

Exhibit 3



August 31, 2023

VIA ELECTRONIC MAIL

Department of Justice
Office of Legal Counsel
E-mail: usdoj-officeoflegalcounsel@usdoj.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization dedicated to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.¹ AFPF is investigating the process by which the Department of Justice’s Office of Legal Counsel (“OLC”) accedes formal legal opinions to the National Archives and Records Administration (“NARA”). Under what AFPF understands to be current records disposition authorities, OLC is required to transfer formal legal opinions to NARA’s custody and control in five-year blocks when the most recent record in each block is thirty years old.²

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, AFPF hereby requests access to the following:

1. All current records authorities (*e.g.*, records retention schedules and related materials) governing the disposition of OLC’s formal legal opinions.
2. All records that reflect the transfer, deposit, and/or accession of OLC’s formal legal opinions to NARA’s custody and control, including all signed SF 258s and related correspondence.
3. All written requests by OLC for the continued retention of formal legal opinions past the specified period on any relevant records disposition schedule, as provided by 36 C.F.R. § 1235.14(b).
4. All written responses (*i.e.*, approval or disapproval) by NARA to any OLC request for continued retention of formal legal opinions, as contemplated by 36 C.F.R. § 1235.16(a)–(b).

Request for a Public-Interest Fee Waiver

AFPF requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge 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.”³

¹ See AMS. FOR PROSPERITY FOUND., www.americansforprosperityfoundation.org (last visited August 31, 2023).

² See SF 115 Request for Records Disposition Authority No. N1-060-10-31 (July 26, 2010), *available at* <https://bit.ly/3EgJLs5>.

³ 5 U.S.C. § 552(a)(4)(A)(iii); see 36 C.F.R. § 1250.56; see generally *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

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In this case, the requested records unquestionably shed light on the “operations or activities of the government” because they relate to how OLC and NARA preserve and maintain OLC’s formal legal opinions. These opinions are vitally important insofar as they function as a sort of internal “working law” of the Executive Branch. In many instances, formal legal opinions are treated as authoritative and binding interpretations of law. Yet, despite their importance, OLC opinions are not consistently available to the public. OLC itself does not publish all formal opinions, but rather selectively discloses opinions online. It is furthermore unclear whether *all* OLC opinions are being properly accessioned to NARA consistent with relevant records disposition authorities or, if not, how frequently and on what grounds OLC is seeking to retain custody and control of older opinions. There is scant information publicly available about this issue, and most of the records sought by AFPP neither proactively disclosed by NARA or OLC nor are they otherwise published by other requesters.

AFPP intends to educate the public with the results of this request. It has the intent and ability to make those results available to a reasonably broad public audience through various media. AFPP’s staff has significant experience and relevant expertise; these professionals will analyze responsive records, if any, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public. Finally, AFPP is a non-profit organization, as defined under Section 501(c)(3) of the Internal Revenue Code, and it therefore has no commercial interest in making this request.

Request to Be Classified as a Representative of the News Media

In addition to a public interest fee waiver, AFPP requests that it be classified as a “representative of the news media” for fee purposes.⁴ As the D.C. Circuit has explained, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.⁵ AFPP satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although not required, AFPP gathers the news it publishes from a variety of sources. It does not merely make raw information available to the public, but distributes distinct work product, including press releases, blog posts, reports, and other informative materials.⁶ These

⁴ 5 U.S.C. § 552(a)(4)(A)(ii); *see* 28 C.F.R. § 16.10(b)(6).

⁵ *See Cause of Action*, 799 F.3d at 1121.

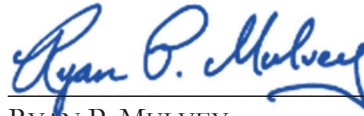
⁶ *See, e.g., AFPP Obtains Over 400 Pages of Secretary Mayorkas Using Personal Email for Government Business*, AMS. FOR PROSPERITY (May 19, 2023), <https://bit.ly/3DdcqgZ>; *AFP Foundation investigates DHS secretary’s use of private email while creating Disinformation Governance Board*, AMS. FOR PROSPERITY (Jan. 12, 2023), <https://bit.ly/3HTpOJe>; *New emails undermine official reason for cancelling key oil and gas lease*, AMS. FOR PROSPERITY (Sept. 8, 2022), <https://bit.ly/3te6boa>; *AFP Foundation launches FOIA investigation into Disinformation Governance Board*, AMS. FOR PROSPERITY (May 9, 2022), <https://bit.ly/3GRBgWn>; *More evidence the VA is improperly delaying or denying community care to eligible veterans*, AMS. FOR PROSPERITY (Jan. 28, 2022), <https://bit.ly/37mDnlX>; *AFP Foundation gets CMS to release state-level Medicaid improper payment data after years of stonewalling*, AMS. FOR PROSPERITY (Jan. 20, 2022), <https://bit.ly/34sz7A2>; AMS. FOR PROSPERITY FOUND., PERMISSION TO CARE: HOW CERTIFICATE OF NEED LAWS HARM PATIENTS AND STIFLE HEALTHCARE INNOVATION (Oct. 2021), *available at* <https://bit.ly/3Zrjgg7>; *Records confirm VA’s use of inaccurate wait time numbers*, AMS. FOR PROSPERITY (Oct. 1, 2021), <https://bit.ly/3a9KGeL>; *Government documents reveal Export-Import Bank fails to protect taxpayers . . . again*, AMS. FOR PROSPERITY (Oct. 30, 2020), <https://bit.ly/3hD09Jn>; *Kansas Shut Down Businesses That Were Willing and Able to Comply with Safety Guidelines*, AMS. FOR PROSPERITY FOUND. (July 21, 2020), <https://bit.ly/3vbj7eC>; AMS. FOR PROSPERITY FOUND., ET AL., GONE IN AN INSTANT: HOW INSTANT MESSAGING THREATENS THE FREEDOM OF INFORMATION ACT (Mar. 2020), AMS. FOR PROSPERITY FOUND., *available at* <https://bit.ly/2zQOEKI>.

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distinct works are distributed to the public through various online outlets, such as websites, Twitter, and Facebook. The statutory definition of a “representative of the news media” contemplates that organizations such as AFPF, which electronically disseminate information and publications via “alternative media[.]” shall be considered to be news-media entities.”⁷

Record Production and Contact Information

To facilitate document review, please provide non-exempt responsive records in an electronic format in lieu of a paper production. If a portion of responsive records can be produced more readily, AFPF requests that those records be produced first with any remaining records released on a rolling basis as circumstances permit. If you have any questions about this request, please contact me at rmulvey@afphq.org. Thank you for your attention to this matter.



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⁷ 5 U.S.C. § 552(a)(4)(A)(ii).