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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a nonprofit legal organization defending the rights and interests of Americans.

IRLI is a supporting organization of the Federation for American Immigration Reform (FAIR).

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May 1, 2024

Joseph R. Schaaf
Chief Counsel
Administrative Law Unit
Executive Office for Immigration Review
United States Department of Justice
5107 Leesburg Pike Suite 1903
Falls Church, VA 22041

Freedom of Information Act (FOIA) Request

VIA E-MAIL:

Dear Mr. Schaaf or other FOIA Officer:

I write representing the Federation for American Immigration Reform (FAIR), a national, nonprofit public interest, membership organization of concerned Americans who share a common belief that our nation's immigration policies must be reformed to serve the national interest.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, FAIR hereby requests that the Executive Office for Immigration Review ("EOIR") produce the following records:

1) All communications, including emails, from or to EOIR Director David Neal or Chief Immigration Judge Sheila McNulty, from and including October 1, 2023 through and including May 1, 2024, regarding requiring immigration judges to obtain prior approval before speaking with Congress, the news media or the public

For fee purposes, FAIR requests that search, review, and production fees for this request be waived because of FAIR's public interest purpose and non-profit status. FAIR is entitled to a complete waiver of fees because of its public-interest purpose. FOIA's fee waiver provision is contained at 5 U.S.C. § 552(a)(4)(A)(ii)(II). This states as follows:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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.

The Department of Justice, of which EOIR is a component, will consider certain factors when deciding whether the disclosure of the requested information is in the public interest for purposes of a waiver (or reduction) of fees. See 28 C.F.R. § 16.10(k)(2), which provides in pertinent part:

(2) A component must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that disclosure of the requested 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. In deciding whether this standard is satisfied the component must consider the factors described in paragraphs (k)(2)(i) through (iii) of this section:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. Components will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester.

FAIR easily satisfies each of the factors in the regulation. First, the information responsive to our request would clearly “shed light on the operations or activities of the government.”

Second, the disclosure will “contribute significantly” to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to FAIR’s individual understanding, as FAIR intends to use its analytical and editorial skills to publish and disseminate to the general public the records obtained pursuant to this FOIA request through news articles, press releases, studies, and reports. Notably, FAIR has a special expertise in the subject matter of this FOIA request it has disseminated information to the public about immigration-related current events through the various media forms discussed below.

The law does not require a FOIA requester who qualifies for a fee waiver to spell out to the government in exacting detail how the disclosed information will significantly contribute to the public’s understanding of the government’s operations. Instead, a requester needs to merely “pinpoint the type of government activity he is investigating”¹ and describe with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities. Also, agencies should administer the fee provision in “an objective manner and should not rely on their own, subjective view as to the value of the information.”²

Finally, the disclosure would not be primarily in the commercial interest of FAIR. FAIR is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code and does not seek this information for any commercial benefit. FAIR is committed to protecting the public’s right to be aware of the immigration-related activities of government agencies and to ensuring the lawful and appropriate use of government funds by those agencies.

As multiple United States Courts of Appeals have noted, “Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters.’”³ Of the information requested, there is no possibility, let alone plans, of pursuing profit-making opportunities. The information will be used to further the knowledge of interests of the general public. FAIR intends of disseminating its analysis of the requested information through its regular channels, discussed below. FAIR thus satisfies this element.

FAIR is entitled to a complete waiver of fees because FAIR undeniably qualifies as a “representative of the news media, or news media requester” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). This provision defines “representative[s] of the news media” broadly to include organizations like FAIR that disseminate news through electronic communications, including “publishers of periodicals ... who make their products available for purchase by or

¹ *Jarvik v. CIA*, 495 F. Supp. 2d 67, 73 (D.D.C. 2007).

² 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

³ *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1311 (D.C. Cir. 2003) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

subscription by or free distribution to the general public.” The statutory definition unequivocally requires that organizations which electronically disseminate information and publications via “alternative media shall be considered to be news-media entities.”

What is more, in *National Security Archive v. U.S. Dep’t of Defense*,⁴ the United States Court of Appeals for the District of Columbia Circuit noted FOIA’s legislative history demonstrates that “it is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected... In fact, any person or organization which regularly publishes or disseminates information to the public...should qualify for waivers as a representative of the news media.”⁵

For instance:

- FAIR maintains a frequently visited website at <http://www.fairus.org/> that contains numerous news articles, action alerts, press releases, studies, and reports authored by FAIR staff members;
- FAIR publishes a newsletter called the “FAIR Immigration Report,” which is the nation’s most widely read U.S. immigration reform newsletter, packed with immigration reform facts and news regarding the activities of federal and state courts, legislatures, and executive officials;
- FAIR disseminates information via YouTube, Facebook, X/Twitter, Instagram and Rumble; FAIR’s YouTube videos have more than 16 million views to date, FAIR’s Facebook page currently registers more than 1.6 million likes, and FAIR’s X/Twitter feed has more than 140,000 follower;
- FAIR staff members regularly give interviews and disseminate information on MSNBC, CNN, ABC, NBC, CBS, FOX, C-SPAN, among other TV stations, and hundreds of radio stations;
- FAIR staff members give interviews for news articles and author news pieces that appear in the *New York Times*, *USA Today*, *Washington Post*, and hundreds of other newspapers, magazines, and websites;
- FAIR staff members have testified before congressional and state legislative committees as experts on immigration-related issues.

Moreover, other agencies of the federal government have granted FAIR “representative of thenews media” category status. *See, e.g.*, FOIA Request No. 12-00455-F (U.S. Immigration and Customs Enforcement), news media status granted on Oct. 19, 2015; FOIA Request 15-FI-HQ-01975 (Department of Housing and Urban Development), news media status granted on October 0, 2015; FOIA Request COW2016000114 (U.S. Citizenship and Immigration Services),

⁴ 880 F.2d 1381 (D.C. Cir. 1989).

⁵ *Id.* at 1386 (citations omitted).

news media status granted on Feb. 10, 2016; FOIA Request 16-00374-F (Drug Enforcement Administration), news media status granted on Mar. 4, 2016. As the United States Court of Appeals for the District of Columbia Circuit noted in *Oglesby v. Dept. of the Army*,⁶ agencies should grant news media requestor status other agencies have done so because of “the need for uniformity among the agencies in their application of FOIA.”⁷

FAIR will use its staff’s multi-decades of combined experience in policy and legal analysis, investigative reporting, government oversight, and public interest litigation to turn the documents request in this FOIA request into distinct works that FAIR will disseminate through the aforementioned media outlets.

Finally, for the reasons set forth above, it is self-evident that the requested information constitutes “news” for purposes of FOIA.

If you have questions about this request, please contact me by e-mail at djaroslav@irli.org or by phone at 202-792-1081.

Thank you for your attention to this matter.

Sincerely,

David L. Jaroslav
Investigations Counsel



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⁶ 920 F.2d 57 (D.C. Cir. 1990).

⁷ *Id.* at 66.