

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICANS FOR PROSPERITY FOUNDATION)
1310 North Courthouse Road, Suite 700)
Arlington, VA 22201,)

Plaintiff,)

v.)

Civil Action No. 23-0510

U.S. DEPARTMENT OF HOMELAND SECURITY)
2707 Martin Luther King Jr. Avenue, SE)
Washington, D.C. 20528,)

Defendant.)

COMPLAINT

1. Plaintiff Americans for Prosperity Foundation (“AFPF”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to agency records maintained by Defendant United States Department of Homeland Security (“DHS”).

2. AFPF seeks copies of email messages exchanged between Secretary Alejandro Mayorkas’s official agency accounts and his personal email accounts. AFPF is also requesting a copy of DHS’s current policy regarding access to personal email accounts on DHS technology systems, as well as its rules for the use of personal email when conducting official agency business.

3. Records released by DHS in another FOIA lawsuit brought by AFPF confirm that Secretary Mayorkas has at least once received intra-agency correspondence to a personal email account. Given the Secretary’s past involvement in a scandal involving the use of personal email, as well as the present threat of the alienation of federal records, AFPF is concerned that current rules prohibiting the use of personal email accounts are not being diligently followed.

4. DHS has neither issued a timely determination on AFPF's FOIA request nor produced the requested records.

5. The records at issue have significant value that serves the public interest. The last major scandal at DHS involving the improper use of personal email elicited intense media attention, as well as oversight efforts by the National Archives and Records Administration ("NARA") and Congress. One of the most nefarious ways that executive branch officials evade transparency is by using private email to conduct official business. Such a practice cannot be tolerated. The records at issue directly impinge on the question of whether violations of federal law and DHS policy have occurred at the highest level of the agency.

JURISDICTION AND VENUE

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

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

PARTIES

8. 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 transparency is critical to citizens' ability to hold those in powerful positions accountable. AFPF therefore routinely files and litigates FOIA requests to obtain information that provides the public with insight into *what* the government is up to and *who* is responsible for agency decision-making. AFPF is unable to accomplish this mission, however, if government officials evade their transparency obligations by employing private email accounts when conducting official business.

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

FACTS

I. AFPF's Investigation of the DHS Disinformation Governance Board

10. In May 2022, AFPF opened an investigation into the DHS Disinformation Governance Board. *See AFP Foundation launches FOIA investigation into Disinformation Governance Board*, Ams. for Prosperity, May 9, 2022, <https://bit.ly/3GRBgWn>. AFPF sought to discover, among other things, DHS's standard for identifying "false information," as well as the identity of agency decision-makers responsible for the operations of the Board. To that end, AFPF filed a FOIA request seeking information about the Board's foundation, activities, and scope.

11. AFPF sued DHS for the agency's failure to respond to that FOIA request. *See Ams. for Prosperity Found. v. Dep't of Homeland Sec.*, No. 22-2015 (D.D.C. filed July 12, 2022); *see also Americans for Prosperity Foundation Sues for Disinformation Governance Board Records*, Ams. for Prosperity, July 12, 2022, <http://bit.ly/3luiKek>.

12. DHS provided its first interim response of non-exempt records as part of that litigation in December 2022. Relevant here, DHS disclosed records showing Secretary Mayorkas used personal email at least once for official purposes. *See AFP Foundation investigates DHS secretary's use of private email while creating Disinformation Governance Board*, Ams. for Prosperity, Jan. 12, 2023, <http://bit.ly/3HTpOJe>.

13. Specifically, two pages—which either reflect two parts of a single chain or two separate messages—reveal how Marsha Espinosa, DHS Assistant Secretary for Public Affairs,

emailed Secretary Mayorkas at a personal email address. Secretary Mayorkas then responded to Ms. Espinosa and separately forwarded the exchange to an official DHS account. **Exhibit 1.**

14. AFPF contacted opposing counsel to confirm whether the foregoing pages did, in fact, reflect Secretary Mayorkas's use of personal email. AFPF also asked DHS to confirm it had issued a preservation notice to Secretary Mayorkas and instructed him to search his personal accounts for agency records potentially responsive to AFPF's request. AFPF asked DHS, in the alternative, to aver it had certified that Secretary Mayorkas transferred into agency control all records located in any personal accounts that may be relevant to AFPF's request. **Exhibit 2.**

15. By email, dated December 19, 2022, the Department of Justice relayed the following message from DHS:

DHS can confirm that page 62 (DHS-001-02015-000062) consists of two instances that [*sic*] Secretary Mayorkas utilized his personal email account. In one of the two emails, Secretary Mayorkas forwarded the email from his personal account to his DHS account pursuant to DHS policy. DHS has no reason to believe that [Secretary Mayorkas's] personal email account would include responsive records.

Exhibit 3.

II. Secretary Mayorkas's History of Using Personal Email for Agency Business

16. DHS and Secretary Mayorkas are no strangers to scandals involving agency employees' use of personal email on agency time, whether for personal or official purposes.

