



October 22, 2021

Via Online Portal and Email

Douglas Hibbard, Chief, Initial Request Staff
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Freedom of Information Act Request: AFL Request FOIA-2022-00056

Dear Mr. Hibbard and Ms. Golden:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Pursuant to 5 U.S.C. § 552(a), we make the following Freedom of Information Act request for records relating to AFL Request FOIA-2022-00056.

I. Special Definitions

“AFL” means America First Legal Foundation.

“Department” means the U.S. Department of Justice and all relevant components.

“OPA” means the Office of Public Affairs.

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

“Request” means AFL’s Freedom of Information Act Request dated October 7, 2021, assigned number FOIA 2022-00056.

II. Requested Records

A. All records of or concerning the Department's processing of the Request. The relevant time is October 7, 2021, to October 18, 2021.

B. All records relating to or mentioning the decision by the Director of the Office of Public Affairs to deny expedited processing of the Request. The relevant time is October 7, 2021, to October 18, 2021.

C. All records of or concerning communications with any person having an email address containing eop.gov regarding the Request. The relevant time is October 7, 2021, to October 18, 2021.

D. All records, including but not limited to emails, drafted, sent, or received by OPA and/or Anthony Coley concerning (1) AFL, and/or (2) expedited processing of the Request. The relevant time is October 1, 2021, until this Item is processed.

III. Custodians

- A. The Office of the Attorney General
- B. The Office of Legal Counsel
- C. The Office of Public Affairs
- D. Anthony Coley, Director, OPA
- E. Paul P. Colburn, Special Counsel
- F. The Office of the Deputy Attorney General
- G. The Office of the Associate Attorney General

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.¹

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.

¹ 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).

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe both our Items and the term “record” broadly and give full effect to applicable law, including 44 U.S.C. 3301(a) and controlling judicial authorities.
- 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 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.²

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.

VI. Production

AFL welcomes production on an agreed rolling basis to speed production and reduce agency burden. If possible, please provide responsive records in an electronic format by email, native format by mail, 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.

VII. Conclusion

If you have any questions about this request or believe further discussions regarding search and processing will speed the efficient production of records of interest to AFL, then please contact me at FOIA@aflegal.org.

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

Finally, if AFL's request for a fee waiver is not granted in full, then please contact us immediately upon making such a determination.

Thank you in advance for your cooperation. I look forward to hearing from you soon.

Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation