



February 2, 2023

VIA E-MAIL

Dr. Brett Baker
Office of the Inspector General
National Archives and Records Administration
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College Park, MD 20740-6001
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Freedom of Information Act Request: NARA OIG Referral Authority

Dear Dr. Baker,

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to promote the rule of law, prevent executive overreach, protect due process and equal protection, and educate Americans about the individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, all to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend 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. For example, AFL’s employees regularly appear on radio and on cable and broadcast news programs; our email list contains over 34,000 unique addresses; our Facebook page has over 43,000 followers; our Twitter page has over 18,000 followers and the Twitter page of our Founder and President has over 199,000 followers; and we have another 30,853 followers on GETTR.

I. Background

On August 8, 2022, the Federal Bureau of Investigation raided the home of former President Donald J. Trump. The raid was allegedly necessary to collect certain documents sought by the National Archives and Records Administration (NARA)

supposedly in former President Trump’s possession. According to the affidavit predicated the issuance of a search warrant, the raid was the result of a “referral” from NARA’s Office of the Inspector General (OIG).¹ However, the Presidential Records Act does not authorize OIG “referrals.” Rather, the only lawful manner NARA may share records with the FBI is via a subpoena or other judicial process issued by a court of competent jurisdiction *to NARA*.² No such subpoena or court order was ever issued. Furthermore, presidential records are subject to “any rights, defenses or privileges” a former President may invoke – in fact, until the expiration of the twelve-year restriction under 44 U.S.C. § 2204, they are presumptively privileged.³

II. Records Requested

Because of the serious risk that NARA and your office acted in an unlawful and *ultra vires* manner America First Legal requests the following records pursuant to 5 U.S.C. § 552(a).

- A. All records regarding or relating to the NARA OIG “referral” that is referenced in the FBI affidavit unsealed on August 26, 2022. The time frame for this item is January 1, 2022, to August 26, 2022.
- B. All records regarding or relating to the NARA OIG’s legal authority to make the “referral” that is referenced in the FBI affidavit unsealed on August 26, 2022. The time frame for this item is January 1, 2022, to August 26, 2022.
- C. All records the NARA OIG relied upon to conclude that it had the legal authority to make the “referral” that is referenced in the FBI affidavit unsealed on August 26, 2022. The time frame for this item is January 1, 2022, to August 26, 2022.

¹ *Affidavit in support of an application under Rule 41 for a warrant to search and seize*, In the Matter of the Search of: Locations Within the Premises to be Searched in Attachment A, p. 7-8 (S.D. Fla.) (unsealed Aug. 26, 2022).

² 44 U.S.C. § 2205(2)(A).

³ The constitutionally correct view is that the records of a former President are presumptively privileged, and only in the context of public requests for access once the statutory twelve-year hold has expired does the sitting President have any say in the matter of executive privilege. This makes sense, because a former President’s confidentiality interests have largely dissipated once the hold expires, and the sitting President is in the best position *at that time* to determine whether records should be subject to automatic release or remain privileged. *See* 44 U.S.C. §§ 2203(g), 2204(c)(1). Yet Acting Archivist Debra Wall relied on an Obama-era Executive Order that Congress had at least impliedly rejected, to deny former President Trump the ability to review his own records both for relevance and privilege. Acting Archivist Wall acted in a decidedly prejudiced manner, in clear violation of the law. *See, e.g.,* <https://www.archives.gov/files/foia/category-7-final.pdf#page=51>; <https://www.archives.gov/files/foia/category-6-final.pdf#page=4>.

- D. All records regarding the Acting Archivist's decision to deny former President Trump the ability to review his own records prior to their transfer to the FBI. The time frame for this item is January 1, 2022, to August 26, 2022.
- E. All records regarding the processing of the above items.

III. Processing

Processing should occur in strict compliance with the processing guidance in the Attorney General's Memorandum on Freedom of Information Act Guidelines. 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 raid on the home of a former President, and the apparent failure of NARA OIG to follow legal requirements because of partisan political considerations. Given the current controversy over the mishandling of classified records by the sitting President and others, NARA OIG's fidelity to its legal authorities and its commitment to the nonpartisan discharge of its statutory obligations are matters 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. Indeed, the revelation that classified documents were found in multiple unsecured locations has raised alarms from both sides of the political aisle. 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

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."

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 Ave SE #231, Washington, DC 20003.

Thank you,

/s/ Reed D. Rubinstein

America First Legal Foundation