17. During the Obama Administration, then-Secretary Jeh Johnson came under fire for securing special "waivers" for himself and "28 other senior officials"—including then-Deputy Secretary Mayorkas—to bypass an agency-wide prohibition on the use of browser-based Internet webmail on official technology systems, including personal accounts hosted on Gmail, Yahoo, and AOL. *See, e.g.,* Josh Rogin, *Homeland Security Leaders Bent Rules on Private Email*, Bloomberg, July 20, 2015, <https://bit.ly/3injTn1>.

18. DHS later announced it had rescinded the “waivers” after public backlash. *See* Tal Kopan, *Report: DHS chief used personal email on work computer*, Politico, July 20, 2015, <http://bit.ly/3lnXPtw>. Public criticism highlighted the serious national-security threats associated with agency leadership accessing personal web-based email platforms at work.

19. Congress also conducted oversight in the wake of the scandal. *See* Aliya Sternstein, *House Committee Now Probing Jeh Johnson’s Personal Email Use at DHS*, Nextgov, Mar. 14, 2016, <http://bit.ly/3HPL0Qc>.

20. Notwithstanding DHS’s about-face on the question of the waivers, the agency faced at least one FOIA lawsuit concerning access to private email generated by DHS leadership. *See, e.g.*, Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials’ Private Email Docs*, Daily Caller News Found., Nov. 18, 2015, <http://bit.ly/3K3vbs5>.

21. In that case, a federal district court judge eventually ordered several current or former DHS officials—including Secretary Johnson and now-Secretary Mayorkas—to preserve the contents of their private accounts onto portable hard drives for possible use in FOIA searches. *See* Josh Gerstein, *Judge orders 4 Homeland Security officials to preserve private-account emails*, Jan. 18, 2017, Politico, <http://bit.ly/3YLdt0B>.

22. News of this lawsuit prompted NARA to open an investigation into the possible unauthorized disposition of federal records. *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, <http://bit.ly/3x9USiZ>.

23. Secretary Johnson, for his part, ended up searching through more than 26,000 emails stored in his personal account as part of an effort to identify and return federal records to

the government. Alex Swoyer, *Jeh Johnson's personal email use at DHS snared in growing pursuit*, Wash. Times, May 1, 2017, <https://bit.ly/3jWf6Jr>.

24. Some of the alienated federal records Secretary Johnson returned to the government were disclosed under the FOIA. *See, e.g., Judicial Watch Obtains 216 Pages of Documents Containing Official Emails Sent Through Private, Unsecured Email Accounts of Former Homeland Security Secretary Jeh Johnson, Three Other Top Officials*, Judicial Watch, Feb. 13, 2017, <http://bit.ly/3HKjXFO>.

25. Upon information and belief, DHS still proscribes the use of personal email for official agency business and prohibits DHS officials from accessing such accounts through DHS hardware (*e.g.*, computers, phones, *etc.*).

26. Upon information and belief, Secretary Mayorkas has not been issued a waiver or permission to use personal email accounts on government systems or for government purposes.

III. AFPF's January 10, 2023 FOIA Request

27. By letter, dated January 10, 2023, AFPF submitted a FOIA request to DHS through the agency's online portal seeking access to three categories of records:

- (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).

Exhibit 4 (internal footnotes omitted).

28. AFPF indicated the relevant time period for its request was "February 2, 2021 to the present," and it defined the term "present" as "the date on which DHS begins its search for

responsive records.” *Id.*; *cf.* 5 C.F.R. § 5.4(a) (“[A] component ordinarily will include only records in its possession as of the date that it begins its search.”).

29. AFPP further indicated that the phrase “‘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.” Ex. 4.

30. AFPP explained it sought “the entirety of any email chain, any portion of which contains an individual email message responsive to [its] request[.]” *Id.*

31. AFPP advised DHS that if it “identifies responsive records it deems outside its legal control . . . [,] the agency [should] inform AFPP that such records exist and provide a detailed control analysis that justifies their treatment.” *Id.*

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

33. DHS processes FOIA requests directed to the departmental Privacy Office through an online portal called “DHS SecureRelease.”

34. Upon receipt of AFPP’s FOIA request, SecureRelease assigned it tracking number 2023-HQFO-00641. **Exhibit 5.**

35. SecureRelease also assigned AFPP’s FOIA request to DHS’s “simple” queue. *Id.*

36. By email, dated February 10, 2023, AFPP inquired with DHS as to the status of its FOIA request. **Exhibit 6.** AFPP explained its request had been received by DHS on January 10, 2023, and that the deadline for the agency’s determination was February 8, 2023. *Id.*

37. By letter, dated February 13, 2023, DHS provided a formal acknowledgement of AFPP’s request. **Exhibit 7.** The agency indicated it was extending its statutory deadline to provide

a final response by ten business days “pursuant to 6 C.F.R. Part 5 § 5.5(c).” DHS claimed AFPF’s request would “require a thorough and wide-ranging search.” *Id.*

38. DHS also purported to “conditionally grant” AFPF’s request for a public interest fee waiver. *Id.* The agency asserted it reserved the right to deny a fee waiver at the time of production “[i]f upon review of [a sample set of responsive] documents, [it] determine[d] that the disclosure of the information” would not advance the public interest. *Id.*

39. Finally, DHS appeared to deny AFPF’s fee-category request by classifying AFPF a “non-commercial requester.” *Id.* The agency neither provided an explanation for its apparent fee determination nor did it address the fee-category arguments set out in AFPF’s FOIA request.

