



May 10, 2024

VIA EMAIL

U.S. Army Corps of Engineers
Humphreys Eng Center
CEHEC-OC
7701 Telegraph Rd
Alexandria, VA 22315-3860
foia@usace.army.mil

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization dedicated to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.¹ This month, the Council on Environmental Quality (“CEQ”) finalized a rule implementing revised regulations for certain procedural provisions of the National Environmental Policy Act (“NEPA”).² Those revisions reflect, in part, recent amendments to NEPA in the Fiscal Responsibility Act (“FRA”).³

The FRA amendments were meant to streamline the energy permitting process by simplifying and shortening environmental assessments and environmental impact statements, among other things. However, CEQ’s rulemaking appears to go beyond its statutory authority and betrays Congress’s intent by creating requirements for environmental assessments and environmental impact statements that will further complicate the permitting process.⁴

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, AFPF hereby requests the following records⁵:

All electronic communications, including attachments, sent to or by the following U.S. ACE employees, including through any alias accounts:

- Susan L. Murphy, Legislative Affairs Chief
- Jeremy M. LaDart, Planning and Environmental Division Chief
- Trevor Popkin, Regulatory Division Chief
- Planning and Environmental personnel

¹ See AMS. FOR PROSPERITY FOUND., www.americansforprosperityfoundation.org (last visited May 8, 2024).

² Nat’l Env’tl. Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024) (to be codified at 40 C.F.R. pts. 1500–08).

³ See *id.*; see generally Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (June 3, 2023).

⁴ See Press Release: New NEPA Rule Deepens Permitting Quagmire (Apr. 30, 2024), <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=415949>.

⁵ For purposes of this request, the term “record” means any medium of information storage in the form and format maintained by the agency at the time of the request. If any portion of a “record,” so defined, is responsive to AFPF’s request, then the agency should process and disclose that record in its entirety. If the agency considers a medium of information storage to contain multiple records that it believes can be segmented on the basis of the subject-matter or scope of AFPF’s request, AFPF explicitly seeks access to those separate “records” as well. They should not be treated as “non-responsive.”

In addition to email messages and attachments, please search for and provide records from any other medium of electronic communication used by CEQ including but not limited to Microsoft Teams, text messaging, *etc.* Please also limit your search and processing of records for the foregoing custodians to those records that return as responsive to any of the following keyword search commands⁶:

- a. (“Fiscal Responsibility Act” OR “FRA”) AND (“NEPA” OR “National Environmental Policy Act”) AND (“concerns” OR “authority” OR “congressional intent” OR “page limit”)
- b. (“environmental justice” OR “climate change” OR “indigenous knowledge”) AND (“phase 2” OR “phase two” or “phase II” OR “implementing” OR “National Environmental Policy Act” OR “NEPA” OR “permitting”)
- c. (“1506.1” OR “environmental review” OR “federal action”) AND “required”
- d. (“Graves” OR “Scalise” OR “Low Energy Costs Act” OR “BUILDER” OR “BUILDER ACT”) AND (“NEPA” OR “National Environmental Policy Act” OR “permitting” OR “environmental review”)

The time period for this request is May 29, 2023, to the present.⁷

For the purposes of this request, please omit daily news clippings or other mass mailings unless there is commentary related to them. With respect to responsive email records, AFPF 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 to this request. Finally, if the agency identifies responsive records it deems outside its legal control (*e.g.*, congressional or presidential records), AFPF requests the agency inform AFPF that such records exist and provided a reasoned basis for its control determination.

Request for a Public Interest Fee Waiver

AFPF 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.”⁸ In this case, the requested records unquestionably shed light on the “operations or activities of the government” as they relate to the Biden Administration’s actions to implement energy policies that seemingly counteract statutory law.

AFPF intends to educate the public with the results of this FOIA request. It has the intent and ability to make those results available to a reasonably broad public audience through various media. Its staff has significant experience and relevant expertise; AFPF professionals will analyze responsive records, if any, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public. AFPF is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, and it has no commercial interest in making this request.

⁶ To the extent a record returns as responsive to any of the keyword search commands detailed in this request, they should be processed for disclosure. AFPF intends these keywords to determine the responsiveness of a record. The agency should therefore refrain from subject-matter scoping or further responsiveness review, except to confirm that a potentially responsive record does, in fact, contain the search terms set out in this request. *Cf. NBC 7 San Diego v. Dep’t of Homeland Sec.*, No. 19-1146, 2022 WL 17820557 (D.D.C. Dec. 20, 2022).

⁷ The term “present” should be construed as the date on which an agency begins its search for responsive records.

⁸ 5 U.S.C. § 552(a)(4)(A)(iii); *see 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).

