

Nov. 4, 2021

VIA ELECTRONIC DELIVERY

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Re: FREEDOM OF INFORMATION ACT REQUEST Expedited Processing and Fee Waiver Requested

Attorney General's memorandum on forming a partnership to address threats against school administrators, board members, teachers and staff

To Whom It May Concern:

Headquarters: 3100 Broadway • Suite 1210 • Kansas City, Missouri 64111 • (816) 931-5559 • FAX (816) 931-1115 Virginia Office: 19415 Deerfield Avenue • Suite 312 • Leesburg, Virginia 20176 • (703) 554-6100 • FAX (703) 554-6119 This is a Freedom of Information Act Request under 5 U.S.C. Section 552 *et seq.* and 28 CFR 16.1 *et seq.* relating to the October 4, 2021, Memorandum issued by the Attorney General on the formation of a partnership among federal, state, local, tribal, and territorial law enforcement to address threats against school administrators, board members, teachers and staff ("October 4 Memorandum").

Paragraph #4 of the Memorandum states, in part:

To this end, I [Attorney General Merrick Garland] am directing the Federal Bureau of Investigation, working with each United States Attorney, to convene meetings with federal, state, local, Tribal, and territorial leaders in each federal judicial district within 30 days of the issuance of this memorandum. These meetings will facilitate the discussion of strategies for addressing threats against school administrators, board members, teachers, and staff, and will open dedicated lines of communication for threat reporting assessment, and response.

This Request seeks records relating to meetings held under this directive.

Further, as this request relates to a matter of significant current and ongoing public interest and debate, Landmark Legal Foundation ("Landmark") requests that this records request be given expedited processing. In addition, as Landmark is a tax exempt organization with a long record of widely sharing public records through various media outlets as part of its public education program, Landmark requests the waiver of all fees and costs associated with this request.

I. Records Requested

Landmark seeks disclosure of the following records from October 4, 2021 to November 4, 2021 relating to:

- Any records of communications between DOJ personnel in your office and state, local, Tribal and territorial leaders discussing meetings held or planning to be held pursuant to the October 4 Memorandum. Communications includes emails (sent from official government accounts or personal email accounts), text messages and letters.
- Any meeting agendas produced, distributed and currently in possession of DOJ
 personnel in your office relating to meetings with federal, state, local, Tribal, and
 territorial leaders held or planning to be held under the directive of the October 4
 Memorandum.
- 3. Any records listing names of individuals who have attended any meetings held under the directive of the October 4 Memorandum.
- 4. Any transcripts or audio recording of meetings between DOJ personnel and state, local, Tribal and territorial leaders held under the October 4 Memorandum.

- 5. Any memos received by DOJ personnel in your office from state, local, Tribal and territorial leaders on matters discussed in the October 4 Memorandum.
- 6. Any memos sent by DOJ personnel in your office to state, local, Tribal and territorial leaders on matters pertaining to the matters discussed in the October 4 Memorandum.

II. Fee Waiver & Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Department regulations allow for waiver or reduction of fees. 28 CFR 16.11. Requesters must show:

(i) 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 (ii) Disclosure of the information is not primarily in the commercial interest of the requester. 28 CFR 16.11(k).

As shown below, Landmark satisfies each of these factors.

1. Release of Requested Records will contribute significantly to public understanding of government operations or activities.

The Attorney General's October 4, 2021 Memorandum set off a political and legal firestorm. Its legal validity has been the subject of many news reports and commentary in all media sectors. As recently as October 27, 2021 Attorney General Merrick Garland testified before the Senate Judiciary Committee on the Memorandum's effect on the free speech rights of parents who wish to testify before school boards. Who is attending the meetings proscribed in the Memorandum and what is being discussed might involve suppression of the 1st Amendment rights of parents throughout the nation.

In his testimony before the Senate Judiciary Committee, Attorney General Garland stated that he believed the memorandum did not chill free speech.² He stated that the Memorandum was to address violence and threats of violence against school board members.³ The details of these meetings directly involves whether a threat exists and whether the federal government has jurisdictional authority in these matters.

