



February 16, 2023

**VIA E-MAIL**

Freedom of Information Act Officer  
National Endowment for Democracy  
1201 Pennsylvania Ave, NW, Suite 1100  
Washington, DC 20004

**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> This is an “initial request.”<sup>2</sup>

AFPF is investigating how the State Department, through the National Endowment for Democracy (“NED”), may be violating the First Amendment by providing grant funding to the Global Disinformation Index (“GDI”). According to the *Washington Examiner*, the GDI is “secretly blacklisting and trying to defund conservative media.”<sup>3</sup> Our tax dollars should not be used to censor US citizens or companies.

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

1. All documents reflecting any financial support—or details of that support—given to the GDI, Disinformation Index, Inc., Disinformation Index Foundation, AN Foundation, or Park Advisers.
2. All internal and external communications (e-mail, text, instant messaging, calendar items, etc.), including attachments (memos, guidance documents, directives, etc.), regarding financial support for GDI, Disinformation Index, Inc., Disinformation Index Foundation, AN Foundation, or Park Advisers.

The time period for this request is January 1, 2021 to the present.<sup>4</sup>

For the purposes of this request, please omit daily news clippings or other mass mailings unless there is commentary related to them. For all items of this request, if NED uncovers responsive e-mail records, AFPF’s request specifically seeks the entirety of any e-mail chain, any portion of which contains an individual e-mail message responsive to this request, *i.e.*, the entire e-mail chain is

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<sup>1</sup> See AMS. FOR PROSPERITY FOUND., [www.americansforprosperityfoundation.org](http://www.americansforprosperityfoundation.org) (last visited Feb. 14, 2023).

<sup>2</sup> 22 C.F.R. § 66.5(a)(3).

<sup>3</sup> Gabe Kaminsky, *Disinformation Inc: State Department bankrolls group secretly blacklisting conservative media*, *Washington Examiner*, Feb. 9, 2023, available at <https://www.washingtonexaminer.com/restoring-america/equality-not-elitism/disinformation-group-secretly-blacklisting-right-wing-outlets-bankrolled-state-department>.

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

responsive to this request. If NED identifies responsive records it deems outside its legal control (e.g., congressional or presidential records), AFPF requests that NED inform AFPF that such records exist.

### **Request for a Public Interest Fee Waiver**

AFPF requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that NED 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 State Department, through NED, used federal money in a way that potentially violates the First Amendment.

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 that work to an audience.<sup>8</sup> 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>9</sup> These

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<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 66.5(h); see also *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> 22 C.F.R. § 66.5(f)(3)

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

<sup>8</sup> AFPF notes that NED’s definition of a “representative of the news media,” 22 C.F.R. § 66.5(c)(10), conflicts with the statutory definition and controlling case law. NED has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [T]here is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). In any case, AFPF qualifies as a representative of the news media under either definition.

<sup>9</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/37mDnlX>; *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>;

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>10</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. Thank you for your attention to this matter.

*Kevin Schmidt*

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KEVIN SCHMIDT

DIRECTOR OF INVESTIGATIONS, AFPF

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*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>10</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).