



July 28, 2022

VIA FOIAOnline and hq.foia@epa.gov

Jeffrey Prieto, General Counsel
National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2310A)
Room 7309 Clinton North Building
Washington, DC 20460

Freedom of Information Act Appeal: EPA-2022-004717 Fee Waiver Denial

Dear Mr. Prieto:

This is an appeal under the Freedom of Information Act.

On June 10, 2022, America First Legal Foundation (AFL) submitted a request for documents under the Freedom of Information Act (FOIA) to the United States Environmental Protection Agency and requested a fee waiver. Exhibit 1. This request was assigned identification number EPA-2022-004717. In a letter dated June 30, 2022, EPA denied AFL's fee waiver request, stating that AFL's fee waiver justification specifically failed to detail the informative value of the requested records and what would be shared for an increased public understanding. Exhibit 2. Furthermore, the letter emphasized that, because AFL's fee waiver request "did not provide enough detail on the one identified factor, the National FOIA Office did not make a determination on the sufficiency of [AFL's] request with respect to the other factors."¹ Accordingly, AFL appeals EPA's initial denial and provides the following information to address the six factors enumerated in EPA's FOIA Regulations.

As described in EPA's denial letter, EPA's FOIA Regulations makes fee waiver determinations based on whether "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' (public interest requirement) and 'is not primarily in the commercial interest of the requestor' (non-commercial interest requirement)."²

¹ Exhibit 2 at 3.

² See Exhibit 2 at 1 (quoting 40 CFR § 2.107(l)).

Factor 1: the subject of the request

To evaluate the public interest requirement, EPA first considers whether the subject of the requested records concerns “the operations or activities of the government.”³ AFL’s request concerns EPA’s “strategic plan,” required by Executive Order 14019 (March 7, 2021) on “Promoting Access to Voting,” to be submitted within 200 days of the date of the executive order.⁴ According to the executive order, EPA’s strategic plan must outline the ways that EPA “can promote voter registration and voter participation,” including by considering “ways to provide relevant information in the course of activities or services that directly engage with the public—including through agency materials, websites, online forms, social media platforms, and other points of public access—about how to register to vote.”⁵ As such, the requested record clearly concerns identifiable operations or activities of the federal government.

Factor 2: the informative value of the information to be disclosed

To evaluate the public interest requirement, EPA next considers whether disclosure is “likely to contribute” to the understanding of government operations or activities.⁶ The informative value of the information to be disclosed is quite clear. The right to vote is foundational to the American system of government, and the public should be informed about the state of this foundational right. Indeed, the executive order asserts, “It is the responsibility of the Federal Government to expand access to, and education about, voter registration and election information.”⁷ Information related to the Government’s efforts to expand access to voting—including EPA’s strategic plan to do so using its authorized operations and activities— is therefore of critical import to the public. Moreover, without disclosure of this information, it is not at all obvious how EPA, whose mission is “to protect human health and the environment,” would promote access to voting in any way.⁸ Indeed, AFL’s request seeks to increase public understanding of EPA’s plans to utilize its authorized operations and activities to promote an interest that is far removed from EPA’s stated mission.

Factor 3: the contribution to an understanding of the subject by the public is likely to result from disclosure

To evaluate the public interest requirement, EPA then considers whether disclosure will contribute to the understanding of a reasonably broad audience of persons

³ 40 C.F.R. § 2.107(l)(2)(i) (2019).

⁴ Exhibit 1 at 1.

⁵ Exec. Order No. 14019, 86 Fed. Reg. 13,623 (Mar. 10, 2021).

⁶ 40 C.F.R. § 2.107(l)(2)(ii) (2019).

⁷ Exec. Order No. 14019, 86 Fed. Reg. 13,623 (Mar. 10, 2021).