Thus, Landmark submits this FOIA request to the Department of Justice to inform and educate the public as to details of meetings held under the October 4 Memorandum and to test the veracity of public statements made by the Attorney General and details in the Memorandum.

¹ https://www.c-span.org/video/?515521-1/department-justice-oversight-hearing (October 29, 2021).

² Id.

³ Id.

Along with Department regulations, the FOIA requires the Department to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v. BATF, 964 F. Supp.494, 498 (D.D.C. 1997). Further, "the amended statute 'is to be liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carucci 835 F.2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy then explained that the 1986 amendment's purpose was "to remove the roadblocks and technicalities which have been used by various federal agencies to deny waiver or reduction of fees under FOIA." 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the Department's regulations set forth factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors, as clearly demonstrated by a close reading of the regulations.

a. Whether the subject of the requested records concerns "the operation or activities of the government."

This factor concerns the subject of the request. 28 CFR 16.11(k)(2)(i). Landmark seeks government records relating to meetings held under the Attorney General's October 4, 2021 Memorandum. Meetings held with individuals outside the federal government with DOJ officials (including FBI personnel) concerns the operations of DOJ activities and by extension, the government.

b. Whether the disclosure is likely to contribute to an "understanding of the operations or activities of government."

This factor concerns the informative value of the information to be disclosed. 28 CFR 16.11(k)(2)(ii). The disclosure of the records sought will contribute to the public's knowledge of the details of meetings between DOJ (and FBI) personnel and third parties about the issues raised in the October 4 Memorandum. To Landmark's knowledge, DOJ has not stated whether this information will be made public. And there is no telling when DOJ would release details of these meetings and what type of information would be released. Even in an instance where Congress has demanded release of information, federal agencies have been slow to respond. The release of records relating to meetings held under the October 4 Memorandum will help clarify government activities that aren't conducted in public view. This would no doubt contribute to an understanding of government operation or activities.

c. Whether the disclosure of the requested information will contribute to "public understanding."

This factor concerns the contribution to an understanding of the subject by the public likely to result from disclosure. 28 CFR 16.11(k)(2)(iii). The disclosure of the requested information will contribute to the public understanding of the Department's operations as a result of Landmark's long record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and share the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the "public understanding" of the Department's conduct and operations:

- Landmark will post responsive information on its website (www.landmarklegal.org), which is accessed regularly by thousands of individuals and offers the information to potentially millions of citizens;
- 2. Landmark will use its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;
- 3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups and the media;
- Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;
- Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such numerous articles in the past;
- 6. Landmark will issue press releases to specific media outlets; and
- 7. Landmark staff will appear on television and radio programs.⁴

Landmark has a proven record of ensuring that information it receives under FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the *Associated Press*, *The Wall Street Journal*, *The Washington Post*, *The Washington Times* and *the* Fox News Channel.

Landmark's attorneys are regular guests on radio shows throughout the country. Editorials written by Landmark personnel are featured in publications such as The Hill, The Federalist, The Daily Wire, MSN, RealClearPolicy and the Dallas Morning News.

d. Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

This factor concerns the significance of the contribution to public understanding. 28 CFR 16.11(k)(2)(iv). The disclosure of the records requested will contribute significantly to the public understanding of government operations or activities. Matters discussed, evidence presented and names of attendees at meetings held under the October 4, 2021 Memorandum will

⁴ <u>See Judicial Watch, Inc. v. Rosotti,</u> 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

clarify the frequency and veracity of the purported threats that School Boards are facing. The information requested will disclose whether individuals with certain political agendas are trying to influence DOJ policy and whether groups or individuals are being excluded. The information requested will also disclose whether DOJ and the FBI are acting outside the scope of their legal and constitutional authority.

Landmark satisfies each of these factors.

2. Disclosure of Requested Material is Not in Landmark's Commercial Interest.

To grant a fee waiver, the disclosure of the requested material must not be in the commercial interest of the requester. 28 CFR 16.11(k)(ii). Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information tracks Landmark's mission to educate the public about the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest nonprofit organization. So a waiver of fees should be granted.

