



July 19, 2022

VIA ONLINE REQUEST FORM

Food and Drug Administration
Division of Freedom of Information
Office of the Executive Secretariat, OC
5630 Fishers Lane, Room 1035
Rockville, MD 20857

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Americans for Prosperity (“AFP”), a 501(c)(4) nonpartisan organization dedicated to the belief that every person has a unique set of gifts and the ability to contribute to society in their own way, an idea that has inspired progress since our country’s founding.¹

AFP is investigating how the Food and Drug Administration’s (“FDA”) regulations effectively shutting out imported infant formula from the domestic market have contributed to devastating shortages. Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, AFP hereby requests the following records² from January 1, 2022 to the present:³

1. All FDA memoranda, guidance documents, or directives regarding the infant formula shortage.
 2. All communications (e-mail, text, instant messaging, etc.) between the following FDA components, including through any alias accounts, and the White House:
 - a. Office of the Commissioner
 - b. Office of Policy, Legislation, & International Affairs
 - c. Office of Regulatory Affairs
 - d. Office of External Affairs
 - e. Center for Food Safety and Applied Nutrition
- that include the following keyword combinations:

¹ See AMS. FOR PROSPERITY, www.americansforprosperity.org (last visited July 18, 2022).

² 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 AFP’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 AFP’s request, AFP explicitly seeks access to those separate “records” as well. They should not be treated as “non-responsive.”

³ 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).

- 1) “formula” AND “tariffs”
- 2) “formula” AND “labeling requirements”
- 3) “formula” AND “regulation” AND “imports”

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 e-mail records, AFP’s request specifically seeks the entirety of any e-mail chain, any portion of which contains an individual e-mail message responsive to this request, *i.e.*, the entire e-mail chain is responsive to this request. If the agency identifies responsive records it deems outside its legal control (*e.g.*, congressional records), AFP requests the agency inform AFP that such records exist.

Request for a Public Interest Fee Waiver

AFP 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.”⁴

In this case, the requested records unquestionably shed light on the “operations or activities of the government” as they relate to how government policy artificially reduced the supply of imported infant formula and contributed to a devastating shortage.

AFP 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; AFP 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. AFP is a non-profit organization as defined under Section 501(c)(4) 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, AFP requests that it be classified as a “representative of the news media” for fee purposes.⁵ 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.⁶ AFP 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, AFP 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.⁷ 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

⁴ 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).

⁵ 38 U.S.C. § 1.561(b)(7).

⁶ *See Cause of Action*, 799 F.3d at 1121.

⁷ *See generally*, <https://americansforprosperity.org/newsroom/>.

AFP, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”⁸

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, AFP 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, AFP

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).