v)(II)'s enactment was "the quality or state of being urgent." The common public meaning of "urgent", in turn, was "requiring or compelling speedy action or attention."<sup>4</sup> The pending Motion meets this test, as the State of Texas has only a very short time to gather facts and determine if improper political considerations played a part in the Biden Administration's extraordinary decision to seek attorney Hamilton's disqualification.

In the alternative, the department should grant AFL expedited processing of Items A, B, and D under the department's expanded regulatory test for matters of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence, even if it concludes AFL fails the statutory test. *See* 28 C.F.R. § 16.5(e)(1)(iv). The Case challenges the legality of the Biden Administration's decision to open the southern border to and then resettle uncounted tens of thousands of illegal aliens, many infected with COVID-19, and is a matter of widespread and exceptional media interest.<sup>5</sup> The possibility that the department's defensive litigation tactics are tainted by improper political considerations certainly presents a possible question about the government's integrity that affects public confidence in the department. Accordingly, AFL's expedited processing request should be granted.

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<sup>3</sup> 5 U.S.C. §§ 552(a)(6)(E)(i)(I), 552(a)(6)(E)(v)(II); *see also* 28 C.F.R. §§ 16.5(e)(ii).

<sup>4</sup> The FOIA must be interpreted in accord with the ordinary public meaning of its terms at the time of enactment. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

<sup>5</sup> *See, e.g.*, Todd Bensman, *Catch-and-Bus: Thousands of Freed Border Crossing Immigrants are Dispersing Across America*, CIS REPORT (Mar. 31, 2021) <https://cis.org/Bensman/CatchandBus-Thousands-Freed-BorderCrossing-Immigrants-Are-Dispersing-Across-America>; Josh Boak & Emily Swanson, *Biden's Approval Slumps After a Slew of Crises: AP-NORC Poll*, AP (Oct. 1, 2021) <https://apnews.com/article/immigration-coronavirus-pandemic-joe-biden-business-health-020342e77b3cbbaf281b1c466fefe975>; Sabrina Rodriguez, *It's not Just Republicans, Everyone's Mad at Biden Over Migration.*, POLITICO (Sep. 21, 2021) <https://www.politico.com/news/2021/09/21/migration-biden-border-troubles-513370>; Dianne Solis, *Abbott's Approval Rating on Immigration is Higher Than That of Biden, New Texas Poll Finds*, THE DALLAS MORNING NEWS (Sep. 20, 2021) <https://www.dallasnews.com/news/politics/2021/09/20/abbots-approval-rating-on-immigration-is-higher-than-that-of-biden-new-texas-poll-finds/>.

Also in the alternative, the Circuit test for expedited processing requires the department to weigh three main factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.<sup>6</sup> AFL meets this test as well. Respecting factor one, as noted above, the Case, the Motion, and their subject matter are assuredly matters of public concern and media interest and central to a pressing issue of the day. Respecting factor two, if production is delayed, then both AFL and the public at large will be precluded from obtaining in a timely fashion information vital to the current and ongoing debate surrounding immigration policy and government integrity. Being closed off from the opportunity to debate the department's conduct here, including its potential use of litigation tactics for political advantage or payback, itself is a harm in an open democracy.<sup>7</sup> Disclosing relevant records months or even years from now will be of academic interest only, for any damage will have been done and stale information is of little value.<sup>8</sup> Respecting factor three, AFL's Items certainly involve "federal government activity."

Any concerns the department or other requesters may raise about granting AFL expedited processing have been weighed by Congress, and Congress has concluded them to be of subsidiary importance to compelling and time-sensitive cases, such as this. Practically speaking, AFL believes it is difficult for the department to credibly argue expedited processing in this case would cause much delay to other requesters given the very specific nature of AFL's FOIA requests and the extremely limited time window.

Finally, by way of this letter, AFL certifies its compelling need for expedited processing of Items A, B, and D for the purposes of 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(3).

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<sup>6</sup> *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 309-10 (D.C. Cir. 2001).

<sup>7</sup> In *Protect Democracy Project*, the District Court reasoned:

But do the requests touch on 'a matter of current exigency to the American public,' and would 'delaying a response...compromise a significant recognized interest,' *Al-Fayed*, 254 F.3d at 310? Likely, the answer to both questions is yes. Regarding nationwide 'exigency': In its requests, submitted the day after the April 6 missile strikes against Syria, Protect Democracy explained that 'the President's decision to initiate military action is of the utmost importance to the public,' and that 'whether the President has the legal authority to launch [such] a military strike' is similarly critical. Few would take issue with these assertions. But as evidence that they were justified, one need look no further than the widespread media attention—including by some of the nation's most prominent news outlets—paid both to the April 6 strike and its legality, as early as the date of Protect Democracy's requests.

*Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 299-300 (D.D.C. 2017). If the one or two news cycles worth of attention given to one missile strike is sufficient to constitute "urgent" then certainly, then illegal immigration and the possible taint of the department's litigation positions by improper considerations do as well.

<sup>8</sup> See *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

## **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, 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.

## **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 [FOIA@aflegal.org](mailto:FOIA@aflegal.org). Finally, if AFL's request for a fee waiver and for expedited processing are not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Reed D. Rubinstein  
Reed D. Rubinstein  
America First Legal Foundation