

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICA FIRST LEGAL FOUNDATION,
611 Pennsylvania Ave SE #231
Washington, DC 20003

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Defendant.

Civil Action No.: 22-

COMPLAINT

1. Plaintiff America First Legal Foundation (“AFL”) brings this action against the United States Department of Justice (“DOJ”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Additionally, it may grant declaratory relief pursuant to 28 U.S.C. § 2201, *et seq.*

3. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

4. AFL is a 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, and encourage public knowledge and understanding of the law and individual rights guaranteed under the United States Constitution and the laws of the United States. AFL's mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, all to educate the public. All of the records AFL receives will be made publicly available on AFL's website for citizens, journalists, and scholars to review and use. AFL's principal office is located in the District of Columbia.

5. DOJ is an agency of the federal government within the meaning of 5 U.S.C. § 552(f) and has possession and control of the records AFL seeks.

BACKGROUND

6. One of the significant duties tasked to the Executive Branch by Article II of the Constitution is the nomination of Article III judges for Senate confirmation.

7. Indeed, the Biden Administration has prioritized the reshaping of the federal judiciary since its earliest days.¹

8. Furthermore, there has been increased urgency to confirm federal judges as partisan control of the Senate hangs in the balance this November.²

¹ Jonathan Swan et al., *Biden's Quiet Court Drive*, AXIOS (July 22, 2021), <https://tinyurl.com/mtsfvaeu>; Sam Baker, *Biden Outpacing Trump with Blistering Pace of Judicial Confirmations*, AXIOS (Sep. 14, 2022), <https://tinyurl.com/pcsd6c3>.

² Marianne Levine, *Senate Prepares to Pick Up the Judicial-pick Pace as November Looms*, POLITICO (Aug. 22, 2022), <https://tinyurl.com/mtvhtx3n>.

9. Yet, far more scrutiny had been applied to the previous administration's exercise of its constitutional duty.³

10. Questions remain whether the Biden Administration is enforcing procedures that protect the privacy and due process rights of those who submit information to the government.

11. The answers to these and many related questions bears directly on the public's confidence in the Government's integrity.

12. "Timely disclosure of records is also essential to the core purpose of FOIA." U.S. Dep't Just., Freedom of Information Act Guidelines (Mar. 15, 2022), <https://tinyurl.com/2yd463dv>.

AFL'S FOIA REQUESTS

13. On June 24, 2021, to better understand these issues, AFL submitted a FOIA request to DOJ's Mail Referral Unit. *See* Ex A.

³ *See, e.g.*, James Warren, *Donald Trump is Rapidly Reshaping the Nation's Courts*, VANITY FAIR (Aug. 4, 2017), <https://tinyurl.com/2p8p9byv>; Elie Mystal, *Donald Trump and the Plot to Take Over the Courts*, NATION (July 15, 2019), <https://tinyurl.com/2p8zhk7d>; Matt Stevens, Trump Has Reshaped the Judiciary. Here's How the 2020 Democrats Would Address That, N.Y. TIMES (Feb. 8, 2020), <https://tinyurl.com/5d8jmdpd>; Charles Davis, *AOC Considering Impeachment, Schumer Weighing Supreme Court Expansion in Wake of Mitch McConnell's 'Blatant, Nasty Hypocrisy'*, BUSINESS INSIDER (Sep. 20, 2020), <https://tinyurl.com/au9v8pph>; Press Release, Senate Democrats, *Schumer Statement on Pres. Trump's Updated List Of Potential Radical Right-Wing SCOTUS Nominees* (Sep. 9, 2020), <https://tinyurl.com/3zc4m3k8>; Dahlia Lithwick and Mark Joseph Stern, *Democrats Won the Senate. Can They Fix the Courts Now?: Biden is Inheriting a Crisis in the Federal Judiciary*, SLATE (Jan. 8, 2021), <https://tinyurl.com/2p8n8pfz>; Sahil Kapur, *After Trump, Democrats Set Out on a Mission to 'Repair the Courts'*, NBC NEWS (Jan. 30, 2021), <https://tinyurl.com/2dp4r89j>.

14. In that FOIA request, AFL also requested expedited processing and a fee waiver. *See id.*

15. On July 21, 2021 DOJ's Mail Referral Unit sent an e-mail to AFL acknowledging receipt of the FOIA request and assigning it Tracking Number EMRUFOIA072021. *See Ex. B.*

16. In that response, DOJ's Mail Referral Unit stated it has referred AFL's request to the DOJ components most likely to have the records: the Office of Information Policy (OIP) and the Federal Bureau of Investigation (FBI). *See id.*

17. As of the date of this Complaint, more than 400 days after AFL's request was submitted, neither component has completed its search. *See infra* at 19-39.

18. Based on the FBI's own estimate, it would not complete action on AFL's request until the year 2027. *See infra* at 33-39.

OIP Request FOIA-2021-01790

19. On July 30, 2021 OIP sent a letter to AFL acknowledging receipt of the FOIA request and assigned it Tracking Number FOIA-2021-01790. *See Ex. C.*

20. In that response, OIP stated that AFL's request fell within "unusual circumstances," and OIP would need to extend the time limit to respond to AFL's request beyond the ten additional days provided by FOIA. *See id.*

21. In that response, OIP also stated that "any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request." *Id.* at 2.

22. Notwithstanding the intense public scrutiny paid to the issues underlying AFL's FOIA request, OIP denied the request for expedited treatment after concluding that it "cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activities generally." *Id.* at 1.

