15 July 2022 (12:00 pm EDT)

Alina M. Semo, Director (alina.semo@nara.gov)
Martha Murphy, Deputy Director (martha.murphy@nara.gov)
Office of Government Information Services
National Archives and Records Administration
8601 Adelphia Road-OGIS
College Park, MD 20740-6001

URGENT – OGIS Should Advise OSTP Today to Process the CAIDP Appeal for Expedited Processing by July 18

Dear Ms. Semo and Ms. Murphy,

I am writing to you regarding a FOIA matter involving expedited processing currently pending before the Office of Science of Technology (OSTP). Given the urgency of the situation and the relevant provisions in the FOIA and the OSTP regulations, I am requesting that you take action today. I have briefly summarized the key facts below. The relevant documents are attached

Thank you for your assistance

Summary

This request to the Office of Government Information Services (OGIS) concerns the failure of the Office of Science and Technology Policy (OSTP) (1) to “expeditiously process” an appeal of an adverse determination of expedited processing and (2) to make a determination on a new request for expedited processing within 10 days. The agency’s delay in this matter has immediate consequence on the ability of the American public and the Congress to assess the current state of the “Artificial Intelligence Bill of Rights,” one of the most important AI policy initiatives in the United States. Adding to the urgency of this determination is the pending hearing, before the Senate Commerce Committee, for the next Director of OSTP.

CAIDP writes to request that OGIS inform OSTP today that a determination on the CAIDP appeal is due no later July 18, 2022

Chronology

On June 20, 2022, CAIDP sent a FOIA request to the OSTP. In the FOIA request CAIDP asked for three categories of records. Given the urgency of the matter and the widespread public

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1 See Exhibit 1.
interest in the agency’s proposed “AI Bill of Rights,” CAIDP requested expedited processing of the request. CAIDP also requested a fee waiver.²

On June 28, OSTP responded to CAIDP. OSTP granted the fee waiver but denied the request for expedited processing.³

On June 30, CAIDP sent an “APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR EXPEDITED PROCESSING” to the OSTP.⁴ CAIDP appealed the original adverse determination. CAIDP also submitted a new request for expedited processing, citing new facts including a forthcoming hearing in the Senate Commerce Committee for the next Director of the Agency. CAIDP included two lengthy exhibits that detailed widespread public interest in both the OSTP “AI Bill of Rights” and the controversy surrounding the influence of private funding on OSTP policy that led to the departure of the former Director.

On July 7, OSTP sent an email to CAIDP in which it asked whether to treat the June 30 appeal as “duplicate requests from the same requester.”⁵

CAIDP responded promptly on July 7, 2022 to explain that the June 30 appeal was not a “duplicate request” (which is how an agency would characterize two requests for the same records), but focused solely on the agency’s denial of expedited processing. CAIDP stated that “Both (1) the original denial was wrong as a matter of law, and (2) subsequent facts (particularly the nomination of a new director) make it even more clear that expedited processing should be granted.”⁶

On July 11, OSTP sent an email to OSTP in which it expressed appreciation for the clarification, but then said the agency would review the appeal and provide a response “within 20 business days.”⁷

CAIDP replied on July 11, again responded promptly, to explain that “The Freedom of Information Act makes clear that the initial determination for a request for expedited processing “shall be made within 10 days after the date of the request,” and that the agency “must ensure . . . expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.” [citations omitted]⁸

² See Exhibit 2.
³ See Exhibit 3.
⁴ See Exhibit 4.
⁵ See Exhibit 5.
⁶ Id.
⁷ Id.
⁸ Id.
CAIDP further explained, “CAIDP’s Appeal of the Denial of Expedited Processing / New Request for Expedited Request was sent to the agency on June 30, 2022. According to the OSTP regulation, a determination was due July 10, 2022.” Attempting to give the agency a little additional time to process the appeal, CAIDP wrote “allowing the agency the most generous calculation of ‘within 10 days,’ a response could be due by July 18, 2022.” [citations omitted] (emphasis in original.)

On July 14, OSTP wrote to CAIDP that there “appears to be some lingering confusion regarding your request and appeal.’ OSTP then stated it would treat the June 30 letter from CAIDP, titled “APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR EXPEDITED PROCESSING,” as simply an appeal. The OSTP, relying on provisions for processing FOIA appeals and not appeals for expedited processing, then granted itself “20 working days,” announced that the date would be calculated from July 7, 2022 (the date of an agency email), and concluded that a determination on the appeal would be made by August 3, 2022.

On July 14, CAIDP, again responding promptly, objected strongly to OSTP’s attempt to recharacterize the June 30 communication, stating “Your attempt to reinterpret the June 30 document as only an appeal is simply not credible.” Regarding the date by which the determination on the appeal would be due, CAIDP pointed out that the OSTP had confused the provisions for an appeal concerning a records question and the provisions concerning an appeal for expedited processing. CAIDP cited the relevant agency regulations. CAIDP wrote, “There is no scenario under which OSTP could claim ‘20 working days’ to resolve an appeal concerning the denial of expedited processing.”

CAIDP concluded

To be clear, the confusion in this matter is that the OSTP FOIA office does not understand that the appeal process for the denial of expedited processing is distinct from the appeal process for the denial (or partial denial) of an underlying record request. The OSTP’s regulations, the federal statute, and case law, make clear the need to resolve this appeal as soon as practicable, and certainly more rapidly than for a typical FOIA appeal.

CAIDP explained that it would write to OGIS regarding this matter if the OSTP was unable to confirm that it would provide a response by July 18, 2022.

9 Id.
10 Id.
11 Id.
12 Id.
OSTP did not respond.

Action Requested

CAIDP is requesting the OGIS contact OSTP today and advise the agency that it must comply with the agency regulations and the federal FOIA regarding the consideration of appeal. A response to CAIDP is due by July 18, 2022.

Sincerely,

Marc Rotenberg, President
Center for AI and Digital Policy

Cc: OSTP FOIA Office
EXHIBIT 1

OSTP FOIA Regulations
(32 CFR §2402)
(f) Compliance
Comply with this AD within the compliance times specified, unless already done.

(g) Requirements
Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0155.

(b) Exceptions to EASA AD 2020–0155
(1) Where EASA AD 2020–0155 refers to its effective date, this AD requires using the effective date of this AD.
(2) The “Remarks” section of EASA AD 2020–0155 does not apply to this AD.
(3) Where the EASA AD specifies “any discrepancies,” those discrepancies include damage or deformity to the DDS tab, a jammed butterfly latch, a RDU that does not engage easily, and a RDU that does not latch.
(4) Where paragraph (3) of the EASA AD specifies a compliance time of “before next flight,” that compliance time does not apply to this AD.
(5) Where AOT A44P001–20–00 and A23L001–20–00, as specified in EASA AD 2020–0155, specify the gap must be equal to or greater than 4.2mm, for this AD, the gap must be greater than 4.0mm.

(i) Other FAA AD Provisions
The following provisions also apply to this AD:
(1) Alternative Methods of Compliance (AMOCs): The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD.
Information may be emailed to: 9-ASV-AIR-730-AMOCs@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.
(2) Contacting the Manufacturer: For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS’s EASA Design Organization Authorization (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.
(3) Required for Compliance (RC): For any service information referenced in EASA AD 2020–0155 that contains RC procedures and tests: Except as required by paragraph (j)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator’s maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information
For more information about this AD, contact Dan Rodina, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3225; email: dan.rodina@faa.gov.

(k) Material Incorporated by Reference
(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.
(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.
(ii) [Reserved]
(3) For information about EASA AD 2020–0155, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; Internet: www.easa.europa.eu. You may find this EASA AD on the EASA website at https://ad.easa.europa.eu.
(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at https://www.regulations.gov by searching for and locating Docket No. FAA–2020–0968.
(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email fedreg.regal@nara.gov or visit https://www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on October 16, 2020.
Lance T. Gant,
Director, Compliance & Airworthiness Division, Aircraft Certification Service.

OFFICE OF SCIENCE AND TECHNOLOGY POLICY
32 CFR Part 2402
Implementing the Freedom of Information Act
AGENCY: Office of Science and Technology Policy.
ACTION: Final rule.
SUMMARY: The White House Office of Science and Technology Policy (OSTP), after consideration of the public comments submitted in response to its Notice of Proposed Rulemaking published on October 31, 2018, is amending its regulations to implement the FOIA Improvement Act of 2016. The regulations reflect OSTP’s policy and practices and affirm its commitment to providing the fullest possible disclosure of records to the public.
FOR FURTHER INFORMATION CONTACT: Nick Wittenberg, Legal Counsel, OSTP, (202) 456–4444. Questions about the content of this notice may also be sent to ostpfoia@ostp.eop.gov.
SUPPLEMENTARY INFORMATION: OSTP is amending its regulations governing its implementation of the Freedom of Information Act (FOIA). In 2013, OSTP implemented its FOIA regulations, currently codified at 32 CFR part 2402. The FOIA Improvement Act of 2016, Public Law 114–185, requires each agency to review and update its FOIA regulations in accordance with its provisions. Among other things, the FOIA Improvement Act makes changes that require agencies to (1) withhold information only when it is reasonably foreseeable that disclosure would harm an interest protected by an exemption; (2) allow a minimum of ninety (90) days to file an appeal following an adverse determination; and (3) inform requestors of their right to seek dispute resolution services.
In connection with OSTP’s review of its FOIA regulations, OSTP is updating these regulations to clarify OSTP’s process for responding to requests for information, incorporate new language on partial disclosures of information, increase the period of time for a requester to appeal an adverse determination from thirty (30) days to ninety (90) days, and require OSTP to notify requestors of their right to seek dispute resolution services. Due to the scope of the proposed revisions, the new rules will replace OSTP’s current FOIA regulations in their entirety. The new rules will reflect statutory changes to the FOIA and improve FOIA-related service and performance, thereby strengthening OSTP’s compliance with the FOIA.
On October 31, 2018, OSTP issued a Notice of Proposed Rulemaking seeking comments on the proposed changes to its FOIA regulations. In response, OSTP received one public comment about the proposed rule. The commenter did not suggest any changes to the rule. OSTP, however, decided to make one minor additional change in order to clarify the calculation of fees. In the definition of “direct cost” in § 2402.3(c)(5), OSTP is changing the phrase, “employee or
employees” to “personnel” to more accurately reflect the fact that paid, contract, and other staff are used to search for, duplicate, and respond to FOIA requests. For this same reason, OSTP is revising § 2402.9(b) regarding calculation of fees to change the use of the word, “employee(s),” to “personnel.”

Statutory and Executive Order Reviews

Executive Orders 12866 and 13563—Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, Improving Regulative and Regulatory Review, section 1(b), General Principles of Regulation. This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866; accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB). Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OSTP has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

Paperwork Reduction Act

OSTP has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply because these regulations do not contain any information collection requirements subject to OMB’s approval.

Executive Order 12988—Civil Justice Reform

These regulations meet the applicable standards set forth in sections 3(a) and 3(b) of Executive Order 12988, Civil Justice Reform.

Executive Order 13132—Federalism

These regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, OSTP has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Regulatory Flexibility Act

This regulation finalizes the amendments to OSTP’s FOIA regulations to incorporate certain changes made by the FOIA Improvement Act of 2016, to reflect developments in case law, and to streamline its procedures. OSTP, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and certifies that it will not have a significant economic impact on a substantial number of small entities because it pertains to administrative matters affecting the agency.

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, et seq.

Small Business Regulatory Enforcement Fairness Act of 1996

This regulation is not a major regulation as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

National Environmental Policy Act of 1969

OSTP has reviewed this regulation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347, and has determined that it will not have a significant effect on the human environment.

List of Subjects in 32 CFR Part 2402

Freedom of information, Administrative practice and procedure.

For the reasons set forth in the preamble, OSTP revises 32 CFR part 2402 to read as follows:

PART 2402—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Sec.

2402.1 Purpose and scope.
2402.2 Delegation of authority and responsibilities.
2402.3 General policy and definitions.
2402.4 Procedure for requesting records.
2402.5 Responses to requests.
2402.6 Timing of responses to requests.
2402.7 Confidential commercial information.
2402.8 Appeal of denials.
2402.9 Fees.
2402.10 Waiver of fees.
2402.11 Maintenance of statistics.
2402.12 Disclaimer.


§ 2402.1 Purpose and scope.

