



December 1, 2022

VIA E-MAIL

Department of Health and Human Services Office of the Secretary
Freedom of Information Act Office
200 Independence Avenue, SW
Washington, D.C. 20201
E-mail: FOIARequest@hhs.gov

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 investigating the Biden Administration’s decision to extend the COVID-19 public health emergency. Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, AFPF hereby requests the following records:

1. All data, studies, guidance, memoranda, or other evidence relied upon by Secretary Becerra or his staff and advisors in deciding to extend the COVID-19 public health emergency.
 - a. Time period: September 1, 2022 to the present.
 - b. Please limit the search to the records custodians identified below as part of Item 2.
2. All internal and external communications (e-mail, text, instant messaging, calendar items, etc.), including attachments (memos, guidance documents, directives, etc.), that are responsive to any of the following keyword searches:
 - a. (“Biden” OR “POTUS” OR “President”) AND (“pandemic” AND “over” OR “60 Minutes”)
 - i. Time period: September 18, 2022 to the present.²
 - b. (“Public Health Emergency” or “PHE” OR “Public Health Service Act”) AND (“Medicaid” OR “CHIP”) AND (“ineligible” OR “redetermination” OR “eligibility” OR “FMAP” OR “Telehealth”)
 - i. Time period: September 1, 2022 to the present.

¹ See AMS. FOR PROSPERITY FOUND., www.americansforprosperityfoundation.org (last visited Nov. 29, 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 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.”

- c. (“Public Health Emergency” or “PHE” OR “National emergency”) AND (“Senate”) AND (“vote” OR “veto”)
 - i. Time period: November 10, 2022 to the present.

Please limit the search to the following records custodians and include any alias accounts maintained by those individuals:

- a. Secretary Xavier Becerra
- b. Deputy Secretary Andrea Palm
- c. Assistant Secretary for Health Admiral Rachel L. Levine, MD
- d. Chief of Staff Sean McCluskie
- e. Assistant Secretary for Preparedness and Response Dawn O’Connell
- f. Senior Advisor, Office of White House Liaison, Caroline Dvorsky
- g. Counselor for Public Health and Science Sarah Despres
- h. Deputy Chief of Staff for COVID Response Kathryn Alvarez

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, AFPP’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 or presidential 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.”³

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 decision to extend the public health emergency despite statements from the President declaring the pandemic “over.”⁴

AFPP 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; AFPP 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. AFPP 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.

³ 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).

⁴ Dan Diamond, *Biden’s claim that ‘pandemic is over’ complicates efforts to secure funding*, WASHINGTON POST (Sept. 19, 2022), <https://www.washingtonpost.com/health/2022/09/18/biden-covid-pandemic-over/>.

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.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 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.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 AFPF, 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, 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

⁵ 38 U.S.C. § 1.561(b)(7).

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

⁷ See, e.g., *New emails undermine official reason for cancelling key oil and gas lease*, AMS. FOR PROSPERITY FOUND. (Sep. 8, 2022), available at <http://bit.ly/3te6boa>; *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>.

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).