



April 6, 2022

Via Email

Elizabeth A. Wood, FOIA Office
Civil Division
U.S. Department of Justice
1100 L Street, NW, Room 8314
Washington, DC 20530-0001
Civil.routing.FOIA@usdoj.gov

Office of the Solicitor General
Attention: FOIA Coordinator
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
OSGFOIA@usdoj.gov

Via FOIA STAR

Mr. Douglas Hibbard, Chief, Initial Request Staff
Office of Information Policy
U.S. Department of Justice
6th Floor, 441 G Street, N.W.
Washington, D.C. 20530

Freedom of Information Act Request: Emails to or from dcole@aclu.org

Dear Mr. Hibbard, Ms. Wood, and FOIA Coordinator:

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.

I. Background

In recent weeks, significant public attention has focused on the activities of individuals married to judges. For instance, there has been intense focus on the private activities and statements of Ginni Thomas, who is married to Associate Justice Clarence Thomas. Certain commentators have claimed Ms. Thomas’ private activities and views require Justice Thomas to recuse himself from certain proceedings or resign.¹

¹ Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022), <https://tinyurl.com/2xath48s>; Press Release, Sen. Padilla, *Padilla Demands Justice Clarence Thomas Explain Failure to Recuse Himself from Key Supreme Court Decisions and Seeks*

But there has not been the same public focus on the activities of other individuals who are married to judges. American Civil Liberties Union Legal Director David Cole, for instance, is married to Judge Cornelia Pillard of the U.S. Court of Appeals for the D.C. Circuit. At all times relevant, Mr. Cole displayed an intense, irrational animus toward former President Trump, calling for and facilitating “resistance” to his Administration.² However, Judge Pillard routinely heard cases in which former President Trump and his Administration were defendants.

AFL therefore requests the following records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

II. Requested Records

A. All records of communications to or from the email dcole@aclu.org. The time frame for this item is January 20, 2017, through the date of processing. This item does not include pleadings.

B. All records relating to the processing of this request.

III. Processing Requirements

The Department must comply with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines.³ This means, among other things, the following.

- The Department may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.

Future Recusal (Mar. 29, 2022), <https://www.padilla.senate.gov/newsroom/press-releases/padilla-demands-justice-clarence-thomas-explain-failure-to-recuse-himself-from-key-supreme-court-decisions-and-seeks-future-recusal%E2%99%A2%E2%99%A3/>; Amy Wang, *Ocasio-Cortez calls on Supreme Court Justice Clarence Thomas to Resign*, WASH. POST (Mar. 29, 2022), <https://tinyurl.com/yhp7dh6v>; Eric Lutz, *Calls for Recusals, Resignations, and Even Impeachment: Democrats Escalate Ethics Campaign Around Clarence Thomas*, VANITY FAIR (Mar. 30, 2022), <https://tinyurl.com/42x5b8kn>.

²See David Cole, *Can Civil Rights and Civil Liberties Survive a Second Trump Term?*, WASH. MONTHLY (Apr. 5, 2020), <https://washingtonmonthly.com/2020/04/05/can-civil-rights-and-civil-liberties-survive-a-second-trump-term/>; Ruth Conniff, *‘En Garde!’ ACLU’s David Cole Talks about the Resistance to Donald Trump*, PROGRESSIVE MAGAZINE (May 23, 2017), <https://progressive.org/magazine/david-cole-resistance-conniff/>. Cole even opposed measures to stop anti-Semitic violence, simply because President Trump endorsed them. See Kevin Freking, *Trump Signs Order Targeting College Anti-Semitism*, 4 NEW YORK (Dec. 11, 2019), <https://www.nbcnewyork.com/news/national-international/trump-signs-order-college-anti-semitism/2240220/>.

