



April 1, 2020

**VIA FOIAOnline**

Kevin Krebs, Assistant Director, FOIA/Privacy Staff  
Executive Office for United States Attorneys  
Department of Justice  
175 N Street, NE  
Suite 5.400  
Washington, DC 20530-0001

**Re: Freedom of Information Act Request**

Dear Mr. Krebs:

I write on behalf of the West Virginia chapter of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization that drives long-term solutions to the country’s biggest problems.<sup>1</sup> It recently came to our attention that the U.S. Attorney for the Southern District of West Virginia (“SDWV”) Michael Stuart ran radio advertisements (“ads”) opposing criminal justice reforms in West Virginia.

An audio clip of one of the ads can be found [here](#), just after the 1 hour 40 minute timestamp.<sup>2</sup> The ad argues that law enforcement is effectively fighting crime but that it’s not because “we’re hugging the bad guys” and warns that “bail reform and other social justice initiatives threaten to reverse course.” It adds that “revolving doors from arrests to the street only embolden criminal activity.” It imagines that “there’s only one way to kill a snake, you gotta take the head completely off.” The ad concludes with “this is no time to go soft on crime.” The narrator identifies himself: “I’m Mike Stuart, the United States Attorney for the Southern District of West Virginia, and I’ll keep fighting for us to keep winning.” One could easily mistake this for a campaign ad during election season. SDWV also put out a press release touting its so-called “Public Service Announcements,” which includes a transcript of a different ad than cited above, stating that the PSAs would start airing on February 17, 2020. Press Release, SDWV, United

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<sup>1</sup> See AMERICANS FOR PROSPERITY FOUNDATION, <https://americansforprosperityfoundation.org/>.

<sup>2</sup> We can provide a clipped version of the audio if it is useful to aid in the records search.

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States Attorney Mike Stuart Launches Public Service Announcements (PSAs) (Feb. 15, 2020), *available at* <https://bit.ly/3btNwKd>.

SDWV ran these ads at the same time the West Virginia legislature was considering several critical bills, some of which touched on issues enumerated in Mr. Stuart's narrative.<sup>3</sup> We do not believe this is a coincidence. Despite the efforts of SDWV, many of these reform bills successfully passed the state legislature, aiding citizens and helping to re-integrate people into society. *See, e.g.*, [H.B. 4714](#) (Seizure and Forfeiture Reporting Act); [H.B. 2419](#) (Bail Reform); [S.B. 620](#) (Parole Reform); [H.B. 4958](#) (Ending Driver's License Suspension for Failure to Pay Court Fines/Fees); [H.B. 4004](#) (Creating the West Virginia Sentencing Commission); [S.B. 562](#) (Expungement Expansion); [H.B. 4352](#) & [H.B. 4353](#) (Fresh Start Expansions).

We are investigating how these ads were created, approved, and funded. We are particularly concerned that SDWV used taxpayer dollars to advance the policy interests of an individual federal government employee. We also want to ensure that SDWV complied with Department of Justice ethical guidelines and rules, the Hatch Act, 5 U.S.C. § 7321 *et seq.*, the anti-lobbying provisions of the Anti-Deficiency Act, 18 U.S.C. § 1913, and any other applicable laws.

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, AFPP hereby requests the following records:<sup>4</sup>

1. All emails sent or received by Michael Stuart or his direct reports containing the following terms and reasonable variants thereof: "ads", "advertisement", "advertisements", "bail reform", "parole reform", "civil asset forfeiture", "expungement", "public service announcement", "public service announcements", "PSA", "PSAs", or "fresh start".
2. All communications by or between Michael Stuart or his direct reports and any member of the West Virginia legislature; any staff of the West Virginia legislature;

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<sup>3</sup> See the links below for the timeline of each bill.

<sup>4</sup> The term "record" means the entirety of the record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677–78 (D.C. Cir. 2016) (admonishing agency for withholding information as "non-responsive" because "nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure").

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the Governor's office of West Virginia; or any staff of the Governor's office of West Virginia.<sup>5</sup>

3. All records reflecting the total cost of these ads, including what sources of funds paid for these ads.
4. All records reflecting the decision to run these ads.
5. All records containing audio recordings of the ads, including any audio recordings that were ultimately not released to the public.
6. All communications between SDWV and any radio, television, or print company in connection with placing and running these ads.