The regulations in this part prescribe procedures by which individuals may obtain access to the Office of Science and Technology Policy’s (OSTP) agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, as well as the procedures OSTP must follow in response to requests for records under the FOIA. The regulations should be read together with the FOIA and the Office of Management and Budget’s (OMB’s) “Uniform Freedom of Information Fee Schedule and Guidelines,” which provides information about access to records. All requests for access to information contained within a system of records pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, shall be processed in accordance with these regulations as well as those contained in 32 CFR part 2403.

§ 2402.2 Delegation of authority and responsibilities.

(a) The Director of OSTP designates the OSTP General Counsel as the Chief FOIA Officer and hereby delegates to the Chief FOIA Officer the authority to act upon all requests for agency records and to re-delegate such authority at his or her discretion.

(b) The Chief FOIA Officer shall designate a FOIA Public Liaison, who shall serve as the supervisory official to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial request. The FOIA Public Liaison will be listed on the OSTP website (https://www.whitehouse.gov/ostp/foia) and may re-delegate the FOIA Public Liaison’s authority at his or her discretion.

(c) The Director establishes a FOIA Requester Service Center that shall be staffed by the Chief FOIA Officer and the FOIA Public Liaison. The contact
information for the FOIA Requester Service Center is: Address: Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue NW, Washington, DC 20504; Telephone: (202) 456-4444; Fax: (202) 395-1224; Email: ostpfoia@ostp.eop.gov. Updates to this contact information will be made on the OSTP website.

§ 2402.3 General policy and definitions.

(a) Non-exempt records available to public. Except for records exempt from disclosure by 5 U.S.C. 552(b) or published in the Federal Register under 5 U.S.C. 552(a)(1), OSTP’s agency records subject to the FOIA are available to any requester who requests them in accordance with these regulations.

(b) Record availability on the OSTP website. OSTP shall make records available on its website in accordance with 5 U.S.C. 552(a)(2), as amended, and other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. To save both time and money, OSTP strongly urges requesters to review documents available on the OSTP website before submitting a request.

(c) Definitions. For purposes of this part:

(1) All of the terms defined in the FOIA and the definitions included in OMB’s “Uniform Freedom of Information Act Fee Schedule and Guidelines” apply unless otherwise defined in this subpart.

(2) The term agency record means a record that is:

(i) Either created or obtained by OSTP; and

(ii) Under OSTP’s control at the time the FOIA request is received.

(3) The term commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSTP shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSTP has reasonable cause to doubt a requester’s stated use, OSTP shall provide the requester a reasonable opportunity to submit further clarification.

(4) The terms disclose and disclosure refer to making records available, upon request, for examination and copying, or furnishing a copy of records.

(5) The term direct cost means those expenditures OSTP actually incurred in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in response to a FOIA request. Direct costs include the salary of the personnel performing the work (i.e., the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses, such as the cost of space, heating, or lighting of the facility in which the records are stored.

(6) The term duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (e.g., magnetic tape or disk), among others.

(7) The term educational institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To fall within this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research.

(8) The term fee waiver means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied.

(9) The term FOIA Public Liaison means an agency official who is responsible for assisting requesters in defining the scope of their request to reduce processing time, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(10) The term non-commercial scientific institution means an institution that is not operated on a commercial basis, as that term is defined in these regulations, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To fall within this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scientific research.

(11) The termperfected request means a FOIA request for records that reasonably describes the records sought and has been received by OSTP in accordance with the requirements set forth in § 2402.4.

(12) The term representative of the news media and news media requester mean 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. In this clause, the term news means information that is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase by subscription by, or through free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve, such as through electronic or digital means, such news sources shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(13) The term requester means any person, including an individual, partnership, corporation, association, Native American tribe, or other public or private organization, other than a Federal agency that requests access to records.

(14) The term review means the process of examining documents located in response to a request that is for a commercial use to determine whether any portion of any document located is permitted to be withheld. It includes the processing of any documents for disclosure—i.e., doing all that is necessary to review exempt information and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(15) The term search refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(16) The term working day means a regular Federal working day between...
the hours of 9:00 a.m. and 5:00 p.m. It does not include Saturdays, Sundays, or legal Federal holidays. Any requests received after 5:00 p.m. on any given working day will be considered received on the next working day.

§ 2402.4 Procedure for requesting records.
(a) Format of requests. (1) In general. Requests for information must be made in writing and may be delivered by mail, fax, or electronic mail, as specified in § 2402.2(c). All requests must be made in English. Requests for information may specify the preferred format (including electronic formats) of the response. When a requester does not specify the preferred format of the response, OSTP shall produce scanned records to be delivered electronically.

(2) Records in electronic formats. (i) OSTP shall provide responsive records in the format requested if the record or records are readily reproducible by OSTP in that format. OSTP shall make reasonable efforts to maintain its records in formats that are reproducible for the purposes of disclosure. For purposes of this paragraph, the term readily reproducible means, with respect to electronic format, a record that can be downloaded or transferred intact to an electronic medium using equipment currently in use by the agency processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt records from nonexempt records may cause the releasable material to be not readily reproducible.

(ii) In responding to a request for records, OSTP shall make reasonable efforts to search for the records in electronic format, except where such efforts would interfere with the operation of the agency’s automated information system(s). For purposes of this paragraph, the term search means to locate, manually or by automated means, agency records for the purpose of identifying those records that are responsive to a request.

(iii) Searches for records maintained in electronic format may require the application of codes, queries, or other minor forms of programming to retrieve the requested records.

(3) Attachment restrictions. To protect OSTP’s computer systems, OSTP will not accept files sent as email attachments or as web links. A requester may submit a request by postal mail, by fax, or in the body of the email text.

(b) Contents. A request must describe the records sought in sufficient detail to enable OSTP personnel to locate the records with a reasonable amount of effort. To the extent possible, a requester should include specific information that may assist OSTP personnel in identifying the requested records, such as the date, title or name, author, recipient, and subject matter of the record. In general, a requester should include as much detail as possible about the specific records or the types of records sought. Before submitting a request, a requester may contact the OSTP FOIA Public Liaison to discuss the records sought and to receive assistance in describing the records. If, after receiving a request, OSTP determines that it does not reasonably describe the records sought or that the request will be unduly burdensome to process, OSTP shall inform the requester of the additional information that is needed or how the request may be modified. A Requester attempting to reformulate or modify such a request may discuss their requests with OSTP’s FOIA Public Liaison.

(c) Date of receipt. A request that complies with paragraphs (a) and (b) of this section is deemed a “perfected request.” A perfected request is deemed received on the actual date it is received by OSTP. A request that does not comply with paragraphs (a) and (b) of this section is deemed received when information sufficient to perfect the request is actually received by OSTP.

(d) Contact information. A request must contain contact information, such as the requester’s phone number, email address, or mailing address, to enable OSTP to communicate with the requester about the request and provide released records. If OSTP cannot contact the requester, or the requester does not respond within 30 calendar days to OSTP’s requests for clarification, OSTP will administratively close the request.

(e) Types of records not available. The FOIA does not require OSTP to:

(1) Compile or create records solely for the purpose of satisfying a request for records;

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that OSTP must notify the requester of the destruction or disposal of the requested records.

§ 2402.5 Responses to requests.
(a) In general. In determining which records are responsive to a request, OSTP will ordinarily include only records in its possession as of the date it begins its search for records. If any other date is used, OSTP shall inform the requester of the date.

(b) Authority to grant or deny requests. OSTP shall make initial determinations to grant or deny, in whole or in part, a request for records.

(c) Granting of requests. When OSTP determines that any responsive records shall be made available, OSTP shall notify the requester in writing and provide copies of the requested records in whole or in part. Records disclosed in part shall be marked or annotated to show the exemption(s) applied to the withheld information and the amount of information withheld unless doing so would harm the interest protected by an applicable exemption. If a requested record contains exempted material along with nonexempt material, all reasonably segregable material shall be disclosed.

(d) Adverse determinations. If OSTP makes an adverse determination denying a request in any respect, it must notify the requester of that adverse determination in writing. Adverse determinations include decisions that:

The requested record is exempt from disclosure, in whole or in part; the request does not reasonably describe the records sought, but only if, after discussion with the FOIA Public Liaison, the requester refuses to modify the terms of the request; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester; denials involving fees or fee waiver matters; and denials of requests for expedited processing.

(e) Content of adverse determinations. Any adverse determination issued by OSTP must include:

(1) A brief statement of the reason(s) for the adverse determination, including any FOIA exemption applied by the agency in denying access to a record unless such inclusion would harm the interest protected by an applicable exemption;

(2) An estimate of the volume of any records or information withheld, such as the number of pages or other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(3) A statement that the adverse determination may be appealed under § 2402.8 of this subpart and a description of the appeal requirements; and

(4) A statement notifying the requester of the assistance available from OSTP’s FOIA Public Liaison and the dispute...
resolution services offered by the Office of Government Information Services.

(f) Consultations, referrals, and coordinations. When OSTP receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If OSTP determines that it is best able to process the record in response to the request, then it shall do so. If OSTP determines that it is not best able to process the record, then it shall proceed in one of the following ways: (1) Consultation. When records originating with OSTP contain information of interest to another Federal agency, OSTP should typically consult with that Federal agency prior to making a release determination.

(2) Referral. (i) When OSTP believes that a different Federal agency is best able to determine whether to disclose the record, OSTP should typically refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency creating the record is presumed to be the agency best able to determine whether the record should be disclosed. If OSTP and another Federal agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever OSTP refers any part of the responsibility for responding to a request to another agency, OSTP must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral.

(iii) After OSTP refers a record to another Federal agency, the agency receiving the referral shall make a disclosure determination and respond directly to the requester. The referral of a record is not an adverse determination and no appeal rights accrue to the requester therefrom.

(3) Coordination. The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which a referral would be made could harm an interest protected by an applicable exemption, such as an exemption that protects personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party is not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion into the personal privacy of the third party.

Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could harm national security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, OSTP will coordinate with the agency that created the record to seek its views on disclosure of the record. OSTP will then notify the requester of the disclosure determination for the record that is the subject of the coordination.

Section 2402.6 Timing of responses to requests.

(a) In general. OSTP shall ordinarily respond to requests in order of their receipt.

(b) Initial determinations. OSTP will exercise all reasonable efforts to make an initial determination acknowledging and granting, partially granting, or denying a request for records within twenty (20) working days after receiving a perfected request.

(c) Extensions of response time in unusual circumstances. (1) The twenty (20)-working day period provided in paragraph (b) of this section may be extended if unusual circumstances arise. If an extension is necessary, OSTP shall promptly notify the requester of the extension, briefly state the reasons for the extension, and estimate when a response will be issued. Unusual circumstances warranting extension are:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(2) After OSTP notifies the requester of the reasons for the delay, the requester will have an opportunity to modify the request or arrange for an alternative time frame for completion of the request. To assist in this process, OSTP shall advise the requester of the availability of OSTP’s FOIA Public Liaison to aid in the resolution of any disputes between the requester and OSTP, and notify the requester of his or her right to seek dispute resolution services from the Office of Government Information Services.

(3) If no initial determination is made at the end of the twenty-day period provided for in paragraph (b) of this section, including any extension provided for in paragraph (c)(1) of this section, the requester may appeal the action to the FOIA Appeals Officer.

(d) Expedited processing of request. (1) A requester may make a request for expedited processing at any time.

(2) When a request for expedited processing is received, OSTP must determine whether to grant the request for expedited processing within ten (10) calendar days of its receipt. Requests will receive expedited processing if one of the following compelling needs is met:

(i) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. As a matter of administrative discretion, OSTP may waive the formal certification requirement.

(4) Administrative appeals of denials of expedited processing will be given expeditious consideration. If the FOIA Appeals Officer upholds the denial of expedited processing, that decision is immediately subject to judicial review in the appropriate Federal district court.

(e) Multi-track processing. (1) OSTP may use multi-track processing in responding to requests. Multi-track processing means placing simple requests that require limited review in one processing track and placing more voluminous and complex requests in one or more other processing tracks. Requests in each track are processed on a first-in, first-out basis.

(i) Track one—expedited requests. Track one is made up of requests that sought and received expedited processing as provided for in paragraph (d)(2) of this section.

(ii) Track two—simple requests. Track two is for requests of simple to moderate complexity that do not require
§ 2402.7 Confidential commercial information.

(a) In general. Business information obtained by OSTP from a submitter will be disclosed under the FOIA only under this section.

(b) Definitions. For purposes of this section:

(1) Confidential commercial information means records provided to the government by a submitter that arguably contain material exempt from release under 5 U.S.C. 552(b)(4).