23. On March 10, 2022, AFL sent an e-mail to OIP requesting a status update on this request. *See* Ex. D.

24. On March 18, 2022, OIP responded by e-mail, stating that it was continuing to search for records responsive to the AFL's request, and its records search is currently estimated to take eight to nine months to complete. *See id.*

25. On March 21, 2022, AFL responded by e-mail, discussing its openness to narrow the search in order to move the request to a higher priority search queue and requested confirmation whether OIP's contemplated search was based on custodians it had identified in the Offices of Legislative Affairs and Legal Policy. *See Id.*

26. On March 25, 2022, OIP responded by e-mail, confirming that OIP is searching custodians within the two identified offices. *See id.*

27. On April 27, 2022, AFL sent OIP an e-mail requesting an update on the status of the request. *See id.*

28. On June 10, 2022, having received no response to its previous e-mail, AFL sent OIP an e-mail requesting an update on the status of the request. *See id.*

29. On June 17, 2022, OIP responded by e-mail, stating that OIP was still searching for records and estimated the search to be completed in five to six months.

30. On August 2, 2022, AFL sent OIP an e-mail requesting an updated estimate for completion of the search. *See id.*

31. On August 8, 2022, OIP responded by e-mail, stating that it estimates the search will be completed in four months. *See id.*

32. As of the date of this Complaint, AFL has received no further response from OIP about this FOIA request.

FBI Request 1501757-000

33. On March 10, 2022, AFL sent FBI an e-mail requesting the status of the request, which was forwarded by DOJ's Mail Referral Unit to FBI, and requesting FBI's FOIPA Request Number for AFL's request. *See Ex. E.*

34. On September 16, 2022, having received no response to its previous e-mail, AFL sent FBI another e-mail requesting the status of the request and FBI's FOIPA Request Number for the request. *See id.*

35. On September 19, 2022, FBI responded by e-mail, indicating the request had been assigned FOIPA Request Number 1501757-000. *See id.*

36. In that response, FBI stated the request was "presently in Initial Processing, where the assigned analyst is searching for, retrieving and reviewing potentially responsive records." *Id.*

37. In that response, FBI also estimated that “the estimated date on which the FBI will complete action on [AFL’s] request is 2,011 days from the date the FBI opened your request.” *Id.*

38. On September 20, 2022, FBI responded by e-mail, clarifying that it had opened AFL’s request in August 2021. *See id.*

39. As of the date of this Complaint, AFL has received no further response from FBI about its FOIA request.

COUNT I
Violation of FOIA, 5 U.S.C. § 552

40. AFL repeats the foregoing paragraphs as if set forth fully herein.

41. DOJ is an agency of the federal government within the meaning of 5 U.S.C. § 552(f).

42. By letters dated June 24, 2021, AFL submitted a FOIA request to DOJ. *See Ex. A.*

43. AFL’s FOIA requests complied with all applicable statutes and regulations.

44. The requested records are not exempt from FOIA pursuant to 5 U.S.C. § 552(b).

45. DOJ has failed to respond to AFL’s request within the statutory time-period. *See* 5 U.S.C. § 552(a)(6).

46. Accordingly, AFL has exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C).

47. Additionally, AFL’s request demonstrated that expedited processing was appropriate under DOJ’s regulations. Indeed, as AFL demonstrated, “substantial due process rights” would be impaired if pending or potential nominees failed to learn whether DOJ was collecting information in a manner which violates the Paperwork Reduction Act or the Privacy Act. *See* 28 C.F.R. § 16.5(e)(1)(iii). Furthermore, as AFL demonstrated, there is an urgent need to inform Congress and the general public whether a high priority for the Biden Administration—i.e. to confirm more federal judges—involved a process which violated federal law. *See* 28 C.F.R. § 16.5(e)(1)(ii). Similarly, as AFL demonstrated, these requests relate to “matter[s] of widespread and exceptional media interest” and implicate “public confidence in the Government’s integrity.” *See* 28 C.F.R. § 16.5(e)(1)(iv).

48. Yet, DOJ failed to comply with FOIA or with its own regulations when it denied these requests for expedited processing.

49. Accordingly, by denying AFL’s requests for expedited treatment, and by failing to release any responsive, non-exempt records, or otherwise offer a reasonable schedule for production, DOJ has violated FOIA.

PRAYER FOR RELIEF

WHEREFORE, AFL respectfully requests that this Court:

- i. Declare that DOJ unlawfully denied AFL’s requests for expedited processing.
- ii. Declare that the records sought by the request, as described in the foregoing paragraphs, must be disclosed pursuant to 5 U.S.C. § 552.

iii. Order DOJ to complete its searches immediately for all records responsive to AFL's FOIA requests and demonstrate that they employed search methods reasonably likely to lead to the discovery of responsive records.

iv. Order DOJ to produce by a date certain all non-exempt records responsive to AFL's FOIA request.

v. Award AFL attorneys' fees and costs incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E).

vi. Grant AFL such other and further relief as this Court deems proper.

September 20, 2022

Respectfully submitted,

/s/ Michael Ding

MICHAEL DING

D.C. Bar No. 1027252

AMERICA FIRST LEGAL FOUNDATION

611 Pennsylvania Ave SE #231

Washington, D.C. 20003

Tel.: (202) 964-3721

E-mail: michael.ding@aflegal.org

*Counsel for Plaintiff America First
Legal Foundation*