

reintroduced at some later date. Moreover, DHS has yet to disclose adequate information regarding the creation of the Board, its staffing, and the planned scope of its responsibility.

JURISDICTION AND VENUE

5. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).
6. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

7. Plaintiff AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Among other things, AFPF believes government regulation of speech—or attempts to “monitor” such speech for perceived “disinformation” or “misinformation”—threatens to chill individuals’ exercise of fundamental rights. AFPF is therefore investigating DHS’s efforts to create the Disinformation Governance Board. AFPF routinely files and litigates FOIA requests.

8. Defendant DHS is an agency within the meaning of 5 U.S.C. § 552(f)(1). DHS has possession, custody, and control of agency records to which AFPF seeks access and that are the subject of this Complaint.

FACTS

I. DHS’s Disinformation Governance Board

9. In late April 2022, DHS announced the creation of the Disinformation Governance Board, citing the need to combat conspiracy theories and “disinformation,” as well as to protect “privacy, civil rights, and civil liberties.” Amanda Seitz, *Disinformation board to tackle Russia, migrant smugglers*, AP News, Apr. 28, 2022, <https://bit.ly/3OF0ed3>. DHS also announced the Board would be “led by disinformation expert Nina Jankowicz.” *Id.*

10. The creation of the Board met widespread criticism and elicited oversight requests from Congress. *See, e.g.*, Letter from the Hon. James Comer, Ranking Member, U.S. H.R. Comm. on Oversight & Reform, *et al.*, to the Hon. Alejandro Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec. (Apr. 29, 2022), *available at* <https://bit.ly/3uuU1qL>.

11. Americans for Prosperity published a blogpost highlighting the real threat the new Board posed to the exercise of free speech rights:

Public officials determining what speech counts as disinformation and misinformation has been used since the beginning of modern political history to maintain power, silence opposition, trample movements, and punish enemies. Citizens’ ability to dissent and disagree with those in power is critical to driving progress. Our founders recognized free speech and the ability to question and challenge government are essential to our democracy. The concept behind this new Disinformation Board is antithetical to American principles, to say nothing of [DHS’s] history of hostility to civil liberties and the Constitution.

AFP Raises Free Speech Concerns Over DHS’s Newly Announced Disinformation Governance Board, Ams. for Prosperity, Apr. 29, 2022, <https://bit.ly/3R9PepN> (internal quotation marks omitted).

12. In response to growing pushback, DHS Secretary Alejandro Mayorkas attempted to provide greater detail regarding the design and purpose of the Board, while promising it would not “infring[e] on free speech” or “civil liberties.” Kelly Hooper, *Mayorkas cites misinformation about Homeland Security’s disinformation board*, Politico, May 1, 2022, <https://politi.co/3AoT7kJ>. At the same time, Secretary Mayorkas candidly admitted DHS “could have done a better job communicating what [the Board] does and does not do[.]” *Id.*

13. Over subsequent weeks, additional details—at times seemingly contradictory—regarding the Board appeared in the press. *See, e.g.*, Betsy Woodruff Swan & Daniel Lippman, *Small group, big headache: Inside DHS’ messy Disinformation Governance Board launch*, Politico, May 5, 2022, <https://politi.co/3OSs068> (describing DHS’s earlier description of the

Board’s responsibilities as “odd . . . given that [the agency] now says the [B]oard does not run or manage any department operations”). As one report concluded, “much still remains uncertain” about the Board. Jeff Cercone & Maria Ramirez Uribe, *What exactly will new DHS ‘Disinformation Governance Board’ do?*, Politifact, May 10, 2022, <https://bit.ly/3IjJAx2>.

14. DHS “paused” the rollout of the Board in late May 2022 and Nina Jankowicz resigned from the agency shortly thereafter. *E.g.*, Sean Lyngaas *et al.*, *Expert hired to run DHS’ newly created disinformation board resigns*, CNN, May 18, 2022, <https://cnn.it/3Ijssrf>.

15. It remains unclear whether DHS will reintroduce the Board at some later point.

16. Senators Chuck Grassley and Josh Hawley recently released evidence suggesting Secretary Mayorkas gave misleading testimony during a May 2022 hearing before the Senate Homeland Security and Governmental Affairs Committee. *See* Casey Harper, *Lawmakers say documents show DHS Head misled Congress about disinformation board, demand hearing*, The Ctr. Square, June 18, 2022, <https://bit.ly/3P4QvMR>. A coalition of lawmakers have alleged that the agency records released by Senators Grassley and Hawley prove DHS had “been working on the disinformation board longer than [Secretary] Mayorkas let on in his testimony,” and that the Board would, among other things, ““monitor American citizens.”” *Id.*; Letter from the Hon. Rob Portman, Ranking Member, U.S. S. Comm. on Homeland Sec. & Governmental Affairs, *et al.*, to the Hon. Gary Peters, Chairman, U.S. S. Comm. on Homeland Sec. & Governmental Affairs (June 13, 2022), *available at* <https://bit.ly/3IooUnD>.

II. AFPF’s May 5, 2022 FOIA Request

17. By letter, dated May 5, 2022, AFPF submitted a FOIA request to DHS through the agency’s online portal seeking access to three categories of records:

- (1) All records regarding the formation of the [Disinformation Governance] Board including but not limited to its:

- a. Charter
 - b. Principles
 - c. Mission and goals
 - d. Membership or staffing
 - e. Funding sources
 - f. Scope of authority
 - g. Statutory authority for formation
 - h. Participation of membership 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.

Exhibit 1 (internal footnotes omitted).

18. AFPP defined the term “record” as “any medium of information storage in the form and format maintained by the agency at the time of the request.” *Id.* AFPP explained that “[i]f any portion of a ‘record’ . . . is responsive to [its] request, then [DHS] should process and disclose the record in its entirety.” *Id.* Thus, “[i]f [DHS] consider[ed] a medium of information storage to contain multiple records that it believe[d] c[ould] be segmented on the basis of the subject-matter of scope of AFPP’s request,” it must process all potentially segmented records as responsive. *Id.*

19. AFPP likewise explained that, as far as email chains were concerned, it sought “the entirety of any email chain, any portion of which contains an individual email message responsive to [its] request[.]” *Id.*

20. AFPP clarified it did not seek “daily news clippings or other mass mailings unless there is commentary related to them,” and DHS could omit such records from the scope of the request. *Id.*

21. AFPP requested a public interest fee waiver and classification as a representative of the news media for fee purposes. *Id.*

22. By two e-mail messages, dated May 5, 2022, DHS acknowledged it had received AFPP’s FOIA request and assigned it tracking number 2022-HQFO-01004. **Exhibits 2 & 3.**

23. By e-mail, dated May 18, 2022, DHS wrote to AFPP seeking consent to narrow the scope of AFPP’s FOIA request. Specifically, the agency sought (1) to limit its search for Item One to “records of communications” in “specific DHS Offices” and (2) to impose a timeframe limitation of “January 1, 2022 – May 18, 2022.” **Exhibit 4.**

24. AFPP responded to DHS by e-mail declining to narrow its request to “records of communications” but accepting the proposed categories of records custodians and timeframe for Item One. **Exhibit 5.**

25. By e-mail, dated June 6, 2022, AFPP requested an update on the processing of its FOIA request. **Exhibit 6.** AFPP explained it “consider[ed] [its] request . . . perfected as of May 5, 2022, and therefore [DHS’s] statutory deadline [for a determination] is June 17, 2022.” *Id.*

26. DHS did not respond to AFPP’s June 6, 2022 e-mail.

27. As of July 12, 2022, DHS’s online portal indicates the estimated completion date for AFPP’s request is December 13, 2022. **Exhibit 7.**

28. To date, DHS has not issued any determinations on AFPF's fee-related requests.

29. DHS has not provided any further substantive update on the processing of AFPF's request. The agency has neither issued a determination nor produced responsive records.

COUNT I

Violation of the FOIA: Failure to Comply with Statutory Requirements

30. AFPF repeats all of the above paragraphs.

31. The FOIA requires an agency to accept and process any request for access to agency records that (a) "reasonably describes such records," and (b) "is made in accordance with published rules stating the time, place, fees, . . . and procedures to be followed[.]" 5 U.S.C. § 552(a)(3)(A).

32. The FOIA also requires an agency to respond to a valid request within 20 business days or, in "unusual circumstances," within 30 business days. *Id.* § 552(a)(6)(A)–(B). If an agency requires additional time to process a request, the FOIA mandates it provide the requester with "an opportunity to arrange . . . an alternative time frame for processing the request[.]" *Id.* § 552(a)(6)(B)(ii).

33. AFPF's FOIA request here seeks access to agency records maintained by DHS. The request reasonably describes the records sought and otherwise complies with the FOIA and applicable regulations.

34. DHS has failed to issue a determination on or promptly produce agency records responsive to the FOIA request at issue within the applicable time limits.

35. DHS also has failed to comply with the FOIA because it never "arrange[d] . . . alternative time frame[s]" for responding to AFPF's request and never actively invited AFPF to negotiate "alternative" response deadlines.

36. AFPF has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

RELIEF REQUESTED

WHEREFORE, Plaintiff AFPF respectfully requests and prays that this Court:

- a. Order Defendant DHS to process AFPF's FOIA request and issue a determination within 20 business days of the date of the Order;
- b. Order Defendant DHS to produce all agency records responsive to AFPF's FOIA request promptly upon issuing the determination;
- c. Maintain jurisdiction over this case until Defendant DHS complies with the Order and, if applicable, adequately justifies its treatment of all responsive records;
- d. Award AFPF its costs and reasonable attorney fees incurred here pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant such other relief as the Court may deem just and proper.

Dated: July 12, 2022

Respectfully submitted,

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