



September 30, 2021

Via Email & OSD/JS PAL - dcsa.quantico.dcsa-hq.mbx.foia@mail.mil

Freedom of Information Division
1155 Defense Pentagon
Washington, DC 20301-1155

Freedom of Information Act Request: Command Integrity.

Dear FOIA Officer:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

On September 28, 2021, the Chairman of the Joint Chiefs of Staff, Gen. Mark Milley, testified before the Senate Armed Services Committee regarding the Biden Administration’s failed retreat from Afghanistan and his own apparently unauthorized communications with the Chinese Communist Party’s “People’s Liberation Army.” He testified “I do interviews on the record, off the record, and I do background interviews—and I do all that with print media, television media, books, documentaries, all kinds of things.”¹ He further testified to conducting off the record interviews “to make sure that we are explaining ourselves and to make sure that these authors have correct information.”² He further testified “Let’s take Woodward for example, probably 200 people interviewed. And they approached my guys to say, ‘Are these facts true?’ ‘This is what we heard.’ Then we can clarify and mitigate any incorrect information.”³

On September 29, 2021, Axios reported “In a classified briefing with senators on Tuesday, Joint Chiefs Chairman Mark Milley directly blamed the State Department for a botched evacuation from Afghanistan, saying officials ‘waited too long’ to order

¹ Sen. Committee on Armed Services, Hearing, To Receive Testimony on the Conclusion of Military Operations in Afghanistan and Plans for Future Counterterrorism Operations, September 28, 2021, available at <https://www.armed-services.senate.gov/hearings/to-receive-testimony-on-the-conclusion-of-military-operations-in-afghanistan-and-plans-for-future-counterterrorism-operations>. Questioning by Sen. Josh Hawley, at 5:57:40-5:59:00.

² *Id.*

³ *Id.*

the operation out of Kabul's airport, two sources with direct knowledge of the briefing told Axios.”⁴ Axios did not identify these sources. However, given the history of things during Gen. Milley’s tenure as Chairman of the Joint Chiefs,⁵ there is ample reason to believe Gen. Milley, or persons acting on his instructions, may have leaked information to Axios.

Also on September 29, 2021, Gen. Milley testified regarding a “notebook” and the allegations by Bob Woodward that he labeled the Epoch Times, founded by opponents of the Chinese Communist Party, and the media outlet Newsmax, “domestic terrorist” organizations.⁶

AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, to educate the public. At the core of this mission is keeping government officials accountable for their duty to faithfully execute the laws and protect and defend the Constitution and laws of the United States and to educate the public regarding the activities of its leaders. Therefore, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, AFL hereby requests the following records from the U.S. Department of Defense (DOD) within twenty business days. As discussed below, AFL should be granted expedited processing of its Requests.

I. Custodians

Relevant custodians include:

1. Gen. Mark A. Milley
2. Gen. Mark A. Milley’s Chief(s) of Staff
3. The Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff

⁴ Jonathan Swan and Zachary Basu, *Scoop: Milley’s blunt private blame for the State Department*, AXIOS (Sept. 29, 2021) <https://www.axios.com/milley-state-department-afghanistan-evacuation-ebb00a6b-a59d-42b9-b5e0-348b0227b89b.html>

⁵ Gen. Milley was appointed Chairman of the Joint Chiefs on October 1, 2019. Accordingly, he has material responsibility for the strategic failure in Afghanistan, for multiple and apparently unauthorized communications with Chinese Communist military leaders regarding U.S. strategic activities without the knowledge or approval of the President of the United States, for the Department of Defense’s ongoing politicization and its partisan effort to purge conservatives and Republicans from the military on the pretext of combatting “domestic extremism”, for the spread of the pernicious CRT doctrine and the concomitant decay of U.S. warfighting capabilities, and for imprisoning Lt. Col. Stuart Scheller because he spoke out against the Pentagon’s practice of protecting general flag officers from criticism and consequences while holding combat soldiers strictly accountable for, *inter alia*, alleged breaches of “policy” during firefights with terrorists.

⁶ See Andy Ngo, “Gen. Mark Milley is asked by Congressman @Jim_Banks if he referred to Epoch Times, a paper founded by Chinese critics of the Chinese Communist Party, & Newsmax ‘domestic terrorist’ organizations” TWITTER (Sept. 29, 2021, 1:25pm) <https://twitter.com/TPostMillennial/status/1443636059062120454>.

4. Lloyd J. Austin III
5. Lloyd J. Austin III's Chief of Staff
6. The OSD
7. John F. Kirby
8. The Office of the Assistant Secretary of Defense for Public Affairs

