



February 16, 2023

VIA EMAIL – foia@nara.gov

Acting Archivist Debra Steidel Wall, C/O FOIA Officer
The National Archives and Records Administration
8601 Adelphi Road, Room 3110
College Park, MD 20740

Re: Rules and Procedures Governing Presidential Records

Dear Acting Archivist Wall:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to promote the rule of law, 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 information to a national audience through traditional and social media platforms. AFL’s email list contains over 44,000 unique addresses; our Facebook page has 109,000 followers; our Twitter page has over 55,000 followers and the Twitter page of our Founder and President has over 404,000 followers; and we have another 31,600 followers on GETTR.

I. Background

A. The National Archives Lacks Legal Authority to Request Criminal Investigations Regarding Presidential Records

Federal law requires that congressional,¹ presidential,² vice-presidential³ and federal agency records are transferred to the National Archives or otherwise preserved under the control of the United States. But the Presidential Records Act does not authorize the National Archives and Records Administration (NARA) to refer anything to the

¹ 44 U.S.C. § 2118.

² 44 U.S.C. § 2201, *et seq.*

³ 44 U.S.C. § 2207.

Department of Justice. Only the Federal Records Act contains explicit provisions authorizing NARA to refer matters of alleged removal, alienation or destruction of records.⁴ This is why NARA never promulgated regulations or guidance defining or establishing its authority to make referrals regarding presidential records—the authority is simply non-existent.⁵

Nevertheless, on August 8, 2022, after a NARA “referral”,⁶ the Federal Bureau of Investigation (FBI) raided Mar-a-Lago to retrieve presidential records allegedly improperly removed.⁷ And yet, with respect to President Biden’s Vice-Presidential records, no subpoenas, search warrants, civil actions, criminal actions, or replevin motions were ever issued or filed. Congress never authorized NARA to play political favorites. Yet, the facts suggest this is precisely what NARA is doing.

B. NARA Lacks the Authority to Rewrite the Presidential Records Act

To begin with, NARA has unlawfully crossed legislative boundaries by claiming definitional power regarding what is, or is not, a presidential record. The statute is limited to “documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”⁸ Thus, records which do not relate to the duties of the President are not presidential records. Furthermore, if records relate to the official activities of the executive departments and are otherwise segregable from records relating to the President’s duties, they are not presidential records.

However, Gary Stern, NARA’s General Counsel, wrote that a White House official’s use of a personal account to send emails to other White House employees without copying or forwarding those emails to an official account violates the Presidential Records Act independent of the content of those emails.⁹ Moreover, whether records created by White House employees relate to “official government business” is not the legal standard. The standard is whether records created by employees were created

⁴ 44 U.S.C. § 3106.

⁵ Nathan Worcester, *Experts Question Why Biden and Trump Treated Differently in Classified Document Cases*, EPOCH TIMES (Jan. 10, 2023), <http://bit.ly/3Y9QDzt>.

⁶ See e.g., *Emails Between Nara Officials Related to the 15 Boxes as of March 31, 2022 (Part B)*, NARA, <https://bit.ly/3QZrF36>.

⁷ Letter from James Comer, Chairman, H. Comm. on Oversight and Accountability, to Debra Steidel Wall, Acting Archivist of the United States (Jan. 10, 2023), at 1, <https://bit.ly/3wsGD8x>.

⁸ 44 U.S.C. § 2201(2).

⁹ See, e.g., Complaint at 6-10, *United States v. Navarro*, No. 22-cv-2292 (D.D.C. Aug. 3, 2022), available at <https://bit.ly/3JehgPg>.

as part of activities relating to the President’s “constitutional”, “statutory” or “other official or ceremonial” duties. In other words, if a White House staffer conducts activities relating to an agency’s official duties that do not affect the President’s constitutional or legal duties, then such a record is decidedly not a presidential record.

Additionally, the Presidential Records Act requires preservation of records relating to the official duties of the President. The Federal Records Act requires preservation of “the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”¹⁰ The “official government business” standard, developed for purposes of interpreting what constitutes a federal record appropriate for preservation, does not carry over.¹¹ And, to be clear, NARA’s General Counsel has no authority to ever provide “a list of search terms” to a former White House employee to govern that employee’s alleged duty to recover presidential records.¹² If NARA wants to develop search terms or other standards interpreting the Presidential Records Act it must proceed through notice and comment rulemaking in accordance with law.¹³

C. The National Archives Is Legally Required to Recover Biden’s Vice-Presidential Records

Regardless, NARA became legally obligated to “request the Attorney General to initiate” an action for the recovery of the unlawfully removed records when it learned that Biden’s Vice-Presidential records were unlawfully removed.¹⁴ Given the heightened public attention focused on the disparate exercise of government power against former President Trump and now-President Biden,¹⁵ the American public deserve to know whether NARA has complied with the law.¹⁶

II. Records Requested

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, AFL hereby requests access to the following records within twenty business days:

¹⁰ 44 U.S.C. § 3101.

¹¹ *Citizens for Responsibility & Ethics v. Dep’t of Educ.*, 538 F. Supp. 2d 24, (D.D.C. 2008).

¹² Bosanko Decl. ¶ 8, *U.S. v. Peter K. Navarro* (D.D.C. 2022).

¹³ 5 U.S.C. § 553.

¹⁴ 44 U.S.C. § 3106; 44 U.S.C. § 2202.

¹⁵ Jerry Dunleavy, *Archives Takes Different Approaches In Trump Vs. Biden Classified Document Scandals*, WASH. EXAMINER (Jan. 23, 2023); <http://bit.ly/3kzqkEa>.