³ U.S. Dep’t Just. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

- Information that might technically fall within an exemption should not be withheld from AFL unless the Department can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail.
- If the Department determines that it cannot make full disclosure of a requested record, then the FOIA requires that it consider whether partial disclosure of information is possible and take reasonable steps necessary to segregate and release nonexempt information.
- The Department must properly apply the foreseeable harm standard. That means it must confirm and demonstrate to AFL that it has considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.
- Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then the Department must disclose the entire record, as a single record cannot be split into responsive and non-responsive bits. 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 locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please give full effect to all applicable authorities and broadly construe our Item and your obligations to provide responsive records.
- 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 records to official systems within a certain time. AFL has a right to records 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 available tools to conduct a complete and efficient search for potentially responsive records. Many agencies have adopted the National Archives and Records Administration ("NARA") Capstone program or similar policies. These provide options for searching emails and other electronic records

in a manner 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, then 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 before our Items are processed. If potentially responsive records are subject to potential deletion, including on a scheduled basis, please prevent deletion by instituting a litigation hold or other appropriate measures.

IV. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 28 CFR § 16.10, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL has 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 with respect to the important topic of judicial and litigation integrity 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.

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."

V. 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, please provide responsive 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, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

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

Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation



April 6, 2022

Via FOIA Portal

U.S. Department of Homeland Security
Privacy Office, Mail Stop 0655
2707 Martin Luther King Jr. AVE SE
Washington, D.C. 20528-065

Freedom of Information Act Request: Emails to or from dcole@aclu.org

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.

AFL therefore requests the following records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

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A. All records of communications to or from the email dcole@aclu.org. The time frame for this item is January 20, 2017, through the date of processing. This item does not include pleadings.

B. All records relating to the processing of this request.

II. Processing Requirements

The Department must comply with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines.¹ This means, among other things, the following.

¹ U.S. Dep’t Just. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

- The Department may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.
- Information that might technically fall within an exemption should not be withheld from AFL unless the Department can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail.
- If the Department determines that it cannot make full disclosure of a requested record, then the FOIA requires that it consider whether partial disclosure of information is possible and take reasonable steps necessary to segregate and release nonexempt information.
- The Department must properly apply the foreseeable harm standard. That means it must confirm and demonstrate to AFL that it has considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.
- Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then the Department must disclose the entire record, as a single record cannot be split into responsive and non-responsive bits. 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 locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please give full effect to all applicable authorities and broadly construe our Item and your obligations to provide responsive records.
- 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 records to official systems within a certain time. AFL has a right to records 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 available tools to conduct a complete and efficient search for potentially responsive records. Many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program or similar policies. These provide options for searching emails and other electronic records in a manner 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.
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IV. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 6 CFR § 5.11, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL has 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 with respect to the important topic of judicial and litigation integrity 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.

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.”

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

Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation



April 6, 2022

Via FOIA Portal

Mr. Brandon Gaylord
Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201

Freedom of Information Act Request: Emails to or from dcole@aclu.org

Dear Mr. Gaylord:

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.

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Per 5 U.S.C. § 552(a)(4)(A)(iii) and 45 CFR § 5.54, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL has 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 with respect to the important topic of judicial and litigation integrity 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.

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Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation



April 6, 2022

Via FOIA Portal

Ms. Dionne Hardy
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, D.C. 20503

Freedom of Information Act Request: Emails to or from dcole@aclu.org

Dear Ms. Hardy:

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.

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B. All records relating to the processing of this request.

II. Processing Requirements

The Office of Management and Budget (OMB) must comply with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines.¹ This means, among other things, the following.

¹ U.S. Dep’t Just. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

- OMB may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.
- Information that might technically fall within an exemption should not be withheld from AFL unless OMB can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail.
- If OMB determines that it cannot make full disclosure of a requested record, then the FOIA requires that it consider whether partial disclosure of information is possible and take reasonable steps necessary to segregate and release nonexempt information.
- OMB must properly apply the foreseeable harm standard. That means it must confirm and demonstrate to AFL that it has considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.
- Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then OMB must disclose the entire record, as a single record cannot be split into responsive and non-responsive bits. 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.
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III. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 5 CFR § 1303.94, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL has 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 with respect to the important topic of judicial and litigation integrity 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.

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