

LANDMARK LEGAL FOUNDATION

THE RONALD REAGAN LEGAL CENTER

September 27, 2023

VIA ELECTRONIC DELIVERY, VIA SECURERELEASE PORTAL and VIA FEDEX

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

Communication records between Randi Weingarten, Miriam Feldblum, and Antonio Flores of the Homeland Security Academic Partnership Council (HSAPC) and the Department of Homeland Security (DHS)

To Whom It May Concern:

This is a Freedom of Information Act Request under 5 U.S.C. Section 552 *et seq.* and 5 CFR 5.1 *et seq.* relating to the communication between Randi Weingarten, Miriam Feldblum, and Antonio Flores of the HSAPC and DHS staff in the Committee Management Office or any other office within DHS that exercises control and/or oversight to the HSAPC regarding the September 6, 2023, meeting of the of the HSAPC, as well as communications about the formation of the council.

On the webpage describing the goals of the HSAPC, two stand out, which authorize the Council to provide recommendations for:

- DHS-wide funding opportunities, such as grants, scholarships, programs, and hiring surges; and
- Safety and security, including prevention, response, mitigation, recovery, and other emergency management and preparedness measures.¹

¹ <https://www.dhs.gov/nsapc>

This Request seeks records relating to communications between DHS officials and HSAPC members Randi Weingarten, Antonio Flores, and Miriam Feldblum regarding the September 6, 2023, meeting of the HSAPC, as well as additional information discussing the council’s formation and agenda (88 FR 44383).

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 May 1, 2023, to September 6, 2023**, relating to:

1. Any records of communications between DHS personnel in DHS’s Committee Management Office and HSAPC Appointees Weingarten, Flores, and Feldblum discussing plans for action or topics to be discussed in the upcoming meeting as proposed by the notice of public meeting. Communications includes emails (sent from official government accounts or personal email accounts), text messages and letters.
2. Any meeting agendas produced, distributed and currently in possession of DHS personnel in your office relating to the meeting of the HSAPC on September 6, 2023.
3. Any records listing names of individuals who have attended the meetings or had communications regarding the September 6, 2023, meeting of the HSAPC.
4. Any transcripts or audio recordings of HSAPC members and DHS employees discussing the workings of the HSAPC.
5. Any memos received by DHS personnel in your office from non-government members of the HSAPC.
6. Any memos sent by DHS personnel in your office to HSAPC members regarding the September 6, 2023 meeting of the HSAPC

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. 6 CFR 5.11. 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. 6 CFR 5.11(k)(1).

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 creation and actions of the HSAPC have huge political consequences. The council's direct influence over DHS action is reason enough for public disclosure of their records and communications. Furthermore, the politicized appointments of council members such as Randi Weingarten underline a need for disclosure of council plans. The appointments of many of the council members appear to be predominantly based on political leanings rather than expertise in school safety. What the council discusses outside of meetings will aid in the public's understanding of what the government is doing in regard to school safety.

The two largest stated goals of the Council are to recommend "DHS-wide funding opportunities," as well as plans for "safety and security" in US schools. Both goals appear to have a huge scope and would appear to involve large amounts of federal tax dollars potentially impacting a wide segment of the population. It is paramount that the public understands what recommendations are being made to the DHS and how money and manpower are allocated.

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 request concerns "identifiable operations or activities of the federal government"

This factor concerns the subject of the request. 6 CFR 5.11(k)(2)(i). Landmark seeks government records relating to correspondence between the HSAPC members and individuals in the DHS regarding the September 6, 2023 meeting of the HSAPC, as well as background information relating to the council's creation, selection of members, and agenda topics. Meetings held with individuals outside the federal government with DHS officials concern the operation of DHS activities and by extension, the government.

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

This factor concerns the informative value of the information to be disclosed. 6 CFR 5.11(k)(2)(ii). The disclosure of the records sought will contribute to the public's knowledge of the communications between DHS staff and the HSAPC members, as well as the possible influence of their recommendations outside of official correspondence. To Landmark's knowledge, DHS has not stated whether this information will be made public. And there is no telling when DHS would release details of the communications and what type of information would be released. Even in instances where Congress has demanded release of information, federal agencies have been slow to respond. The release of records relating to The September 6, 2023, meeting of the HSAPC will help clarify government activities that aren't conducted in public view. This would no doubt contribute to an understanding of government operations or activities.

c. Whether the disclosure of the requested information will contribute to understanding for a "reasonably broad audience"

This factor concerns the contribution to an understanding of the subject by the public likely to result from disclosure. 6 CFR 5.11(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:

1. 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;
4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;
5. 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.²

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. 6 CFR 5.11(k)(2)(iv). The disclosure of the records requested will contribute significantly to the public understanding of government operations or activities. Matters discussed, possible solutions, and perceived threats to be addressed by the council during their meeting will clarify for the American people the scope of the council's possible actions. The information requested will also show possible agendas being put forth by council members to influence DHS policy. The information requested will also show whether the DHS is acting outside of its lawful scope and allowing itself to be politicized by the recommendations of the HSAPC.

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. 6 CFR 5.11(k)(1)(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. 6 CFR 5.5(e). 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;*

² See *Judicial Watch, Inc. v. Rosotti*, 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.

- (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) 6 CFR 5.5(e)(1).

Department of Homeland Security 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 the activities and goals the HSAPC has for advising the DHS. 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 relate directly to matters of public interest as evidenced by the controversial nature of the appointees to the council. Members such as Randi Weingarten have been at the center of press coverage relating to previous government influence as private citizens. In combination with the HSAPC's scope in recommending measures for funding and safety, there is a clear public interest in what the council's plans are. Disclosure of information relating to the September 6th meeting and creation of the council would help answer questions about the council's priorities.

The creation of the HSAPC gives civilians direct access to influence the actions of the federal government. The safety and funding of our nation's schools are of the utmost importance, but the methods by which these goals are accomplished are equally important. Partisan ideology must be kept away from the policies of the Department of Homeland Security. Government action that involves non-governmental influence should be under strict public scrutiny. The substance of matters discussed relating to this meeting 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 *Elec. Privacy Info. Ctr. v. DOD*, 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 the 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." *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)(citing *National Sec. Archive v. U.S. Dep't of Defense*, 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 DHS conduct. Advisory committee records are only required to be kept as long as the committee exists, so time is of the essence. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Furthermore, please provide assurances that DHS officials are seeking to prevent the 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 a council that has direct access to the Department of Homeland Security, a government agency with wide-reaching jurisdiction and powers, involves review of government integrity. In short, Landmark's request fulfills the requirements of 6 CFR 5.5(e)(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 Benjamin L. Whearty at (703) 638-5999 or via email at ben@landmarklegal.org if you have any questions.

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

Benjamin L. Whearty
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

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

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

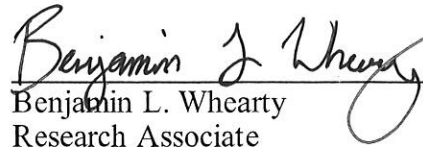
Certification

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.

9/27/2023

~~4/27/2023~~

Date



Benjamin L. Whearty

Research Associate

Landmark Legal Foundation