

U.S. Department of  
Homeland Security

United States  
Coast Guard



Office of the Chief Administrative Law Judge  
United States Coast Guard

40 S. Gay Street Room 412  
Baltimore, MD 21202  
Staff Symbol: CG-00J  
Phone: 410-962-5146  
Fax: 410-962-7142  
Email: sarah.m.grabenstein@uscg.mil

5720  
January 26, 2023

Reed D. Rubinstein, Esq.  
America First Legal Foundation  
611 Pennsylvania Ave., SE  
#231  
Washington, DC 20003  
[foia@aflegal.org](mailto:foia@aflegal.org)

RE: DHS FOIA Appeal No. 2023-HQAP-00219; DHS FOIA Request No. 2023-NPFO-00060

Dear Mr. Rubinstein:

This letter responds to your appeal of the Department of Homeland Security (DHS), Cybersecurity & Infrastructure Security Agency (CISA)'s December 6, 2022 response to your FOIA request (Request No. 2023-NPFO-00060) in which you requested expedited processing. CISA responded to your letter acknowledging receipt of the FOIA request, stating it would respond to your request "as expeditiously as possible," and advising that your request for a fee waiver was conditionally granted. Furthermore, CISA stated it denied your request for expedited processing. On January 12, 2023, you filed an appeal of CISA's determination to deny expedited processing. For the reasons set forth below, I am upholding CISA's response.

Pursuant to a memorandum of agreement, the United States Coast Guard Office of the Chief Administrative Law Judge is reviewing FOIA appeals for the Department of Homeland Security General Counsel's office. Therefore, the Office of the Chief Administrative Law Judge will be rendering the official appeal decision on behalf of the Department of Homeland Security.

In your initial request, submitted on or about November 15, 2022, you sought

1. For the time period between July 1, 2022, and November 4, 2022, all records of any communication sent to or from any of the below listed custodians that contain any of the following terms: "MD," "MDM," "CFITF," "disinformation," "misinformation," "malinformation," "Disinformation Governance Board," "DGB," "GEC," "FITF"
  - a. Jen Easterly
  - b. Alaina Clark
  - c. Bridget Bean
  - d. Victoria Dillon
  - e. Stephanie Doherty
  - f. Kiersten Todt
  - g. Robert Costello
  - h. Geoff Hale
  - i. Kim Wyman
  - j. Allison Snell
  - k. Lauren Protentis
  - l. Brian Scully

2. For the time period of July 1, 2022, through November 8, 2022, all records of any communication sent to or from any CISA employee that contain the search term “facebook.com/xtakedowns.”
3. Records sufficient to evidence all CISA employees who logged into the Facebook portal or accessed it from their work (government) device.
4. All records that define MDM (or any subpart) or instruct CISA employees on how to decide which posts should be flagged/submitted to the portal.

### **Legal Standard for Expedited Processing**

FOIA provides “[e]ach agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records – (I) in cases in which the person requesting the records demonstrates a compelling need; and (II) in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i).

The term “compelling need” indicates a situation where “a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual,” or, “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v).

DHS regulations concerning expedited processing of FOIA requests provide:

- (1) Requests and appeals will be processed on an expedited basis whenever the component determines that they involve:
  - (i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
  - (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information;
  - (iii) The loss of substantial due process rights; or
  - (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

6 C.F.R. § 5.5(e).

### **6 C.F.R. § 5.5(e) – Widespread and Exceptional Media Interest**

In your initial FOIA request, you cited generally to the expedited processing section of the FOIA statute, at 5 U.S.C. § 552(a)(6)(E), but you specifically based your request for expedited processing on the criterion of 6 C.F.R. § 5.5(e)(1)(iv) (“[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.”). I will address this basis first.

CISA based its determination to deny your request for expedited processing on the information you provided in your initial request. Regarding “media interest” in the subject matter of your request, you cited to eight articles published on various websites, and one press release from the office of Senator Mitt Romney. On review of these citations, only one—“Truth Cops” by Ken Klippenstein and Lee Feng—mentioned any of the specific subject matter of your FOIA request, in that it mentions a Facebook portal purportedly used by the federal government to flag content on the social media site. The other articles, as well as Senator Romney’s press release, address the Disinformation Governance Board generally.