B. Landmark's Request Should Receive Expedited Processing.

Under Department regulations, requests may be taken out of order and given expedited treatment. 28 CFR 16.5(d). To receive expedited process, a FOIA request must show any one of four factors:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;
- (iii) The loss of substantial due process rights; or
- (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence. (emphasis added) 28 CFR 16.5(d).

Department of Justice regulations thus track the FOIA's requirement for expedited processing when a compelling need has been established. The regulations have added another factor relating to government integrity. Landmark meets both factors for expedited processing.

1. Urgency to Inform.

a. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. There are legitimate questions on whether the October 4, 2021 Memorandum has chilled individuals' First Amendment rights. As for entities "primarily engaged in disseminating information," a

compelling need is shown by an "urgency to inform the public concerning actual or alleged Federal Government activity" under the FOIA. 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of tremendous public interest and debate as evidenced by the countless news articles, media reports, editorials and coverage raised by the promulgation of the October 4 Memorandum. Whether the matters raised in the October 4 Memorandum are serious and verifiable or whether the Memorandum was issued as an effort to chill speech is a valid question that needs addressing. Disclosure of information from the meetings discussed in the October 4 Memorandum will help answer this question.

As the October 4 Memorandum can effectively chill an individual's right to express himself before a governmental body, the details surrounding meetings held under the Memorandum are of compelling interest. The right to free speech is one of the most protected rights under our constitutional system and efforts to curb speech are given the highest degree of judicial scrutiny and are only upheld if the government can show an overwhelming interest in regulating such speech. The substance of matters discussed at these meetings will illuminate whether the government's actions are permissible.

In short, Landmark meets the factors for a compelling need.

b. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Landmark will post information on its website; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast and electronic media outlets, including the *Washington Post*, *Washington Times*, *The New York Times*, *Wall Street Journal*, and many other national publications. Landmark's work is often discussed on national radio talk shows. Landmark's only purpose in seeking this information is also to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the public and does not accept any government funds. As a result, Landmark must disseminate information about its activities to the public to function.

In <u>Elec. Privacy Info. Ctr. v. DOD</u>, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that he group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." <u>Elec. Privacy Info. Ctr. v. DOD</u>, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)(citing <u>National Sec. Archive v. U.S. Dep't of Defense</u>, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the public when Landmark officials discuss the information in print, television and radio.

Please note, Landmark has been involved in extensive litigation arising from a governmental Department's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. The Agency was thus found in civil contempt of court. Landmark fully expects the Department to fully comply with the legal mandates set forth in the FOIA.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could show improper or politicized DOJ and FBI conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Furthermore, please provide assurances that DOJ and FBI officials are seeking to prevent destruction of repositories of information that may hold records responsive to this request. Additionally, know that any actions taken in contravention of the Department's responsibilities will be raised if this request becomes the subject of litigation.

2. Government Integrity.

For reasons like those describing the urgency to inform the public about the matter, Landmark's request relates to an area that has questioned the integrity of officials at the highest levels of government. Politicizing resources of the Department of Justice and the FBI to chill the First Amendment rights of citizens directly involves government integrity. In short, Landmark's request fulfills the requirements of 28 CFR 16.5(d)(iv).

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citation to applicable exemptions and supporting case law.

Please also note, while Landmark realizes that the Department considers requests for fee waivers case-by-case, Landmark has successfully litigated whether it qualifies for a fee waiver in federal court.

For the reasons stated above, Landmark asks that the Department grant Landmark's requests for a fee waiver and for expedited processing. You may contact Michael O'Neill at (703) 371-6330 or via email at mike@landmarklegal.org if you have any questions.

Please deliver responsive records to Mr. O'Neill's attention at the following address:

Michael J. O'Neill Landmark Legal Foundation 19415 Deerfield Ave. Suite 312 Leesburg, VA 20176

Electronic copies of responsive records can be delivered via email to Mr. O'Neill's email address as well.

Please produce records on a rolling basis as they become available for disclosure.

Certification

<u>Under Department regulations and as required by law, I certify, to the best of my knowledge and belief, that the above facts are true and correct.</u>