

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICANS FOR PROSPERITY FOUNDATION)
4201 Wilson Boulevard, Suite 1000)
Arlington, VA 22203,)

Plaintiff,)

v.)

U.S. DEPARTMENT OF COMMERCE)
1401 Constitute Avenue NW)
Washington, D.C. 20230; and)

NATIONAL INSTITUTE OF STANDARDS)
AND TECHNOLOGY)
100 Bureau Drive)
Gaithersburg, MD 20899,)

Defendants.)

Civil Action No. 24-0091

COMPLAINT

1. Plaintiff Americans for Prosperity Foundation (“AFPF”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, requesting access to agency records maintained by Defendants United States Department of Commerce (“Commerce”) and the National Institute of Standards and Technology (“NIST”).
2. In November 2023, AFPF sent two related FOIA requests to Commerce and NIST seeking records related to the implementation of Executive Order 14110, dated October 30, 2023 and entitled “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.” *See* 88 Fed. Reg. 75,191 (Nov. 1, 2023).

3. Disclosure of the records sought by AFPF, which concern the implementation of new, far-reaching regulations on an emerging technology imposed by an executive order invoking emergency powers, unquestionably serves the public interest.

4. Neither Commerce nor NIST has issued a timely determination on AFPF's FOIA requests nor have they produced the requested records.

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. AFPF routinely files and litigates FOIA requests. It relies on the legal, investigative, and editorial expertise of its staff to review the results of its requests and to produce distinct news and educational materials that are distributed to the interested public.

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

9. Defendant NIST is an agency within the meaning of 5 U.S.C. § 552(f)(1). Its parent agency is Defendant Commerce. NIST 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 November 14, 2023, FOIA Request to Commerce

10. By letter, dated November 14, 2023, AFPF submitted a FOIA request via e-mail to Commerce seeking access to the following records:

1. Records reflecting the statutory authority to require [artificial intelligence] developers to “provide the Federal Government, on an ongoing basis, with information, reports or records” listed in Section 4.2 of [Executive Order 14110].
2. All internal and external email communications sent to or by the following Commerce employees, including through any alias accounts:
 - Secretary Gina Raimondo
 - Deputy Secretary Don Graves
 - Deputy Assistant Secretary for Administration Jeremy Pelter
 - Director of Office for Civil Rights Larry J. Beat
 - Chief of Staff Chris Slevin
 - Any person with supervisory responsibilities for implementing and executing the [artificial intelligence] regulations listed in Section 4.2 of [Executive Order 14110].
- [. . .]
3. Any additional final memoranda, guidance documents, policy statements, etc. regarding [artificial intelligence] not publicly posted or otherwise responsive to the previous request items.

Exhibit 1.

11. AFPF clarified it did not seek “daily news clippings or other mass mailings unless there is commentary related to them” and that Commerce could omit such records from the scope of AFPF’s FOIA request. *Id.*

12. AFPF further limited the scope of item two of its request by asking Commerce only to process records from the identified custodians that contained any of the following sets of keywords:

- a. (“artificial intelligence” OR “AI”) AND (“Defense Production Act” OR “DPA” OR “4555”)

- b. (“artificial intelligence” OR “AI”) AND (“dhs.gov” OR “DHS”)
- c. (“artificial intelligence” OR “AI”) AND [(“POTUS” OR “Biden”) OR (“White House” OR “WH”)]
- d. (“artificial intelligence” OR “AI”) AND (“Barack” OR “Obama”)
- e. (“artificial intelligence” OR “AI”) AND [(“Reed” OR “DCOS Reed”) OR (“Tristan Harris”) OR (“Aza Raskin”) OR (“Center for Humane Technology”)]

Id.

13. AFPF identified the relevant time period for its FOIA request as “January 1, 2023, to the present,” and it defined the term “present” as “the date on which . . . [Commerce] begins its search for responsive records.” *Id.*

14. AFPF also defined the term “record” for purposes of the request as “any medium of information storage in the form and format maintained by the agency at the time of the request.”

Id. AFPF clarified that “[i]f 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.’” *Id.*

15. With respect to e-mail records, AFPF likewise clarified it “seeks the entirety of any email chain, any portion of which contains an individual email message responsive to this request[.]” *Id.*

16. AFPF requested a public-interest fee waiver and classification as a representative of the news media for fee purposes. *Id.*

17. By letter, dated November 15, 2023, Commerce’s Office of the Chief Financial Officer and Assistant Secretary for Administration acknowledged it had received AFPF’s request on November 14, 2023, and assigned it tracking number DOC-OS-2024-000066. **Exhibit 2.**

18. Commerce invoked “unusual circumstances,” as contemplated by 5 U.S.C. § 552(a)(6)(B), to extend its response deadline by ten working days. *Id.* Commerce did not otherwise provide an estimated date of completion for AFPF’s request.

19. Commerce deferred issuing a determination on AFPF’s fee-waiver request, and it failed to address AFPF’s fee-category request. *See id.*

20. Concurrent with the issuance of its acknowledgment letter, Commerce advised AFPF it would “not be able to conduct a search” for a portion of AFPF’s request, namely, a search for records potentially responsive to item two held by “[a]ny person with supervisory responsibilities for implementing and executing the [artificial intelligence] regulations listed in Section 4.2 of [Executive Order 14110].” **Exhibit 3.**

21. Upon further inquiry, but without reference to any legal basis, Commerce argued it “would need a specific Commerce employees [*sic*] name or position title to search for records.” *Id.*

22. To date, Commerce has failed to provide any further update on the processing of AFPF’s request. It has neither issued a determination nor produced responsive records.

