



June 23, 2021

VIA ELECTRONIC MAIL – [hq-foia@nasa.gov](mailto:hq-foia@nasa.gov)

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

**Freedom of Information Act Request: Racial Equity in the NASA Grant Process.**

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’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.

**I. Introduction**

On June 15, 2021, pursuant to Executive Order 13985 (the Executive Order), the National Aeronautics and Space Administration (NASA) published a Request for Information in the Federal Register entitled “Request for Information on Advancing Racial Equity and Support for Underserved Communities in NASA Programs, Contracts and Grants Process.”<sup>1</sup> In this document, the agency defines equity as “the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.”<sup>2</sup>

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<sup>1</sup> 86 FR 31735.

<sup>2</sup> *Id.* at 31735.

This definition comes from the executive order itself, one that is steeped in the divisive rhetoric of Critical Race Theory. That order, like much of the Biden Administration's agenda, seeks to categorize people by race, then treat them differently on that basis. These theories have no place in the mission of an agency like NASA, devoted to space exploration and technical achievement. To that end, AFL is requesting records that relate to affirmative action programs, equity programs and initiatives, and anti-racism training programs at NASA.

## **II. Requested Records**

A. All records, including but not limited to electronic mail, texts, memoranda, and handwritten notes, of, regarding, referring, or relating to Executive Order 13985, including but not limited to the development and implementation of programs pursued in response to that order, from, to, or in the possession of each of the following NASA components:

1. Headquarters
2. Ames Research Center
3. Armstrong Flight Research Center
4. Glenn Research Center
5. Goddard Space Flight Center
6. Jet Propulsion Laboratory
7. Johnson Space Center
8. Kennedy Space Center
9. Langley Research Center
10. Marshall Space Flight Center
11. NASA Shared Services
12. Stennis Space Center

The timeframe for this request is January 20, 2021, to date the records request is processed.

B. All records and communications regarding, referring, or relating to the decision to implement anti-racism programs. This request includes any materials used in the referenced programs, to the extent applicable. The timeframe for this request is January 20, 2021, to date the records request is processed.

C. All communications regarding, referring, or relating to the Request for Information on Advancing Racial Equity and Support for Underserved Communities in NASA Programs, Contracts and Grants Process, published by

NASA on June 15, 2021, in the Federal Register.<sup>3</sup> The timeframe for this request is January 20, 2021, to date the records request is processed.

- D. All records or communications regarding, referring, or relating to policies in place that favor some job or program applicants over others based on social disadvantage, equity, race, minority status, or religion. The timeframe for this request is January 20, 2021, to date the records request is processed.
- E. All records or communications regarding, referring, or relating to policies in place that favor some grant recipients or contractors over others based on social disadvantage, equity, race, minority status, or religion. The timeframe for this request is January 20, 2021, to date the records request is processed.
- F. All communications between NASA staff and any staff working for the Executive Office of the President, relating to the implementation of EO 13985. The timeframe for this request is January 20, 2021, to date the records request is processed.

### III. Redactions and Search Terms

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 NASA 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, NASA should produce email attachments.

The search terms for our requests should include, but not be limited to, all the following:

1. "Executive Order 13985"
2. "EO 13985"
3. "E.O. 13985"
4. "Socially disadvantaged"
5. "Underserved communities"
6. "Anti-racist"
7. "Anti-racism"

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

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<sup>3</sup> *Id.*

- 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 14 C.F.R. §§ 1206.503-504, 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 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.

The text of the Freedom of Information Act (as amended) states 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.”<sup>4</sup> AFL meets these three criteria.

AFL gathers information of potential interest to the public through a variety of channels, including tips we receive from the public and FOIA requests that we submit to various government agencies. We then use our editorial skill to turn these documents and tips into a distinct work, partly through editorial commentary on them, including press releases.<sup>5</sup> We then distribute that information to the public through our social media presence, appearances on cable television shows, and publication on our website. We also ensure that documents we uncover will be written about and covered by other outlets. Together, these three factors establish

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<sup>4</sup> *Cause of Action v. FTC*, 799 F.3d 1120 (D.C. Cir. 2015). See also, 5 U.S.C. § 552(a)(4)(A)(ii).

<sup>5</sup> “[I]f an entity . . . issues substantive press releases concerning the documents it uncovers, or even if it simply provides editorial comments on those documents in interviews with newspapers, such a gloss on the underlying materials could satisfy this element of the definition.” *Cause of Action*, 799 F.3d at 1122.

that AFL is a news requester entitled to a waiver of fees under 5 U.S.C. § 552(a)(4)(A)(iii) and 14 C.F.R. § 1206.503-06.<sup>6</sup>

Second, waiver is proper because 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.”<sup>7</sup> Here, the request seeks information surrounding the implementation of specific policy documents and specific events, which are discrete and identifiable operations and activities of the federal government. These records would provide information that is informative about the way these policies were devised and implemented, information that is currently lacking. It would inform a broad segment of the public, as a Pew Research poll has shown that 52% of voters considered race a top priority.<sup>8</sup> In sum, the records requested would clearly enhance the public understanding of the situation in a significant way. Together, this analysis proves that AFL satisfies NASA’s own standards for classifying public interest requests.<sup>9</sup>

## 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, 600 14<sup>th</sup> Street NW, 5<sup>th</sup> Floor, Washington, D.C. 20005.

## 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

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<sup>6</sup> *Id.* at 1116 “[P]roof of the ability to disseminate the released information to a broad cross-section of the public is not required.”

<sup>7</sup> 14 C.F.R. § 1206.506(c).

<sup>8</sup> Pew Research Center, Important Issues in the 2020 Election, <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/> (last visited June 15, 2021).

<sup>9</sup> NASA’s regulations claim to bar fee waiver in cases where the disclosure is “primarily in the interest of the requester”, but this is unlawful, as per *Cause of Action*, 799 F.3d at 1118, “[T]he text requires only that the disclosure be ‘likely to contribute significantly to public understanding’; and “[I]t no longer matters whether the information will also (or even *primarily*) benefit the requester. Nor does it matter whether the requester made the request for the purpose of benefiting itself.” AFL trusts that NASA will comply with the appropriate precedent in this matter.

[info@aflegal.org](mailto:info@aflegal.org). Finally, if AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation