



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

OFFICE OF GENERAL COUNSEL

June 4, 2021

Gene P. Hamilton
America First Legal Foundation
600 14th Street NW, 5th Floor
Washington, D.C. 20005
info@aflegal.org

Dear Mr. Hamilton,

This letter is in response to your Freedom of Information Act (“FOIA”) request No. SBA-2021-011608, which was assigned to this office on June 1, 2021. You have requested the following:

- A. All records regarding, referring, or relating to the development, selection, and implementation of priorities in awarding grants from the “Restaurant Revitalization Fund” established pursuant to the American Rescue Plan Act and referenced between January 21, 2021 to the date the documents are produced.
- B. All records, including but not limited to electronic mail, texts, memoranda, and handwritten notes, regarding, referring, or relating to priorities in awarding grants from the “Restaurant Revitalization Fund” established pursuant to the American Rescue Plan Act from, to, or in the possession of each of the following SBA components:
 - 1. Office of the Administrator
 - 2. Office of Advocacy
 - 3. Office of Capital Access
 - 4. Office of Communications and Public Liaison
 - 5. Office of Congressional and Legislative Affairs
 - 6. Office of Diversity, Inclusion, and Civil Rights
 - 7. Office of the General Counsel
 - 8. Office of the National Ombudsman
 - 9. Office of the Inspector General

The time frame for this request is January 21, 2021, until the date the documents are produced.

C. All records, including but not limited to electronic mail, texts, memoranda, and handwritten notes, regarding, referring, or relating to priorities in awarding grants from the “Restaurant Revitalization Fund” established pursuant to the American Rescue Plan Act from, to, or in the possession of each of the following individuals:

1. Isabella Casillas Guzman
2. Antwaun Griffin
3. Arthur Plews
4. Ann Lewis
5. Scott Harriford
6. Major Clark
7. John Miller
8. Zina Sutch
9. Gaye Walker
10. Mark Madrid
11. Adriana Menchaca-Gendron
12. Stephen Kong
13. Cynthia Jasso-Rotunno
14. Han Nguyen
15. Stephanie King
16. Kevin Wheeler
17. Susan Sweetser

The time frame for this request is January 21, 2021, until the date the documents are produced.

D. All records regarding, referring, or relating to the development, selection, and implementation of criteria used to verify an applicant’s self-certification of eligibility for grant priority under the “Restaurant Revitalization Fund” established pursuant to the American Rescue Plan Act. The time frame for this request is January 21, 2021, until the date the documents are produced.

E. All records regarding, referring, or relating to the development, selection, and implementation of criteria used to define the meaning of the following terms

1. “subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”
2. “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”

The time frame for this request is January 21, 2021, until the date the documents are produced.

- F. All records regarding, referring, or relating to how the SBA will monitor, audit, or judge the integrity of applicants' self-selection—including on what basis it will determine that such a self-certified claim is invalid—of the following terms.
1. "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."
 2. "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."

The time frame for this request is January 21, 2021, until the date the documents are produced

In addition, you have requested a fee waiver. You state that "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 through regular substantive analyses posted to its website." You also claim you are entitled to a fee waiver because "the requested information is 'in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.'"

Regarding your assertion that AFL is a news media request, SBA disagrees. A member of the news media includes "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." A review of the America First Legal website reveals it to be an organization providing legal services; not a member of the news media. Additionally, under the tab "News" AFL simply posts a summary of the lawsuits or FOIA requests it has filed and a link to court filings or the FOIA request with a brief statement from AFL President Stephen Miller. These date back to May 17, 2021, a mere three days prior to the filing of this FOIA request. SBA does not believe AFL has demonstrated that it will use editorial skills to turn raw materials into a distinct work and denies a fee waiver based on the categorization as a member of the news media.

Regarding your second assertion that the disclosure is in the public interest, SBA also disagrees. Disclosure is in the public interest when it is likely to (1) contribute significantly to public understanding of the operations or activities of the government and (2) is not primarily in the public interest of the requester. A requester must offer more than conclusory statements of public interest. The request must explain with reasonable specificity how disclosure will contribute to public understanding. When "public interest is asserted but not identified with reasonable specificity and circumstances do not clarify the point of the requests, an agency may infer a lack

of substantial public interest.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F2d 1282, 1285 (9th Cir. 1987).

In determining whether disclosure will contribute significantly to public understanding of the operations or activities of the government, an agency should consider: (1) the subject of the request; (2) the informative value of the information to be disclosed; (3) the contribution to an understanding of the subject by the general public likely to result from the disclosure; and (4) the significance of the contribution to public understanding.

For the third factor, the proper focus must be on the contribution to public understanding, rather than personal benefit to be derived by the requester. Therefore, agencies are instructed to evaluate a requester’s identity and qualifications – expertise in the subject area and ability and intention to disseminate the information to the general public.

In determining whether disclosure is not primarily in the commercial interest of the requester, an agency should consider (1) the existence and magnitude of a commercial interest and (2) the primary interest in disclosure. As a threshold matter, an agency must first determine whether the request involves any commercial interest of the requestor and assess the magnitude of that commercial interest. A commercial interest is one that furthers a commercial, trade or profit interest. An entity’s non-profit status alone is not determinative.

SBA notes that AFL is currently in litigation with the SBA regarding the prioritization of certain entities in receiving benefits under the Restaurant Revitalization Fund. The information being requested directly relates to this lawsuit and would personally benefit AFL. As noted above, AFL is an organization providing legal services and “carrying out critical legal, policy, and political battles at the highest levels of the U.S. government.” <https://www.aflegal.org/about>.

The information requested is in furtherance of AFL’s commercial interest in its litigation. Therefore, SBA is denying your request for a fee waiver.

SBA has run a preliminary search for the requested documents and will need to review a large volume of emails and other documents for responsiveness. SBA estimates fees associated with this FOIA request to be \$2,092. The breakdown of the fees are as follows: 16 hours of search time at \$83/hour, \$100 in direct costs for the computer search, and 8 hours of review time at \$83/hour.

If you are dissatisfied with the Agency’s decision, you may file an administration appeal within 90 days of the date of this letter to:

Office of Hearings and Appeals
Attention: Oreoluwa Fashola, FOIA Office
409 3rd Avenue, SW – 8th Floor
Washington, D.C. 20416.

If you are unable to resolve your FOIA dispute through our FOIA Public Liaison in the Office of Hearings and Appeals, the Office of Government Information Services (“OGIS”), the Federal FOIA Ombudsman’s Office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS,
College Park, MD 20740-6001
ogis@nara.gov ogis.archives.gov
202-741-5770 877-684-6448.

Sincerely,

/s/ *Eric S. Benderson*
Eric S. Benderson
Chief FOIA Officer
Office of General Counsel
U.S. Small Business Administration