(2) Submitter means any person or entity from whom OSTP directly or indirectly obtains confidential commercial information. The term includes corporations; State, local, and tribal governments; universities; non-profit organizations; associations; and foreign governments.

(c) Designation of business information. Either at the time of submission or at a reasonable time thereafter, a submitter of business information will use good-faith efforts to designate, by appropriate markings, any portions of its submission that it considers to be protected from disclosure under 5 U.S.C. 552(b)(4). These designations will expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation period.

(d) Notice to submitters. OSTP shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information in order to give the submitter an opportunity to object to disclosure of any specified portion of that information. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(e) Where notice is required. Notice shall be given to a submitter whenever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) OSTP has reason to believe that the information may be protected from disclosure under 5 U.S.C. 552(b)(4).

(f) Opportunity to object to disclosure. OSTP shall allow a submitter reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, the submitter must provide a detailed written statement of objections. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of information withheld under 5 U.S.C. 552(b)(4), the submitter must demonstrate the reasons the submitter believes the information is a trade secret or confidential commercial information that is privileged or confidential. In the event that a submitter fails to adequately respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that OSTP does not receive within the time specified shall not be considered by OSTP. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) Notice of intent to disclose. OSTP shall consider a submitter’s objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSTP determines that disclosure is appropriate over the objection of a submitter, OSTP shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose, which shall include:

(1) A statement of the reason(s) why each of the submitter’s objections to disclosure was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) Exceptions to notice requirements. The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) OSTP determines that the information should not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987;

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such a case, OSTP shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information, but no opportunity to object will be offered; or

(5) The information requested was not designated by the submitter as exempt from disclosure in accordance with this part, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless OSTP has substantial reason to believe that disclosure of the information would result in competitive harm.

(i) Notice of FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSTP shall promptly notify the submitter.

