



July 27, 2023

Via NIH FOIA Portal

NIH FOIA Office
Building 1, Room 344
1 Center Drive, MSC 0188
Bethesda, Maryland 20892-0188

Freedom of Information Act Request: Emails of Dr. David Morens

Dear FOIA Officer:

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. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL's email list contains over 78,000 unique addresses, our Twitter page has 136,900 followers, the Twitter page of our Founder and President has over 482,000 followers, our Facebook page has 139,000 followers, and we have another approximately 31,900 followers on GETTR.

I. Introduction

It has recently come to light that Dr. David Morens, the Senior Scientific Advisor to the Director of the National Institute of Allergy and Infectious Diseases (NIAID), made a routine practice of routing official government communications through his own personal Gmail account. Indeed, he said as much in an email to his colleagues that was recently released by the House Select Subcommittee on the Coronavirus

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Pandemic.¹ In that email he admitted to using a personal Gmail account with the specific intent of preventing the public from gaining access to his emails through the use of the FOIA. While Dr. Morens may have intended to place his emails beyond the reach of the FOIA, he has failed to do so.

Circuit law is clear: “[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, *the records do not lose their agency character just because the official who possesses them takes them out the door.*” *Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol’y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (emphasis added). This is true even when agency officials use their personal email accounts. *Id.*, at 146 (“an agency cannot shield its records from search or disclosure under FOIA by the expedient of storing them in a private email account”). The question of whether emails contained in a personal email account fall within the scope of the FOIA has long been settled. *See, e.g., Cause of Action Inst. v. Nat’l Oceanic & Atmospheric Admin.*, No. CV 19-1927 (TSC), 2023 WL 3619345, at *4 (D.D.C. May 24, 2023) (“the use of personal email accounts [does not alter] the conclusion that the members were acting ‘on behalf of’ [the agency] in creating the [requested] correspondence.”); *Democracy Forward Found. V. United States Dep’t of Com.*, 474 F.Supp. 3d. 69, 74 (D.D.C. 2020) (“This Circuit has made clear that ‘agency records’—even those stored on a personal email account—are subject to FOIA.”) (citing *Competitive Enter. Inst.*, *supra*); *Landmark Legal Found. v. E.P.A.*, 959 F.Supp. 2d 175, 181–183 (D.D.C. 2013).

Moreover, the NIH has the authority—and the obligation—to retrieve official records unlawfully removed from official custody. *See* 44 U.S.C. § 3106(a). Accordingly, AFL requests the following records pursuant to the FOIA, 5 U.S.C. § 552.

II. Requested Records

All emails sent or received by Dr. David Morens in connection with the transaction of government business using any non-governmental email account, including the Gmail account referenced by the letter cited in footnote 1.

III. Special Definitions

An “email sent or received in connection with the transaction of government business” shall be read to include, at a minimum, any email where Dr. Morens uses his official NIH title in the signature block or body of the email, and any other email or emails in the same thread.

¹ Letter from Rep. Brad Wenstrup, Chairman, H. Select Subcomm. on the Coronavirus Pandemic, to Dr. David Morens, Senior Sci. Advisor, Nat’l Inst. of Allergy and Infectious Diseases at 2 (Jun. 29, 2023) (available at <https://bit.ly/44tRsWS>) (“I always try to communicate over gmail because my NIH email is FOIA’d constantly.”).

IV. Processing

The agency must comply with the processing guidance in the Attorney General's Memorandum on Freedom of Information Act Guidelines.² If you have any questions or believe further discussions regarding search and processing will facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at FOIA@aflegal.org.

V. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, 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. Our 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, and 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. Accordingly, AFL has been granted fee waivers on this basis by the Departments of Defense, Education, Energy, Health and Human Services, Justice, Interior, and Homeland Security, and the Office of the Director of National Intelligence. 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 the operations or activities of the government."³

VI. Production

To accelerate the 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 to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,
/s/ Jacob Meckler
Jacob Meckler
America First Legal Foundation

² U.S. Dep't Just. (Mar. 15, 2022), <https://tinyurl.com/4duy4r5k>.

³ 5 U.S.C. § 552(a)(4)(A)(iii).