The time period for this request is January 1, 2020 to the present.<sup>6</sup>

For the purposes of this request, please omit daily news clippings or other mass mailings unless there is commentary related to them. For all items of this request, if the agency uncovers responsive email records, AFPP's request specifically seeks the entirety of any email chain, any portion of which contains an individual email message responsive to this request, *i.e.*, the entire email chain is responsive. If the agency identifies responsive records that it deems outside its legal control (*e.g.*, congressional records), AFPP requests that the agency inform it that such records exist.

### **Request for a Public Interest Fee Waiver**

AFPP requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>7</sup> In this case, the requested records unquestionably shed light on the "operations or activities of the government" as they relate to public advertising done by a Senate-confirmed, federal government employee. The ads may have been funded directly by taxpayer dollars. The ads also call into question SDWV's compliance with a variety of U.S. laws. *See, e.g.*, 18 U.S.C. § 1913; 5 U.S.C. § 7321 *et seq.* Finally, it is unclear whether

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<sup>5</sup> This item encompasses *all* such communications and should not be limited to communications regarding the radio ads.

<sup>6</sup> For purposes of this request, the term "present" should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002). The term "record" means the entirety of the record any portion of which contains responsive information.

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

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the ads properly complied with Department of Justice guidelines managing political activities. *See* Dep't of Justice, Political Activities (Mar. 23, 2020), <https://bit.ly/2xroixr>. It is critical that the public understand whether the U.S. Attorney for the Southern District of West Virginia is following the law and ensure that his office is not using taxpayer dollars for personal projects.

AFPF has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has experience and expertise in producing analysis of government decision making and policy. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, through AFPF's published online newsletter, blog posts, press releases, letters to the DOJ Inspector General, or communications with Congress.<sup>8</sup> In addition, as AFPF is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request to Be Classified as a Representative of the News Media**

As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>9</sup> AFPF satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although it is not required by the statute, AFPF gathers the news it regularly publishes from a variety of sources. AFPF does not merely make raw information available to the public, but rather distribute distinct work products, including press releases, blog posts, policy briefs, newsletters, regulatory comments, coalition letters, letters to congress, and congressional testimony.<sup>10</sup> These distinct

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<sup>8</sup> *See also Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>9</sup> *See id.* at 1121.

<sup>10</sup> AFPF, GONE IN AN INSTANT: HOW INSTANT MESSAGING THREATENS THE FREEDOM OF INFORMATION ACT (March 2020), <https://bit.ly/3anYeSa>; Press Release, AFPF, AFPF joins more than 100 other public interest, civil liberty, and open government organizations to encourage transparency, accountability while acting to contain COVID-19 (Mar. 20, 2020), <https://bit.ly/3byLTep>. AFPF's sister organization, Americans for Prosperity (“AFP”), also publishes such work. *See, e.g.*, AFP, AFP ON EX-IM BANK: CORPORATE WELFARE BY ANY NAME IS CORPORATE WELFARE (June 2019), <http://bit.ly/2LmaclC>; AFP, NEW REPORT WARNS SOCIAL SECURITY CRISIS IS NEARLY HERE (June 2019), <http://bit.ly/2NePKpG>; AFP, AFP ISSUES KEY VOTE ALERT AGAINST \$300+ BILLION “MINIBUS” SPENDING BILL (June 2019), <http://bit.ly/2FtwsXd>; AFP, COALITION CALLS FOR MORE SUNSHINE IN DOJ (May 2019), <http://bit.ly/2XyL81k>; AFP, MEMO: CBO'S GRIM

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works are distributed to the public through various media, including AFPF's website, Twitter, and Facebook. AFPF also provides news updates to subscribers via e-mail. The statutory definition of a "representative of the news media" contemplates that organizations like AFPF, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>11</sup>

**Record Production and Contact Information**

To facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, AFPF requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Eric Bolinder by telephone at 571-329-3324 or e-mail at [ebolinder@afphq.org](mailto:ebolinder@afphq.org). Thank you for your attention to this matter.



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JASON HUFFMAN  
STATE DIRECTOR, AFPF WEST VIRGINIA



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ERIC R. BOLINDER  
POLICY COUNSEL, AFPF

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BUDGET OUTLOOK UNDERSCORES THE NEED FOR CHANGE (Jan. 2019), <http://bit.ly/2NgDLrv>;  
AFP, AFP OFFICIAL COMMENT IN SUPPORT OF THE SAFER AFFORDABLE FUEL EFFICIENT (SAFE)  
VEHICLES PROPOSED RULE FOR MODEL YEARS 2021-2026 (Oct. 2018), <http://bit.ly/2YcYw8F>;

<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).