¹⁶ Patrick Hauf, *Legal Experts Slam FBI’s Failure to Search Biden’s Rehoboth Home as Classified Documents Pile Up*, FOX NEWS (Jan. 23, 2023), <http://bit.ly/3XyK3T5>.

- A. All agreements entered into by the Archivist relating to the deposit of Joseph Biden Vice-Presidential records, including all records relating to agreements between the NARA and the University of Pennsylvania and/or the Penn Biden Center (“Center”). The time period for this request is November 7, 2016 to the present.
- B. All records referring or relating to the status of the Center as a non-Federal archival depository. The time period for this request is November 7, 2016 to the present.
- C. All records identifying the locations of Biden Vice-Presidential records. The time period for this request is November 7, 2016 to the present.
- D. All communications between NARA and any email with the domain “@upenn.edu” or “@pbc.upenn.edu” relating to Biden’s Vice-Presidential Records. The time period for this request is November 7, 2016 and the present.
- E. All records referring or relating to the statutory authority of the Archivist to initiate action through the Attorney General for the recovery of presidential records.
- F. All records reflecting communications from January 1, 2019 to the present between NARA and anyone at the White House, the Biden for President campaign, the Biden-Harris Presidential Transition Team, or Biden’s personal lawyers relating to the review, disposition, removal, alienation, or destruction of Joseph Biden’s Senate or Vice-Presidential records.
- G. All communications related to and all electronic drafts concerning the October 11, 2022 statement by the Archivist that it had assumed physical custody of all Obama-Biden Administration records.
- H. All records reflecting the Archivist’s authority to determine and legal determination that “Upon the conclusion of a President’s term of office” “Presidential records of that President” are determined or defined by NARA, rather than by the former President.¹⁷
- I. All records of communications from Gary Stern (NARA) to any employee of the Department of Justice relating to preservation, removal or alienation of presidential records. The time period of this request is January 20, 2021 to August 8, 2022.
- J. All records of requests from January 20, 2021 to August 8, 2022 by incumbent President Biden for special access to former President Trump’s records.¹⁸
- K. All records relating to the resignation of former Archivist David S. Ferriero. The time period for this request is October 1, 2022 to January 13, 2022.
- L. All records related to the processing of these items.

III. Processing

¹⁷ See e.g., 44 U.S.C. §§ 2201, 2203(g)(1); accord. Pl.’s Mtn. ISO Mtn. Summ. J., *Navarro, supra.* at 8, available at <https://bit.ly/3XRoQn7> (“NARA concluded that these emails were Presidential records”).

¹⁸ E.g., 44 U.S.C. §§ 2205(2)(A)-(C).

Processing should occur in strict compliance with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines.¹⁹ If you have any questions about our request or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, then please contact me at FOIA@aflegal.org.

Also, AFL requests expedited processing of this request. In support thereof, AFL certifies its compelling need for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 36 C.F.R. § 1250.28(a). As many federal agencies have acknowledged in granting AFL expedited processing, AFL is primarily engaged in disseminating information. Additionally, there is an urgency to inform the public regarding the circumstances surrounding the government’s failure to secure classified records from a former Vice President and now-sitting President.²⁰ This is a matter of pressing national importance.

The request also meets NARA’s regulatory test for expedited processing based on a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence. Both requirements are met here because there has been extensive public and congressional interest in the inconsistent processes undertaken by NARA to recover presidential records.²¹ Indeed, the revelation that classified documents were found in multiple unsecured locations has raised alarms from both sides of the political aisle.²² To argue that there is not widespread interest in these events, or that they do not pose questions about government integrity would border on the absurd. This request seeks to expose the circumstances of these monumental events to public inspection, before irreparable harm is done to the nation’s interest, in violation of the law.

AFL is an organization engaged in gathering, analyzing, and disseminating information, and there is great urgency to inform the public concerning events of intense public interest. Moreover, the allegations at hand go directly to public confidence in the integrity of the government. For these reasons, our expedited processing request should be granted.

IV. Fee Waiver Request

¹⁹ U.S. Dep’t Just. (Mar. 15, 2022), <https://bit.ly/3zvp6b6>.

²⁰ Letter from James Comer, Chairman, H. Comm. on Oversight and Accountability, to Debra Steidel Wall, Acting Archivist of the United States (Jan. 10, 2023), <https://bit.ly/3wsGD8x>.

²¹ *Id.*; see also Adela Suliman & Devlin Barrett, *Where Biden Classified Documents Were Found, What Led to Investigation*, WASH. POST (updated Jan. 12, 2023), <http://bit.ly/3j05P33>; Jerry Dunleavy, *Archives Takes Different Approaches In Trump Vs. Biden Classified Document Scandals*, WASH. EXAMINER (Jan. 23, 2023); <http://bit.ly/3kzqkEa>.

²² *Senate Democrats Biden’s Handling of Classified Documents Case*, PBS News Hour (Jan. 22, 2023), <http://bit.ly/3XWhPS5>; Stephen Neukam, *Democratic Lawmakers Back Special Counsel to Probe Biden’s Handling of Records*, THE HILL (Jan. 15, 2023), <http://bit.ly/3Wsa4C8>.

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 36 U.S.C. § 1250.56, 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 we obtain 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."²³

V. 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 Avenue SE #231, Washington, DC 20003.

Thank you,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

²³ 5 U.S.C. § 552(a)(4)(A)(iii).