



July 15, 2021

VIA ELECTRONIC MAIL -

NASA's Headquarters FOIA Public Liaison
300 E Street SW, Room 5L19
Washington, DC 20546

Freedom of Information Act Fee Waiver Appeal

Dear Miss Fox:

This is an appeal under the Freedom of Information Act.

On June 23, 2021, America First Legal Foundation (“AFL”) requested documents from NASA under the Freedom of Information Act (“FOIA”) and requested a fee waiver. NASA assigned this request FOIA Case No. 21-HQ-F-00558 (hereinafter “Request”). On July 9, 2021, we received a denial of our request for a fee waiver in a letter signed by Mireya P. Nyirenda (hereinafter “Denial”). We now appeal the denial of our fee waiver.

NASA denied our request for waiver of search, review, and duplication fees on the basis that AFL is not a qualified public education and news media requester, and that disclosure is not in the public interest. We appeal this denial and the determinations that supported it.

1. Representative of the News Media

AFL filed a fee waiver request on the basis that AFL is a representative of the news media, and thus entitled to a waiver of search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii). *See Request.* NASA denied the waiver without addressing our contention that AFL is a member of the news media. *See Denial.* FOIA’s terms governing fee waivers require NASA to grant fee waivers to any “representative of the news media.” *See Denial.*

In determining what requestors qualify as a representative of the news media, the federal courts and the text of the Freedom of Information Act state that a representative of the news media is “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.” *Cause of Action*, 799 F.3d at 1120. *See also*, 5 U.S.C. § 552(a)(4)(A)(ii); Denial.

This is precisely what AFL does. Upon receiving the relevant documents, AFL will post these documents on our website for anyone in the public to view, will use them to create unique editorial content, and further shape the debate in the media about NASA’s policies, particularly with respect the Biden Administration’s attempt to inject its insidious race-based “equity” agenda into a scientific research agency. Also, AFL will also use the documents to further public education and enhance the discussion of anti-racism and CRT-derived policy more broadly through both written material like press releases and opinion pieces, and potentially through other media appearances on news programs or other media outlets. Consequently, NASA’s denial of our fee waiver request lacks competent legal foundation. *See generally* U.S. Dep’t of Justice, *Guide to the Freedom of Information Act*, “Fees and Fee Waivers” (Sept. 16, 2020) available at <https://www.justice.gov/oip/page/file/1206606/download>.

Strangely, NASA listed another reason for denying the fee waiver request, writing, “[o]ur research revealed that your company is a ‘right-of-center nonprofit organization;’ therefore, we have categorized your request as ‘All Other.’” *See* Denial. Apparently, NASA believes that the perceived political beliefs of requestors factors into whether it provides fee waivers—which is an interesting proposition under the First Amendment to the United States Constitution and the FOIA, and wholly inconsistent with controlling case law in any event. *See Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015) (Garland, C. J.). We encourage NASA to reconsider its apparent practice of screening FOIA requestors on the basis of their political ideology. If NASA does not reconsider, a federal court will resolve the matter for it.

Thus, according to plain statutory text and controlling authorities, AFL is a representative of the news media, and is entitled to a waiver of fees under FOIA. We respectfully ask that NASA correct its mistaken determination that we are an “all other” requester and reclassify AFL as a news media requester.

2. Public Interest

AFL's second claim for a fee waiver was based on disclosure being in the public interest. NASA responded, “[y]ou have not provided enough information describing how the information you are seeking will contribute to public understanding, or how it will it be [sic] of significant interest to the public at-large, rather than a narrow segment of the public.” *See* Denial.

Disclosure of the information is likely to be meaningfully informative because the public is largely in the dark about NASA’s policies regarding the implementation of the Biden Administration’s “equity” agenda, anti-racism trainings, and Critical Race Theory derived programs. Accordingly, AFL has sought emails, email attachments,

transcripts of meetings and phone conversations, and agency notes (among other things) that relate to the implementation of CRT type curriculum and training. This information is not currently public, and thus will meaningfully inform the public about these decisions upon publication.

Further, the public has great interest in knowing how taxpayer funds are being used to promote anti-racism and CRT trainings. Indeed, a recent Economist/YouGov poll showed that 58% of Americans have an unfavorable view of CRT, and only 38% viewed it favorably. *See* The Economist/YouGov, *June 13 - 15, 2021 - 1500 U.S. Adult Citizens*, <https://docs.cdn.yougov.com/loyiu6tamw/econTabReport.pdf>. Clearly, while a sizable majority of the public disapproves, there are deep divisions on this subject, and intense public interest on both sides. However, the standard applied by the DC circuit on this factor is far lower, stating “[t]he statute requires only that the disclosure be likely to contribute significantly to public understanding ... [it does not] require a requester to show an ability to convey the information to a broad segment of the public.” *Cause of Action*, 799 F.3d at 1116. (internal quotations omitted). As an example, the court explained that academic papers which interest relatively few individual readers can still contribute significantly to public understanding, despite not having a broad or general audience. *Id.*

Next, the standards require that disclosure of the information not be “primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). As a nonprofit organization that will post any documents obtained for the public at large to view, without cost, we have no commercial interest in these documents. Thus, it is impossible for disclosure to be primarily in our commercial interest.

We thus respectfully request that NASA reconsider our request for a waiver, classify AFL as a news media requester entitled to fee waiver, and this individual request as a public interest request entitled to a fee waiver.

Thank you for your consideration of this appeal.

Sincerely,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation