



January 10, 2023

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 seeks records regarding Secretary Alejandro Mayorkas’s use of personal email to conduct official Department of Homeland Security (“DHS”) business. Evidence of the Secretary’s use of personal email can be found in records pertaining to the controversial Disinformation Governance Board, which DHS released to AFPF last month as part of ongoing litigation.² DHS has confirmed through counsel that the records do reflect Secretary Mayorkas’s use of a personal email account. To the extent Secretary Mayorkas made ongoing use of personal accounts, that practice would violate long-standing DHS directives prohibiting the use of non-official recordkeeping systems and technologies. The evidence produced to AFPF underscores concerns over DHS’s lack of transparency both generally and, more specifically, with respect to the Disinformation Governance Board and potential threats to free speech.

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

1. All records reflecting outgoing email messages *from* Secretary Mayorkas’s official DHS email account(s) *to* any of his personal email accounts;
2. All records reflecting email messages *from* Secretary Mayorkas’s personal email account(s) that were *received in* his official DHS email account(s); and
3. A copy of DHS’s current policy directive/rule concerning the use of personal accounts on agency technology systems (*e.g.*, web-based email accessed through agency computers) or for official business (*e.g.*, use of personal accounts on personal devices).

The time period for this request is February 2, 2021 to the present.³

¹ See AMS. FOR PROSPERITY FOUND., www.americansforprosperityfoundation.org (last visited Jan. 10, 2023).

² Copies of these records are attached as **Exhibits 1 & 2**. The records were released as part of a December 2022 interim production in *Americans for Prosperity Foundation v. Department of Homeland Security*, No. 22-2015 (D.D.C. filed July 12, 2022).

³ The term “present” should be construed as the date on which DHS begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

For purposes of this request, “official DHS email account(s)” should be understood to include alias accounts, as well as secondary or supplemental accounts assigned to Secretary Mayorkas but utilized by his immediate staff on his behalf.

For all items of this request, AFPF 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 DHS identifies responsive records it deems outside its legal control (*e.g.*, personal records), AFPF requests the agency inform AFPF that such records exist and provide a detailed control analysis that justifies their treatment.

Request for a Public Interest Fee Waiver

AFPF requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that DHS 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” because they relate to the conduct of agency business by Secretary Mayorkas, albeit through private channels—namely, personal email accounts. The use of private email by government actors is a well-established issue of public interest,⁵ and it is uncontroverted that records reflecting such usage are subject to disclosure.⁶ This remains the case even when non-agency accounts or devices are used. DHS is no stranger to the controversy surrounding the use of personal email accounts to conduct official government business.⁷

AFPF intends to educate the public with the results of its request. It has the intent and ability to make those results available to a reasonably broad public audience through various media. AFPF’s staff has significant experience and relevant expertise; these 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. Finally, AFPF is a non-profit organization, as defined under Section 501(c)(3) of the Internal Revenue Code, and it therefore has no commercial interest in making this request.

⁴ 5 U.S.C. § 552(a)(4)(A)(iii); see 6 C.F.R. § 5.11(k)(1)(ii)–(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 See Peter Clarke, *Private Government Emails in the FOIA Era*, FINDLAW (Oct. 10, 2017), <https://bit.ly/3VVzyaL>; see also *Court rules FOIA can apply to private email accounts*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 6, 2016), <https://bit.ly/3k26Zv7>.

⁶ See, e.g., *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016).

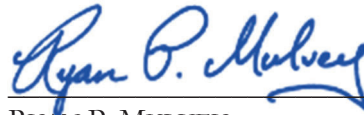
⁷ See, e.g., Alex Swoyer, *Jeb Johnson’s personal email use at DHS snared in growing pursuit*, WASH. TIMES (May 1, 2017), <https://bit.ly/3jWf6jr>; see also Josh Rogin, *Homeland Security Leaders Bent Rules on Private E-mail*, BLOOMBERG (July 20, 2015), <https://bit.ly/3inJTn1>; see generally *DHS Fails to Locate Records Concerning Compliance with Federal Records Act over Private Web-based Email Accounts*, CAUSE OF ACTION INST. (Mar. 8, 2018), <https://coainst.org/3Xcf66o>.

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

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 rmulvey@afphq.org. Thank you for your attention to this matter.



RYAN P. MULVEY
POLICY COUNSEL

⁸ 5 U.S.C. § 552(a)(4)(A)(ii); 6 C.F.R. § 5.11(b)(6).

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

¹⁰ See, e.g., *New emails undermine official reason for cancelling key oil and gas lease*, AMS. FOR PROSPERITY FOUND. (Sept. 8, 2022), <https://bit.ly/3te6boa>; *AFP Foundation launches FOIA investigation into Disinformation Governance Board*, AMS. FOR PROSPERITY FOUND. (May 9, 2022), <https://bit.ly/3GRBgWn>; *More evidence the VA is improperly delaying or denying community care to eligible veterans*, AMS. FOR PROSPERITY FOUND. (Jan. 28, 2022), <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), <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 FOUND. (Oct. 1, 2021), <https://bit.ly/3a9KGeL>; *Government documents reveal Export-Import Bank fails to protect taxpayers ... again*, AMS. FOR PROSPERITY FOUND. (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>.

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii).

Exhibit 1

From: Alejandro Mayorkas (b)(6)

To: Mayorkas, Alejandro (b)(6)

Subject: Fwd: Press Roundup for TUES, 4/26

Date: 2022/04/27 07:06:22

Priority: Normal

Type: Note

CAUTION: This email originated from outside of DHS. DO NOT click links or open attachments unless you recognize and/or trust the sender. Contact your component SOC with questions or concerns.

Sent from my iPhone

Begin forwarded message:

From: Alejandro Mayorkas (b)(6)

Date: April 26, 2022 at 9:55:50 PM EDT

To: "ESPINOSA, MARSHA" (b)(6)

Subject: Re: Press Roundup for TUES, 4/26

Thank you.

Sent from my iPhone

On Apr 26, 2022, at 9:51 PM, ESPINOSA, MARSHA (b)(6)

From: ESPINOSA, MARSHA

Sent: Tuesday, April 26, 2022 9:45 PM

To: 'Mayorkas, Alejandro' (b)(6)

Cc: Tien, John (b)(6) CANEGALLO, KRISTIE (b)(6)

REZMOVIC, JEFFREY (b)(6) ULLOA, ISABELLA (b)(6)

SEIDMAN, RICKI (b)(6) CALLAHAN, MARY ELLEN

(b)(6) LUGO, ALICE (b)(6) PECK, SARAH

(b)(6)

Subject: Press Roundup for TUES, 4/26

Good evening, Secretary,

Exhibit 2



Sender: Alejandro Mayorkas (b)(6)

Recipient: Mayorkas, Alejandro / (b)(6)

Sent Date: 2022/04/27 07:00:35

Delivered Date: 2022/04/27 07:06:22