II. Requested Records

- A) All records sufficient to identify each reporter, author, documentarian, network representative, or member of the media (including but not limited to "print media, television media, books, documentaries") with whom Gen Milley had (a) an "on the record" interview, (b) an "off the record" interview, and/or (c) "background" interview. The timeframe for this request is September 30, 2019, to the date this request is processed.
- B) All records regarding any interview, whether "on the record", "off the record" or on "background" given by Gen. Milley. The time frame for this request is November 4, 2020, to the date this request is processed.
- C) All records of or regarding communications between Gen. Milley and (a) Bob Woodward, (b) Carol Leonning, (c) Philip Rucker, and/or (d) Michael Bender. The timeframe for this request is June 1, 2020, to the date this request is processed.
- D) All records, including but not limited to tapes, recordings, transcripts, and notes (including but not limited to stenographers' notes) of any interviews or conversations, whether on the record or off the record, conducted by Gen. Milley with any person identified in Request C and/or any reporter, author, documentarian, network representative, or member of the media. The timeframe for this request is June 1, 2020, to the date this request is processed.
- E) All records of or regarding communications between Gen. Milley and (a) Nancy Pelosi, (b) officials or representatives of the Communist Chinese Party, or (c) officers or representatives of the Communist Chinese "Peoples Liberation Army". The timeframe for this request is November 3, 2020, to the date this request is processed.
- F) All records, including but not limited to tapes, recordings, transcripts, and notes (including but not limited to stenographer(s) notes) of any interviews or conversations, whether on the record or off the record, conducted by Gen. Milley with any person identified in Request E. The timeframe for this request is November 3, 2020, to the date this request is processed.
- G) All records of or regarding communications between Gen. Milley and/or OSD with the "inter-agency", the Executive Office of the President, and/or the

Department of State concerning “neo”, as both terms are used by Gen. Milley beginning at approximately 02:54 in the unofficial transcript of his September 28, 2021, testimony at <https://www.rev.com/blog/transcripts/military-leaders-gen-milley-testify-on-afghanistan-exit-full-hearing-transcript>.

- H) A copy of all notes taken by Gen. Milley with respect to the civil disobedience of January 6, 2021, including but not limited to the “notebook” referenced in his testimony of September 29, 2021, in response to questions from Rep. Jim Banks and/or in the book “Peril” by Bob Woodward.
- I) All records of communications regarding or referencing any on the record, off the record, or background interview by Gen. Milley between any “custodian” identified in Section I *supra* and any person with an email address containing eop.gov. The timeframe for this request is January 20, 2021, to the date this request is processed.

III. Redactions

FOIA requires the Department to disclose records freely and promptly. 5 U.S.C. §§ 552(a)(3)(A), 552(a)(6)(A); *see also* *FBI v. Abramson*, 456 U.S. 615, 621 (1982); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also* *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989); *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Jud. Watch, Inc. v. U.S. Dep't of Def.*, 847 F.3d 735, 738 (D.C. Cir. 2017); *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 27, 28 (D.C. Cir. 1998). DOD must liberally construe requests and bears the burden of proving it has made a good faith effort to search for requested records using methods “which can be reasonably expected to produce the information requested.” *LaCedra v. EOUSA*, 317 F.3d 345, 347 - 48 (D.C. Cir. 2003); *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). At all times, FOIA must be construed to carry out Congress’s open government mandate according to the ordinary public meaning of its terms at the time of its enactment. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

Redactions are disfavored as the FOIA’s exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then Department of State must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; *see also* *Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, Department of State should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12, AFL requests a waiver of all search and duplication fees.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest. This has previously been recognized by the Department of Defense—in the form of granted of fee waivers—as well the Departments of Education, Energy, Interior, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.” The vigorous participation of military leadership in every-day partisan political discourse strongly deviates from historical precedent. Given the challenges facing military and the United States, it is in the public interest to know to whom in the media the Chairman of the Joint Chiefs is speaking, and whether he or his staff is leaking classified information in an effort to whitewash their own responsibility the strategic defeat in Afghanistan, and for wasting thousands of precious American lives and trillions of American taxpayer dollars.

V. Expedited Processing

As required by 32 C.F.R. § 286.8(e)(3), AFL certifies the following statement in support of expedited processing is true and correct.

Given the critical, extensive, and ongoing public debate regarding the causes and consequences of strategic failure in Afghanistan, the propriety of U.S. military officers assuming command authority to communicate with our chief adversary absent Presidential knowledge and approval, and the apparent evidence of politicization of the armed forces, AFL has a compelling need for expedited processing under 5 U.S.C. § 552(a)(6)(B) and 32 C.F.R. § 286.6(e). Being closed off from the opportunity to understand and debate the activities and decisions made by DOD leaders with respect to Afghanistan, China, and the importance of longstanding DOD Directives and requirements limiting both media entanglements and partisan politics is itself a harm in an open democracy. *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 299–300 (D.D.C. 2017) (citation omitted). For example, the Afghanistan disaster continues to unfold. As Secretary Austin testified, the President lied: Americans have been left behind in Afghanistan.⁷ China is the United States' most serious international adversary. Disclosing relevant records months or even years from now will be of academic interest only for the damage from government opacity will have been done. See *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

VI. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 600 14th Street NW, 5th Floor, Washington, D.C. 20005.

VII. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at

⁷ Specifically:

Sec. Austin: (02:51:06) Senator, thanks for your help in continuing to help get American citizens and Afghans who have helped us out of the country, but as you've seen, we've continued to facilitate-

Senator Hawley: (02:51:16) Well actually I didn't ask you a question, but since you seem to want to address the issue, so since you do, isn't it true that you left Americans behind on August 31st?

Sec. Austin: (02:51:27) There are Americans, there were Americans that were still in Afghanistan and still are.

<https://www.rev.com/blog/transcripts/military-leaders-gen-milley-testify-on-afghanistan-exit-full-hearing-transcript>

FOIA@aflegal.org. Finally, if AFL's request for a fee waiver and for expedited processing are not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation