



March 9, 2023

U.S. Department of State  
Appeals Officer  
HST Room B266  
2201 C Street, NW  
Washington, D.C. 20520

**Re: 22 CFR § 171.13 Administrative Appeal, FOIA Request F-2023-05374**

To Whom it May Concern:

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, all to promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

## **I. Procedural History**

On February 24, 2023, AFL submitted Freedom of Information Act (FOIA) Request F-2023-05374 to the State Department.

By letter from Brooke Nicholas, Branch Chief of the Requester Communications Branch, on February 27, 2022, AFL's request for expedited processing was denied because AFL's "request does not demonstrate a 'compelling need' for the requested information."

AFL hereby appeals this denial of expedited processing.

## **II. Standard of Review**

The FOIA broadly requires agencies to disclose federal records freely and promptly.<sup>1</sup> The department must liberally construe requests and bears the burden of proving it has made a good faith effort to search for the requested records using methods "which can be reasonably expected to produce the information requested."<sup>2</sup> At all times, the

---

<sup>1</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>2</sup> *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).

FOIA must be construed in accord with the ordinary public meaning of its terms at the time of its enactment to carry out Congress's open government mandate.<sup>3</sup>

As the Supreme Court has observed, public awareness of the government's actions is "a structural necessity in a real democracy."<sup>4</sup> *Timely* awareness is equally necessary because "stale information is of little value."<sup>5</sup> When "time is necessarily of the essence," the harm in agency delay is more likely to be irreparable.<sup>6</sup>

### III. AFL is Entitled to Expedited Processing on this Record

As explained in the request, AFL is entitled to expedited processing based on plain statutory text as well as the Department's regulations. Request F-2023-05374 at 4, 22 C.F.R. § 171.11(f)(2)–(3). As to subpart two, AFL is an organization primarily engaged in disseminating information, and the request concerns an actual or alleged federal government activity—namely the use of State Department methods for influencing foreign elections against millions of Americans engaged in domestic political speech. As to subpart three, the requested records concern the First Amendment rights of an untold number of American citizens.

In addition to the statutory and regulatory criteria, AFL is also entitled to expedited processing under controlling Circuit precedent. The United States Court of Appeals for the District of Columbia Circuit considers three main factors to determine if a request demonstrates a "compelling need."<sup>7</sup> Under the D.C. Circuit's approach, a request demonstrates a compelling need, and thus an urgency to inform the public, when: (1) the request concerns a matter of current exigency to the American public; (2) the consequences of delaying a response would compromise a significant recognized interest; and (3) the request concerns federal government activity.<sup>8</sup>

Available evidence suggests that the State Department has worked overseas to influence narratives in favor of American interests. The methods it uses, though, appear to have been adopted, through the National Security Council, and used by other parts of the federal government, like the CDC, for domestic censorship of political speech. Request at FN 4. The media and public interest in this topic is demonstrated by the fact that one of America First Legal's Twitter threads on this subject received over 7 million views, including over 250,000 engagements, 54,000 likes, and a reply from Elon Musk.<sup>9</sup> At the same time, there is a House Select

---

<sup>3</sup> *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

<sup>4</sup> *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

<sup>5</sup> *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988); *Am. Oversight v. U.S. Dep't of State*, 414 F. Supp. 3d 182, 186 (D.D.C. 2019).

<sup>6</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 416 F. Supp. 2d 30, 40–41 (D.D.C. 2006).

<sup>7</sup> *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 309–10 (D.C. Cir. 2001).

<sup>8</sup> *Id.*

<sup>9</sup> TWITTER, @America1stLegal, Dec. 6, 2022, <https://twitter.com/America1stLegal/status/1600246196102389760>.

Committee dedicated to investigating efforts to suppress the Free Speech of everyday Americans, through efforts like those at issue here.<sup>10</sup> The public urgency of this issue is self-evident.

Furthermore, if production is delayed, then both AFL and the public at large will be precluded from obtaining information vital to the current and ongoing debate on these issues in a timely fashion. The Biden Administration's unprecedented decision to use the power of federal government against American citizens is front and center in public discourse at the moment and this information is pertinent to the discussion. Being closed off from the opportunity to debate the censorship efforts our own government has implemented is its own harm to a free society.<sup>11</sup> Disclosing relevant records months or even years from now will be of academic interest only—any damage will have been done and stale information is of little value.<sup>12</sup>

There is no dispute that the request concerns a “federal government activity.”

Finally, the State Department has provided no legal analysis for its denial, instead merely concluding that AFL's request “does not demonstrate a ‘compelling need’ for the requested information.” This does not substitute for a reasoned analysis of the law and facts. “Since the agency did nothing more than parrot its own regulatory language, and offered no reasoning or analysis, its decision, as in the APA context, is entitled to little deference.” *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 436 F.Supp.3d 354, 361 (D.D.C. 2020).

#### IV. Conclusion

Accordingly, AFL appeals the denial of expedited processing on FOIA Request F-2023-05374. Please contact the undersigned at [FOIA@aflegal.org](mailto:FOIA@aflegal.org) if additional clarification or information is required.

---

<sup>10</sup> U.S. House Judiciary Comm., *Select Subcommittee on the Weaponization of the Federal Government*, <https://bit.ly/3Jk2u9a> (last visited Mar. 6, 2023).

<sup>11</sup> In *Protect Democracy Project*, the 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).

<sup>12</sup> *Payne*, 837 F.2d at 494.

22 C.F.R. § 171.11(f)(4) provides that, “A decision in writing on the appeal will be issued within 10 calendar days of the receipt of the appeal.” We hereby request a resolution of this appeal as quickly as possible, but in no case later than 10 calendar days.

/s/ Andrew Block

Andrew J. Block

America First Legal Foundation