



May 5, 2022

VIA ONLINE PORTAL

Freedom of Information Act Request
Department of Homeland Security
Office of the Executive Secretary
2707 Martin Luther King Jr Ave SE
Washington, DC 20528-0525

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 AFPF is seeking records regarding the Department of Homeland Security’s (“DHS”) formation of a Disinformation Governance Board (“Board”).² DHS has not been transparent about the mission, staffing, and authority of the Board and, absent more detailed information, AFPF is concerned about potential harms to free speech.

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

1. All records regarding the formation of the Board including but not limited to its:³
 - a. Charter⁴
 - b. Principles⁵
 - c. Mission and goals
 - d. Membership or staffing

¹ See AMS. FOR PROSPERITY FOUND., www.americansforprosperityfoundation.org (last visited March 9, 2022).

² Kelly Hooper, *Mayorkas cites misinformation about Homeland Security's disinformation board*, Politico (May 1, 2022), available at <https://www.politico.com/news/2022/05/01/mayorkas-defends-dhs-disinformation-board-00029182>.

³ 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 the 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.”

⁴ Secretary Mayorkas confirmed the Board does have a Charter on May 4, 2022 before the Senate Committee on Homeland Security and Governmental Affairs in response to a question from Senator Lankford. See <https://www.hsgac.senate.gov/hearings/05/04/2022/resources-and-authorities-needed-to-protect-and-secure-the-homeland>.

⁵ *Id.* Secretary Mayorkas confirmed the Board principles were being drafted in the same hearing.

- e. Funding sources
 - f. Scope of authority
 - g. Statutory authority for formation
 - h. Participation of members of the Homeland Security Advisory Council
2. All internal and external e-mail communications sent to or by the following DHS employees, including through any alias accounts, regarding the Board or its activities:
- a. Secretary Alejandro Mayorkas
 - b. Any member of the Board, including but not limited to:
 - i. Board Executive Director Nina Jankowicz
 - ii. Undersecretary for Strategy, Policy, and Plans Rob Silvers
 - iii. Principal Deputy General Counsel Jennifer Gaskill
 - c. Any person assigned to or doing work for the Board
 - d. Officer for Civil Rights and Civil Liberties Katherine Culliton-Gonzalez
 - e. Acting Under Secretary for Intelligence and Analysis Melissa Smislova
 - f. Chief of Staff Kristie Canegallo
 - g. Executive Secretary Kimberly O'Connor
3. All records reflecting violations of fundamental rights or raising the need to establish the Board to protect against alleged threats to or violations of fundamental rights, as referenced by Secretary Mayorkas in a hearing before the Senate Appropriations Subcommittee on Homeland Security on May 4, 2022:⁶

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 to this request. If the agency identifies responsive records it deems outside its legal control (*e.g.*, congressional records), AFPP requests the agency inform AFPP 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."⁷

⁶ In response to two questions from Senator Capito, Secretary Mayorkas said the Board was necessary for: "developing the guidelines and standards that should have been in place for many years that haven't been to ensure that this critical mission focused activity of stopping threats to the homeland that are created by disinformation intended to harm us is addressed in a way that does not infringe on fundamental rights...What we haven't had is sufficient standards and policies in place and harmonized efforts so that the efforts in different parts of the department are not in conflict with one another abide by fundamental rights and responsibilities." See <https://youtu.be/pwytuTG80Gk?t=4971>.

⁷ 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).

In this case, the requested records unquestionably shed light on the “operations or activities of the government” as they relate to the formation and responsibilities of a newly created internal working group whose staffing, power, and responsibilities have not been adequately defined by DHS.

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.

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.⁸ 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.⁹ 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.¹⁰ These distinct works are distributed to the public through various online outlets, such as websites, Twitter, 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.”¹¹

Record Production and Contact Information

⁸ 38 U.S.C. § 1.561(b)(7).

⁹ See *Cause of Action*, 799 F.3d at 1121.

¹⁰ See, e.g., *More evidence the VA is improperly delaying or denying community care to eligible veterans*, AMS. FOR PROSPERITY FOUND. (Jan. 28, 2022), available at <https://bit.ly/37mDnlX>; *AFP Foundation gets CMS to release state-level Medicaid improper payment data after years of stonewalling*, AMS. FOR PROSPERITY FOUND. (Jan. 20, 2022), available at <https://bit.ly/34sz7A2>; *Permission to Care: How Certificate of Need Laws Harm Patients and Stifle Healthcare Innovation*, AMS. FOR PROSPERITY FOUND. (Oct. 2021), available at <http://afpf.org/conreport>; *Records confirm VA’s use of inaccurate wait time numbers*, AMS. FOR PROSPERITY FOUND. (Oct. 1, 2021), available at <https://bit.ly/3a9KGeL>; *Government documents reveal Export-Import Bank fails to protect taxpayers ... again*, AMS. FOR PROSPERITY FOUND. (Oct. 30, 2020), available at <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), available at <https://bit.ly/3vbj7eC>; *Gone in an Instant: How Instant Messaging Threatens the Freedom of Information Act* (Mar. 16, 2020), AMS. FOR PROSPERITY FOUND., available at <https://bit.ly/2zQOEKI>.

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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 me at KSchmidt@afphq.org. Thank you for your attention to this matter.

Kevin Schmidt

KEVIN SCHMIDT

DIRECTOR OF INVESTIGATIONS, AFPF