23. Commerce also has not provided an estimated date of completion for processing AFPF’s request.

24. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i) and (B)(i), the date by which Commerce should have issued its final determination on AFPF’s request was December 28, 2023.

II. AFPF’s November 14, 2023, FOIA Request to NIST

25. By letter, dated November 14, 2023, AFPF submitted a FOIA request via e-mail to NIST seeking access to the following records:

1. All records regarding the formation of the [United States Artificial Intelligence Safety Institute (“US AISI”)] 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. Guidance
2. All internal and external e-mail communications sent to or by the following NIST employees, including through any alias accounts:
- Director Laurie E. Locascio
 - Chief of Staff Jason Boehm
 - Director of Diversity, Equity, and Inclusivity Office Janelle Johnson
 - Associate Director for Innovation & Industry Services Mojdeh Bahar
 - Associate Director for Management Resources Delwin Brockett
 - Any person with supervisory responsibilities for creating, executing, and administering US AISI.
- [. . .]
3. Any additional final memoranda, guidance documents, policy statements, etc. regarding [artificial intelligence] not publicly posted or otherwise responsive to the previous request items.

Exhibit 4.

26. AFPP clarified it did not seek “daily news clippings or other mass mailings unless there is commentary related to them” and that NIST could omit such records from the scope of AFPP’s FOIA request. *Id.*

27. AFPP further limited the scope of item two of its request by asking NIST only to process records from the identified custodians that contained any of the following sets of keywords:

- f. (“artificial intelligence” OR “AI”) AND (“Defense Production Act” OR “DPA” OR “4555”)
- g. (“artificial intelligence” OR “AI”) AND (“dhs.gov” OR “DHS”)
- h. (“artificial intelligence” OR “AI”) AND [(“POTUS” OR “Biden”) OR (“White House” OR “WH”)]
- i. (“artificial intelligence” OR “AI”) AND (“Barack” OR “Obama”)

- j. (“artificial intelligence” OR “AI”) AND [(“Reed” OR “DCOS Reed”) OR (“Tristan Harris”) OR (“Aza Raskin”) OR (“Center for Humane Technology”)]

Id.

28. AFPP identified the relevant time period for its FOIA request as “January 1, 2023, to the present,” and it defined the term “present” as “the date on which . . . [NIST] begins its search for responsive records.” *Id.*

29. AFPP also defined the term “record” for purposes of the request as “any medium of information storage in the form and format maintained by the agency at the time of the request.” *Id.* AFPP clarified that “[i]f 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 AFPP’s request, AFPP explicitly seeks access to those separate ‘records’ as well. They should not be treated as ‘non-responsive.’” *Id.*

30. With respect to e-mail records, AFPP likewise clarified it “seeks the entirety of any email chain, any portion of which contains an individual email message responsive to this request[.]” *Id.*

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

32. By letter, signed on November 16, 2023, NIST acknowledged it had received AFPP’s request on November 14, 2023, and assigned it tracking number DOC-NIST-2024-000037. **Exhibit 5.**

33. To date, NIST has failed to provide any further update on the processing of AFPP’s request. It has neither issued a determination nor produced responsive records.

34. NIST also has not provided an estimated date of completion for processing AFPF's request.

35. NIST has not issued any determination on AFPF's fee-related requests.

36. NIST never invoked "unusual circumstances" and did not extend its response deadline by ten working days, as contemplated by 5 U.S.C. § 552(a)(6)(B).

37. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), the date by which NIST should have issued its final determination on AFPF's request was December 13, 2023.

COUNT I

Violation of the FOIA: Failure to Comply with Statutory Requirements

38. AFPF repeats all of the above paragraphs.

39. 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).

40. 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).

41. The "receipt" of a FOIA request triggers an agency's obligation to respond and therefore starts the countdown for all relevant statutory deadlines. 5 U.S.C. § 552(a)(6)(A)(i); *see, e.g., McGehee v. Cent. Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983) ("[W]hen an agency receives a FOIA request . . . it must take responsibility for processing the request.").

42. AFPF's FOIA requests seek access to agency records maintained by Commerce and NIST. The requests reasonably describe the records sought and comply with the FOIA and

applicable agency regulations. They were properly submitted to, received by, and acknowledged by Defendants Commerce and NIST.

43. Neither Commerce nor NIST has issued a determination on or produced agency records responsive to AFPF's requests within the applicable statutory time limits.

44. Neither Commerce nor NIST has issued timely determinations on AFPF's fee-related requests.

45. Commerce has improperly refused to conduct a search for a portion of AFPF's request, even though neither the FOIA nor the agency's regulations require a requester to specifically identify any particular records custodians. *See generally* 15 C.F.R. § 4.4(c)(1)–(2).

46. AFPF is irreparably harmed by the violation of the FOIA by Commerce and NIST and their unlawful withholding of responsive agency records to which AFPF is statutorily entitled.

47. AFPF will continue to be irreparably harmed until such time as Commerce and NIST are compelled to satisfy their obligations under the FOIA.

48. 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 Commerce and NIST to process AFPF's FOIA requests and issue determinations upon the issuance of the Order;
- b. Order Commerce and NIST promptly to produce all non-exempt agency records responsive to AFPF's FOIA requests;
- c. Maintain jurisdiction over this case until Commerce and NIST comply with the Order and, if applicable, adequately justify their treatment of all relevant 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: January 10, 2024

Respectfully submitted,

/s/ Ryan P. Mulvey

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