Further, although you state in your letter that “new reporting shows that the work and mission of the Disinformation Governance Board continued uninterrupted” after its dissolution, most of the articles you cited were written prior to the dissolution of the Board, and thus could not possibly contain any expression of interest in the alleged continuance of the work of the Board after it was disbanded. As such, there was not a sufficient showing in your FOIA request to establish there is “widespread and exceptional” interest in the specific information you are seeking, which is targeted at post-dissolution activity. See Oversight v. U.S. Dep’t of Just., 292 F. Supp. 3d 501, 508 (D.D.C. 2018); cf. Am. C.L. Union v. U.S. Dep’t of Just., 321 F. Supp. 2d 24, 32 (D.D.C. 2004).

### **5 U.S.C. § 552(a)(6)(E)(v)(II) – Urgency to Inform the Public**

An agency may also expedite processing of a request “made by a person primarily engaged in disseminating information” that demonstrates an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

The first prong of this standard requires that the requestor be a “person primarily engaged in disseminating information.” As noted in the legislative history of the FOIA, a person primarily engaged in disseminating information

should not include individuals who are engaged only *incidentally* in the dissemination of information. The standard of ‘primarily engaged’ requires that information dissemination be the *main activity* of the requestor, although it need not be their sole occupation. A requestor who only *incidentally* engages in information dissemination ... would not satisfy this requirement.

H.R.Rep. No. 104–795, at 26, 1996 U.S.C.C.A.N. 3448, 3469 (emphasis added).

As stated in a quote on the front page of the website for America First Legal Foundation (“AFL”), the organization “is the long-awaited answer to the ACLU...Through relentless litigation and oversight we will protect America First, Last, and Always.”<sup>1</sup> The mission of the AFL as an organization primarily dedicated to litigating legal actions is evident. As of the date of the preparation of this appeal determination letter, almost every item in the “News” section of the AFL website is a press release detailing a lawsuit or legal complaint initiated by AFL against a government entity. Similar to the national public interest law firms who have sought expedited processing in the past, AFL’s main activity appears to be litigation, and dissemination of information is incidental that activity. See Landmark Legal Found. v. E.P.A., 910 F. Supp. 2d 270, 276 (D.D.C. 2012); A.C.L.U. of N. California v. Dep’t of Just., No. C 04-4447 PJH, 2005 WL 588354, at \*14 (N.D. Cal. Mar. 11, 2005).

The second prong of this standard requires the requestor demonstrate “an urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). In that regard, an agency should consider “(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” Al-Fayed v. C.I.A., 254 F.3d 300, 310 (D.C. Cir. 2001).

Moreover, the legislative history again sheds light on the standard for expediting processing:

The standard of “urgency to inform” requires that the information requested should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. *The public’s right to know*,

---

<sup>1</sup>Quote by Stephen Miller, President of America First Legal Foundation, <https://aflegal.org/>

*although a significant and important value, would not by itself be sufficient to satisfy this standard.*

H.R.Rep. No. 104-795, at 26 (1996) (emphasis added).

Although the articles and press release cited in your request letter demonstrate an interest by the public in the Disinformation Governance Board generally, they lack any showing that the specifically-requested information is of current exigency to the American public or that tangible consequences that would result from failure to expedite processing. It is not enough to show interest “in only the general subject area of the request.” A.C.L.U. of N. California v. Dep’t of Just., No. C 04-4447 PJH, 2005 WL 588354, at \*13. Your FIOA request did not adequately explain how a delay in CISA’s response would compromise a significant recognized interest, beyond the public’s right to know, generally. Accordingly, I am upholding CISA’s determination to deny expedited processing and your appeal is denied.

Notwithstanding the above decision, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at [ogis@nara.gov](mailto:ogis@nara.gov) or call 1-877-684-6448.

This decision is the final action regarding DHS FOIA Appeal No. 2023-HQAP-00219; FOIA Request No. 2023-NPFO-00060. While a comprehensive review of your appeal was made, you may seek judicial review of this decision pursuant to 5 U.S.C. §552(a)(4)(B) in the United States District Court for either 1) the district where you reside, 2) the district where the agency records are situated, or 3) the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah M. Grabenstein". The signature is fluid and cursive, with the first name "Sarah" being more prominent and the last name "Grabenstein" written in a more compact, connected style.

Sarah M. Grabenstein  
Attorney Advisor  
United States Coast Guard

Copy: Director, FOIA Appeals and Litigation, DHS I&A