Request to Be Classified as a Representative of the News Media

In addition to a public interest fee waiver, AFPF requests that it be classified as a “representative of the news media” for fee purposes.⁹ As the D.C. Circuit has explained, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.¹⁰ 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 not required, AFPF gathers the news it publishes from a variety of sources. It does not merely make raw information available to the public, but distributes distinct work product, including press releases, blog posts, reports, and other informative materials.¹¹ These distinct works are distributed to the public through various online outlets, such as websites, X.com, and Facebook. The statutory definition of a “representative of the news media” contemplates that organizations such as AFPF, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”¹²

Record Production and Contact Information

To facilitate document review, please provide non-exempt responsive records in an electronic format in lieu of a paper production. If a portion of responsive records can be produced more readily, AFPF requests that those records be produced first with any remaining records released on a rolling basis as circumstances permit. If you have any questions about this request, please contact me at TKimbrell@afphq.org. Thank you for your attention to this matter.

Thomas Kimbrell

THOMAS KIMBRELL

INVESTIGATIVE ANALYST, AFPF

⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁰ See *Cause of Action*, 799 F.3d at 1121.

¹¹ See, e.g., *Records Reveal Biden Administration Budget Officials Questioned Legal Authority to Cancel ANWR Lease Sale*, Ams. for Prosperity (May 3, 2024), <https://americansforprosperityfoundation.org/records-reveal-biden-administration-budget-officials-questioned-legal-authority-to-cancel-anwr-lease-sale/>; *AFPF Ramps Up Challenge to Biden Administration Censorship Regime with New FOIA Requests*, Ams. for Prosperity (Mar. 15, 2024), <https://americansforprosperity.org/press-release/afpf-ramps-up-challenge-to-biden-administration-censorship-regime-with-new-foia-requests/>; *DHS still won't reveal its alleged authorities to censor 'misinformation'*, Ams. for Prosperity (Dec. 19, 2023), <https://bit.ly/3NUghoP>; *New federal memos raise concern over social media censorship and free speech online*, Ams. for Prosperity (Sept. 26, 2023), <https://bit.ly/3HeMIL3>; *AFP Foundation Files Suit for ANWR Lease Sale Cancellation Documents*, Ams. for Prosperity (Oct. 31, 2023), <https://bit.ly/3vxsZ6S>; *4 outstanding questions the federal government needs to answer about its Disinformation Governance Board*, Ams. for Prosperity (July 26, 2023), <https://bit.ly/3TUSkBE>; *AFPF Obtains Over 400 Pages of Secretary Mayorkas Using Personal Email for Government Business*, Ams. for Prosperity (May 19, 2023), <https://bit.ly/3DdcqgZ>; *AFP Foundation investigates DHS secretary's use of private email while creating Disinformation Governance Board*, AMS. FOR PROSPERITY (Jan. 12, 2023), <https://bit.ly/3HTpOJe>; *New emails undermine official reason for cancelling key oil and gas lease*, AMS. FOR PROSPERITY (Sept. 8, 2022), <https://bit.ly/3te6boa>; *AFP Foundation launches FOIA investigation into Disinformation Governance Board*, AMS. FOR PROSPERITY (May 9, 2022), <https://bit.ly/3GRBgWn>; *More evidence the VA is improperly delaying or denying community care to eligible veterans*, AMS. FOR PROSPERITY (Jan. 28, 2022), <https://bit.ly/37mDnIX>; *AFP Foundation gets CMS to release state-level Medicaid improper payment data after years of stonewalling*, AMS. FOR PROSPERITY (Jan. 20, 2022), <https://bit.ly/34sz7A2>; AMS. FOR PROSPERITY FOUND., *PERMISSION TO CARE: HOW CERTIFICATE OF NEED LAWS HARM PATIENTS AND STIFLE HEALTHCARE INNOVATION* (Oct. 2021), available at <https://bit.ly/3Zrjpg7>; *Records confirm VA's use of inaccurate wait time numbers*, AMS. FOR PROSPERITY (Oct. 1, 2021), <https://bit.ly/3a9KGeL>; *Government documents reveal Export-Import Bank fails to protect taxpayers . . . again*, AMS. FOR PROSPERITY (Oct. 30, 2020), <https://bit.ly/3hD09Jn>; *Kansas Shut Down Businesses That Were Willing and Able to Comply with Safety Guidelines*, AMS. FOR PROSPERITY FOUND. (July 21, 2020), <https://bit.ly/3vbj7eC>; AMS. FOR PROSPERITY FOUND., ET AL., *GONE IN AN INSTANT: HOW INSTANT MESSAGING THREATENS THE FREEDOM OF INFORMATION ACT* (Mar. 2020), AMS. FOR PROSPERITY FOUND., available at <https://bit.ly/2zQOEKI>.

¹² 5 U.S.C. § 552(a)(4)(A)(ii)(II).