40. DHS’s February 13, 2023 letter did not contain any notice of appeal rights, nor did it alert AFPF of the possibility of pursuing dispute resolution with the agency’s FOIA Public Liaison or the Office of Government Information Services.

41. DHS has never sought clarification or further information from AFPF regarding its FOIA request, as provided by 6 C.F.R. § 5.3(c).

42. DHS’s SecureRelease portal still shows AFPF’s request as assigned to the agency’s “simple” processing track. Moreover, the portal does not reflect DHS’s invocation of “unusual circumstances,” or its purported fee determinations. *See Exhibit 8* (Portal as of Feb. 24, 2023).

43. 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

44. AFPF repeats all of the above paragraphs.

45. 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).

46. The FOIA 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 a requester with “an opportunity to arrange . . . an alternative time frame for processing [.]” *Id.* § 552(a)(6)(B)(ii).

47. The FOIA defines “unusual circumstances” to mean (1) “the need to search for and collected . . . records from field offices or other establishments that are separate from the office processing the request”; (2) “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request”; or (3) “the need for consultation . . . with another agency having a substantial interest in the determination of the request or among two or more component have the agency having substantial subject-matter interest therein,” “but only to the extent reasonably necessary to the proper processing of [a] particular request[.]” *Id.* § 552(a)(6)(B)(iii)(I)–(III).

48. In the case of any adverse determination (*i.e.*, a “denial”), an agency is required to advise the requester of its “right . . . to appeal . . . within a period . . . that is not less than 90 days after the date of such adverse determination[.]” *Id.* § 552(a)(6)(A)(i)(III)(aa); *see* 6 C.F.R. § 5.6(d).

49. In addition to notifying a requester of its right to pursue an appeal, DHS’s FOIA regulations require an adverse determination—including the denial of a fee-related request—to provide a “statement of the reasons for the denial[.]” 6 C.F.R. § 5.6(e)(2).

50. AFPP’s FOIA request seeks access to agency records maintained by DHS. The request reasonably describes the records sought insofar as it provides sufficient detail to enable

DHS personnel to locate the records with a reasonable amount of effort. AFPF's request otherwise complies with the FOIA and applicable DHS regulations.

51. DHS acknowledged receipt of AFPF's FOIA request upon assignment of a tracking number in the SecureRelease portal. *See id.* §5.6(b). The agency then ratified its automatic notice of receipt with the later issuance of a formal acknowledgment letter. *See Ex. 7.*

52. DHS improperly invoked "unusual circumstances" in its February 13, 2023 correspondence because it (a) failed to cite any of the qualifying conditions set out in the FOIA, *see* 5 U.S.C. § 552(a)(6)(B)(iii)(I)–(III); (b) failed to provide an explanation for why a "thorough and wide-ranging search" made an extension "reasonably necessary" given the scope of AFPF's request; and (c) failed to indicate "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i).

53. DHS was statutorily obliged to issue its determination by February 8, 2023.

54. Assuming DHS properly invoked "unusual circumstances," its determination was due by February 23, 2023.

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

56. DHS has also failed to comply with the FOIA because it never "arrange[d] . . . alternative time frame[s]" for responding to AFPF's request and never invited AFPF to negotiate "alternative" response deadlines. 5 U.S.C. § 552(a)(6)(B)(ii).

57. In addition to its failure to issue a timely determination on the substance of AFPF's request, DHS has not issued valid determinations on AFPF's fee-related requests.

58. The FOIA provides that "[d]ocuments shall be furnished without any charge or at a charge reduced below the fees established [for preferential fee categories] 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.” *Id.* § 552(a)(4)(A)(iii).

59. The FOIA does not provide for the re-evaluation of a fee-waiver request based on the content a sample set of records as reviewed by an agency after its search but prior to production.

60. DHS has improperly reserved the right to revoke its grant of a public interest fee waiver upon review of a sample set of records. An agency must determine a fee waiver request based on the face of a request and the reasons given by a requester therein.

61. The FOIA defines a “representative of the news media” to be “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.* § 552(a)(4)(A)(ii).

62. DHS has improperly addressed AFPP’s fee-category request by failing to offer any reasoned analysis of AFPP’s grounds for qualifying as a “representative of the news media.” Further, DHS failed to explicitly state it was denying AFPP’s fee-category request.

63. DHS’s disposition of AFPP’s fee-category request—to the extent the agency intended it to be an adverse determination—also is infirm because the agency failed to notify AFPP of its right to pursue an administrative appeal.

64. AFPP 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, including proper determinations on AFPF's fee-related requests;
- 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: February 24, 2023

Respectfully submitted,

/s/ Ryan P. Mulvey
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