



March 20, 2023

**VIA EMAIL**

Department of Commerce  
Office of Privacy and Open Government  
14th and Constitution Avenue NW  
Washington, DC 20230  
E-mail: [efoia@doc.gov](mailto:efoia@doc.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.<sup>1</sup>

AFPF is investigating how the Department of Commerce (“Commerce”) is attempting to add onerous and counterproductive requirements to the CHIPS Act, including [restrictions specifically rejected](#) by Congress.<sup>2</sup> Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, AFPF hereby requests the following records:<sup>3</sup>

1. All internal or external communications (*e.g.*, email, text and instant messaging, calendar items), including attachments, that are responsive to any of the following keyword searches:
  - a. “CHIPS” AND “buybacks”
  - a. “CHIPS” AND (“NEPA” OR “National Environmental Policy Act”)
  - b. “CHIPS” AND (“profit” OR “upside sharing”)
  - c. “CHIPS” AND (“child care” OR “childcare”)
  - d. “CHIPS” AND “Buy America”
  - e. “CHIPS” AND ([“Biden” OR “POTUS” OR “President”] AND [“election” OR “2024”])
  - f. “CHIPS” AND (“ESG” OR “Environmental”)

The time period for this request is November 1, 2022 to the present.<sup>4</sup>

Please limit the search to the following records custodians and include any alias accounts maintained by those individuals:

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<sup>1</sup> See AMS. FOR PROSPERITY FOUND., [www.americansforprosperityfoundation.org](http://www.americansforprosperityfoundation.org) (last visited Mar. 15, 2023).

<sup>2</sup> Brian Riley, *Biden Administration Disregards Senate CHIPS Vote*, Nat’l Taxpayers Union, Mar. 7, 2023, <https://www.ntu.org/publications/detail/biden-administration-disregards-senate-chips-vote>.

<sup>3</sup> For purposes of this request, the term “record” means any medium of information storage in the form and format maintained by the agency at the time of the request. If any portion of a “record,” so defined, is responsive to AFPF’s request, then the agency should process and disclose the record in its entirety. If the agency considers a medium of information storage to contain multiple records that it believes can be segmented on the basis of the subject-matter or scope of AFPF’s request, AFPF explicitly seeks access to those separate “records” as well. They should not be treated as “non-responsive.”

<sup>4</sup> The term “present” should be construed as the date on which the Commerce Department begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

- A. Secretary Gina M. Raimondo
- B. Chief of Staff Mike Harney
- C. Deputy Chief of Staff Luis Jiminez
- D. Deputy Chief of Staff Calynn Jenkins
- E. White House Liaison Miguel L'Heureux
- F. Director of Public Affairs Brittany Caplin

For purposes of this request, please omit daily news clippings or other mass mailings unless there is commentary related to them. If any portion of a record, so defined, is found to be potentially responsive to AFPF's request, then Commerce should process the record in its entirety without any further segmentation or subject-matter scoping. If Commerce considers a certain medium of information storage to contain multiple "records" that it believes can be broken up for purposes of responding to AFPF's request, AFPF explicitly seeks access to those separate materials, too. No discrete portion of a record should be treated as "nonresponsive." This extends to email chains—AFPF seeks the entirety of all potentially responsive email chains. Finally, if Commerce identifies records it deems outside its legal control (e.g., personal records, congressional records, etc.), AFPF requests the agency inform AFPF that such records exist and provide a detailed control analysis that justifies their treatment.

#### **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."<sup>5</sup>

In this case, the requested records unquestionably shed light on the "operations or activities of the government" as they relate to how the Department of Commerce is planning to distribute billions of taxpayer dollars under the CHIPS Act.

AFPF intends to educate the public with the results of this FOIA request. It has the intent and ability to make those results available to a reasonably broad public audience through various media. Its staff has significant experience and relevant expertise; AFPF 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. AFPF is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, and it 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, AFPF requests that it be classified as a "representative of the news media" for fee purposes.<sup>6</sup> 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.<sup>7</sup> AFPF 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

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<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4; see *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).

<sup>6</sup> 15 C.F.R. § 4.11(b)(6)

<sup>7</sup> See *Cause of Action*, 799 F.3d at 1121.

that work to an audience. Although not required, AFPF 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.<sup>8</sup> These 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.”<sup>9</sup>

### **Record Production and Contact Information**

To facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, AFPF requests that those records be produced first, and the remaining records be produced on a rolling basis as circumstances permit. If you have any questions about this request, please contact me at [KSchmidt@afphq.org](mailto:KSchmidt@afphq.org). Thank you for your attention to this matter.

*Kevin Schmidt*

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KEVIN SCHMIDT

DIRECTOR OF INVESTIGATIONS, AFPF

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<sup>8</sup> See, e.g., *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 FOUND. (Sep. 8, 2022), available at <http://bit.ly/3te6boa>; *More evidence the VA is improperly delaying or denying community care to eligible veterans*, AMS. FOR PROSPERITY FOUND. (Jan. 28, 2022), available at <https://bit.ly/37mDnIX>; *AFP Foundation gets CMS to release state-level Medicaid improper payment data after years of stonewalling*, AMS. FOR PROSPERITY FOUND. (Jan. 20, 2022), available at <https://bit.ly/34sz7A2>; *Permission to Care: How Certificate of Need Laws Harm Patients and Stifle Healthcare Innovation*, AMS. FOR PROSPERITY FOUND. (Oct. 2021), available at <http://afpf.org/conreport>; *Records confirm VA's use of inaccurate wait time numbers*, AMS. FOR PROSPERITY FOUND. (Oct. 1, 2021), available at <https://bit.ly/3a9KGeL>; *Government documents reveal Export-Import Bank fails to protect taxpayers ... again*, AMS. FOR PROSPERITY FOUND. (Oct. 30, 2020), available at <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), available at <https://bit.ly/3vbj7eC>; *Gone in an Instant: How Instant Messaging Threatens the Freedom of Information Act* (Mar. 16, 2020), AMS. FOR PROSPERITY FOUND., available at <https://bit.ly/2zQOEKI>.

<sup>9</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).