⁸ See EPA, *Our Mission and What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>.

interested in the subject.⁹ EPA “presumes that a representative of the news media will satisfy this consideration.”¹⁰

News media status, for purposes of a fee waiver determination, turns on the nature of the organization seeking the waiver, not the underlying FOIA request.¹¹ EPA’s regulations refer to FOIA to define “representative of the news media.”¹² The federal courts and the text of the FOIA itself both provide that a representative of the news media is “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.”¹³

AFL is a representative of the news media for purposes of a fee waiver determination. As AFL’s FOIA request indicated, we file 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.”¹⁴ AFL’s email list contains over 34,000 unique addresses, our Facebook page has over 42,000 followers, our Twitter page has over 16,000 followers, the Twitter page of our Founder and President has over 195,000 followers, and we have another 30,000 followers on GETTR. The fact that AFL requests these documents from EPA tends to show that AFL gathers information of potential interest to the public.¹⁵ Further evidence of the fact that AFL generally engages in this type of activity can be found by browsing the news and oversight sections of its website. Next EPA must consider whether AFL creates “distinct works” using the materials it gathers. Addressing this element, the D.C. Circuit has said “if an entity...issues substantive press releases concerning the documents it uncovers, or even if it simply provides editorial comments on those documents in interviews with newspapers, such a gloss on the underlying materials could satisfy this element of the definition.” AFL publishes information and provides comments on the published material.¹⁶ This satisfies the *Cause of Action* standard. Not only does distribution of published material occur on our website, it is further amplified by our team members’ frequent appearances on cable networks and their visible presence on social media.¹⁷ Regardless, proof of ability to disseminate the information widely is not required.¹⁸ Mere evidence that an organization distributes information to an audience is all that is required.

⁹ 40 C.F.R. § 2.107(l)(2)(iii) (2019).

¹⁰ *Id.*

¹¹ *Cause of Action v. FTC*, 799 F.3d 1108, 1122 (D.C. Cir. 2015).

¹² 40 CFR § 2.107(d)(1), referring to 5 U.S.C. § 552(a)(4)(A)(ii).

¹³ 5 U.S.C. § 552(a)(4)(A)(ii). *See also*, *Cause of Action* 799 F.3d at 1120.

¹⁴ Exhibit 1 at 1. *See* America First Legal, *Press Releases*, <https://www.aflegal.org/news?category=press-releases>.

¹⁵ *See Cause of Action*, 799 F.3d at 1118.

¹⁶ *See* America First Legal, *Oversight*, <https://www.aflegal.org/oversight>.

¹⁷ *See* America First Legal, *AFL In The News*, <https://www.aflegal.org/news?category=in-the-news>.

¹⁸ *Cause of Action*, 799 F.3d at 1116.

Under the relevant standards, as laid out by the D.C. Circuit and FOIA's text, AFL is a news media requestor. Tellingly, this has been recognized by the Departments of Education, Homeland Security, Interior, and Energy in fee waiver determinations for numerous FOIA requests. EPA should accordingly presume that AFL satisfies this consideration in its six factor analysis.

Factor 4: the significance of the contribution to public understanding

To evaluate the public interest requirement, EPA finally considers whether "disclosure is likely to contribute 'significantly' to public understanding of government operations or activities."¹⁹ Because EPA's mission, relating to human health and the environment, is not at all related to the subject matter of the requested records, which relate to voting access, the public understandably has no understanding about the ways that EPA plans to promote voting access, absent disclosure of the requested record. Therefore, disclosure would most significantly contribute to public understanding of EPA's operations or activities.

Factor 5: the existence and magnitude of commercial interest

To evaluate the non-commercial interest requirement, EPA first considers whether "the requester has a commercial interest that would be furthered by the requested disclosure."²⁰ As a nonprofit organization that provides these documents to the public without charge, AFL has no commercial interest in these documents, or in any commercial interest at all. In *Cause of Action*, the D.C. Circuit explained that "[t]he statutory criterion focuses only on the likely effect of the information disclosure," as opposed to the purpose of the request.²¹ Given that AFL will provide these documents to the public without charge, there is no way that the primary effect of publishing them could accrue to AFL's commercial interest.

Factor 6: the primary interest in disclosure

To evaluate the non-commercial interest requirement, EPA then weighs the public interest against any identified commercial interest in disclosure.²² EPA ordinarily presumes that "when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester."²³ As detailed above, AFL is a news media requester with no commercial interest in the disclosure. AFL's interest in these documents is primarily in the education of the American public about the activities of our government. We believe that when a government agency is directed to undertake efforts related to

¹⁹ 40 C.F.R. § 2.107(l)(2)(iv) (2019).

²⁰ 40 C.F.R. § 2.107(l)(3)(i) (2019).

²¹ *Cause of Action*, 799 F.3d at 1118

²² 40 C.F.R. § 2.107(l)(3)(ii) (2019).

²³ *Id.*

voting and elections, the public should be educated about those efforts. We seek to provide the public with that information.

We respectfully request that EPA grants AFL's fee waiver request because disclosure of the requested information is in the public interest and not for a commercial interest. Thank you for your consideration of this appeal.

Sincerely,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

EXHIBIT 1



June 10, 2022

VIA Electronic Submission

Environmental Protection Agency
National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Freedom of Information Act Request: EPA Voting EO Strategic Plan

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 communicate with a national audience through traditional and social media platforms. AFL's email list contains over 33,000 unique addresses, our Facebook page has over 35,000 followers, our Twitter page has over 14,000 followers, the Twitter page of our Founder and President has over 182,000 followers, and we have another 29,000 followers on GETTR.

Pursuant to 5 U.S.C. § 552(a), AFL requests the following records.

I. Requested Records

- A. The Agency's "strategic plan," that was required by Section 3(b) of Executive Order 14019 (March 7, 2021) on "Promoting Access to Voting," to be submitted to the Assistant to the President for Domestic Policy by September 23, 2021.

II. Processing

The EPA must comply with the processing guidance in the Attorney General's Memorandum on Freedom of Information Guidelines.¹ This means, among other things, the following.

- You may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.
- Information that might technically fall within an exemption should not be withheld unless you can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail.
- If you cannot make full disclosure of a requested record, then the FOIA requires that you consider whether partial disclosure of information is possible and take reasonable steps necessary to segregate and release nonexempt information.
- You must properly apply the foreseeable harm standard by confirming for and demonstrating to AFL that you have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.
- Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then you must disclose the entire record, as a single record cannot be split into responsive and non-responsive bits. AFL's request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please give full effect to all applicable authorities and broadly construe our Item and your obligations to provide responsive records.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move records to official systems within a

¹ U.S. Dep't Just. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

certain time. AFL has a right to records in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.

- Please use all available tools to conduct a complete and efficient search for potentially responsive records. Many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program or similar policies. These provide options for searching emails and other electronic records in a manner reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, then please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted before our Items are processed. If potentially responsive records are subject to potential deletion, including on a scheduled basis, please prevent deletion by instituting a litigation hold or other appropriate measures.

IV. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii), 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. 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. For example, its 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. 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. This has previously been recognized by the Departments of Defense, Education, Energy, 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.”² AFL’s request concerns identifiable operations or activities of the government, and the information requested is likely to contribute significantly to the public understanding of the steps taken by the Biden Administration across the federal government to expand access to voter registration and election information.

V. Production

To accelerate 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. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

If you have any questions about this request or believe further discussions regarding search and processing will speed the efficient production of records of interest to AFL, then please contact me at FOIA@aflegal.org. Finally, please contact us immediately if AFL’s request for a fee waiver is not granted in full. Thank you in advance for your cooperation.

Sincerely,

/s/ Michael Ding
Michael Ding
America First Legal Foundation

² 5 U.S.C. § 552(a)(4)(A)(iii).

EXHIBIT 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

June 30, 2022

Michael Ding
America First Legal Foundation
611 Pennsylvania Ave SE #231
Washington, DC 20003

**Re: Freedom of Information Act Request – EPA-2022-004717
Fee Waiver Determination**

Dear Michael Ding:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA), National FOIA Office (NFO) on June 10, 2022 in which you are seeking: “The Agency’s “strategic plan,” that was required by Section 3(b) of Executive Order 14019 (March 7, 2021) on “Promoting Access to Voting,” to be submitted to the Assistant to the President for Domestic Policy by September 23, 2021.”

You requested a waiver of fees to process your FOIA request. EPA regulations provide a mechanism for requesters to seek records responsive to a FOIA request “without charge or at a charge reduced below” the agency FOIA fee schedule when the NFO determines “based on all available information, that 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” (public interest requirement) and “is not primarily in the commercial interest of the requester” (non-commercial interest requirement). Freedom of Information Act Regulations Update, 84 Fed. Reg. 30,028, 30,037-38 (June 26, 2019) (to be codified at 40 C.F.R. pt. 2).

To evaluate the public interest requirement, the EPA considers each of four factors: (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 public is likely to result from disclosure; and (4) the significance of the contribution to public understanding. Freedom of Information Act Regulations Update, 84 Fed. Reg. at 30,037-38; *see also* 40 C.F.R. §§ 2.107(l)(2)(i)-(iv) (2018).

To determine the non-commercial interest requirement, the EPA considers each of two factors: (1) the existence and magnitude of a commercial interest; and (2) the requester’s primary interest in the information disclosure. Freedom of Information Act Regulations Update, 84 Fed. Reg. at 30,038; *see also* 40 C.F.R. §§ 2.107(l)(3)(i)-(ii). If the EPA determines the requester has a commercial interest that is furthered by disclosure of the requested information and the commercial interest is primary to any specified public interest, the requester is not entitled to a

waiver of fees.

Fee waiver requests must specifically address each, and all, of the factors. Freedom of Information Act Regulations Update, 84 Fed. Reg. at 30,038; *see also* 40 C.F.R. § 2.107(l)(5). If a requester's written justification for a fee waiver fails to address or substantiate each of the factors discussed below, the EPA will deny the request for a fee waiver. *Id.* The NFO evaluated the information you provided in support of your request for a fee waiver and applicable EPA regulations. For the reasons explained below, your request for a fee waiver is denied.

For the second factor above, EPA's regulations state that "The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding." *See* 40 C.F.R. § 2.107(l)(2)(ii).

For the reasons below, your fee waiver justification failed to adequately demonstrate the informative value of the information to be disclosed *See* 40 C.F.R. § 2.107(l)(2)(ii). Your fee waiver justification stated:

"Per 5 U.S.C. § 552(a)(4)(A)(iii), 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. 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. For example, its 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. 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. This has previously been recognized by the Departments of Defense, Education, Energy, 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." AFL's request concerns identifiable operations or activities of the government, and the information requested is likely to contribute significantly to the public understanding of the steps taken by the Biden Administration across the federal

government to expand access to voter registration and election information.”

Your justification did not detail the informative value of the requested records and what would be shared for an increased public understanding. Therefore, your statement did not address the required second factor in enough detail for EPA to grant your fee waiver request.

You may appeal this fee waiver determination by email at hq.foia@epa.gov, by mail to the EPA’s National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460, or through FOIAonline if you are an account holder. You may also submit your appeal by hand delivery, courier service, or overnight delivery; you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal."

Your fee waiver request is denied because you did not address with enough detail the factor described above, under EPA’s FOIA Regulations, located at 40 C.F.R. § 2.107(l). Because your fee waiver request did not provide enough detail on the one identified factor, the National FOIA Office did not make a determination on the sufficiency of your request with respect to the other factors. Should you choose to appeal this determination, please be sure to provide information to address all six factors required by EPA’s FOIA Regulations in your appeal. For more information about the FOIA fee waiver factors, please visit our website at: <https://www.epa.gov/foia/requesting-foia-fee-waivers>.

Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Sincerely,

 Digitally signed by KEVIN
HILL
Date: 2022.06.30
11:22:57 -04'00'

Kevin W. Hill
Attorney-Adviser
National FOIA Office