(j) Notice to requesters. Whenever OSTP provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSTP shall also notify the requester(s). Whenever OSTP notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSTP shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSTP shall notify the requester(s).
§ 2402.8 Appeal of denials.
(a) Right to administrative appeal. A requester has the right to appeal to the FOIA Appeals Officer any adverse determination.
(b) Notice of appeal. (1) Time for appeal. To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted no later than ninety (90) calendar days after the date of the initial adverse determination or after the time limit for response by OSTP has expired. Prior to submitting an appeal, the requester must pay in full any outstanding fees associated with the request.
(2) Form of appeal. An appeal shall be initiated by filing a written notice of appeal. The notice shall specify the tracking number assigned to the FOIA request by OSTP and be accompanied by copies of the original request and adverse determination. To expedite the appellate process and give the requester an opportunity to present his or her arguments, the notice shall contain a brief statement of the reason(s) why the requester believes the adverse determination to be in error. Requesters may submit appeals by mail or electronically. If sent by regular mail, appeals shall be sent to: Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue NW, Washington, DC 20504. Appeals sent via electronic mail shall be submitted to ostofoia@ostp.eop.gov. Updates to this contact information shall be made on the OSTP website. To facilitate handling, the requester should mark both the appeal letter and envelope, if submitted by mail, or subject line of the transmission, if submitted electronically, with “Freedom of Information Act Appeal.”
(c) Decisions on appeals. The FOIA Appeals Officer shall make a determination in writing on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within twenty (20) working days after the receipt of the appeal. If the denial is wholly or partially upheld, the Chief FOIA Officer shall:
(1) Notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(6)(B)–(G); and
(2) Notify the requester that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, OGIS, College Park, MD 20740; Email: ogis@nara.gov; Telephone: 202–741–5770, Facsimile: 202–741–5789, Toll-free: 1–877–684–6448.
(d) Dispute resolution services. Dispute resolution is a voluntary process. If OSTP agrees to participate in the dispute resolution services provided by the Office of Government Information Services, it will actively engage as a partner in the process in an attempt to resolve the dispute.
(e) When appeal is required. Before seeking judicial review of OSTP’s adverse determination in Federal district court, a requester generally must first submit a timely administrative appeal.
§ 2402.9 Fees.
(a) Fees generally required. OSTP shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. OSTP shall charge fees in accordance with paragraph (b) of this section unless fees are waived or reduced in accordance with § 2402.10.
(b) Calculation of fees. In general, fees for searching, reviewing, and duplication will be based on the direct costs of these services, including the average hourly salary (basic pay plus 16% for benefits) of the personnel conducting the search, reviewing the records for exemption, or duplicating the records. Charges for time less than a full hour will be in increments of one quarter hour.
(1) Search fees. Search fees may be charged even if responsive documents are not located or are located but withheld on the basis of an exemption. However, search fees shall not be charged or shall be limited as follows:
(i) Educational, scientific, or news media requests. No search fee shall be charged if the request is not for a commercial use and is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.
(ii) Other non-commercial requests. No search fee shall be charged for the first two hours of searching if the request is not for a commercial use and is submitted by an entity that is not an educational or scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media.
(iii) Requests for records about oneself. No search fee shall be charged to search for records performed under the terms of the Privacy Act, 5 U.S.C. 552a(f)(5).
(2) Review fees. Review fees shall be assessed only with respect to those requesters who seek records for a commercial use. A review fee shall be charged for the initial examination of documents located in response to a request to determine whether the documents may be withheld from disclosure and for the redaction of document portions exempt from disclosure. Records or portions of records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such subsequent review are also assessable.
(3) Duplication fees. Records will be photocopied at a rate of ten cents ($0.10) per page. For other methods of reproduction or duplication, OSTP will charge the actual direct costs of producing the document(s). Duplication fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use.
(c) Aggregation of requests. When OSTP determines that a requester, or a group of requesters acting in concert, is attempting to evade the assessment of fees by submitting multiple requests in place of a single, more complex request, OSTP may aggregate any such requests and assess fees accordingly.
(d) Fees likely to exceed $25. If total fee charges are likely to exceed $25, OSTP shall notify the requester of the estimated amount to be charged. The notification shall offer the requester an opportunity to confer with the FOIA Public Liaison to formulate the request to meet the requester’s needs at a lower cost. OSTP may administratively close a submitted FOIA request if the requester does not respond in writing within thirty (30) calendar days after the date on which OSTP notifies the requester of the fee estimate.
(e) Advance payments. Fees may be paid upon provision of the requested records, except that payment may be required prior to that time if the requester has previously failed to pay fees or if OSTP determines that the total fees will exceed $250. When payment is required in advance of the processing of a request, the time limits prescribed in § 2402.6 shall not be deemed to begin until OSTP has received payment of the assessed fees. If the requester has previously failed to pay fees or charges are likely to exceed $250, OSTP shall notify the requester of the estimated cost and:
(1) Obtain satisfactory assurance from the requester, in writing, of full payment; or
(2) OSTP may require the requester to pay the full amount of any fees owed or make an advance payment of the full amount of OSTP’s estimated charges.
§ 2402.10 Waiver of fees.

(a) In general. OSTP shall waive part or all of the fees assessed under § 2402.9 if, based upon information provided by a requester or otherwise made known to OSTP, the disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations or activities and is not primarily for commercial purposes. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis. To determine whether a fee waiver requirement is met, OSTP shall consider the following factors:

(1) Disclosure of the requested information would shed light on the operations or activities of the Federal Government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information already in the public domain, in either the same or a substantially similar form, would not be meaningfully informative if nothing new would be added to the public’s understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area as well as the requester’s ability and intention to effectively convey information to the public must be considered. OSTP will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OSTP will consider the following criteria:

(i) OSTP will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters are encouraged to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, OSTP will determine whether that is the primary interest furthered by the request. OSTP will ordinarily presume that when a news media requester has satisfied the conditions in paragraphs (a)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester. Data brokers or others who merely compile and market government information for direct economic return will not receive the benefit of this presumption.

(b) Timing of fee waivers. A request for a waiver or reduction of fees should be made when a request for records is first submitted to the agency and should address the criteria referenced in paragraph (a) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date of the fee waiver request was received.

(c) Clarification. Where OSTP has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, OSTP may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes.

(d) Restrictions on charging fees. Except as described in paragraphs (c)(1) through (3) of this section, if OSTP fails to comply with the FOIA’s time limits for responding to a request, it may not charge search fees. In addition, subject to the exceptions set forth in paragraphs (c)(1) through (3) of this section, if OSTP does not comply with the FOIA’s time limits for responding to a request, it may not charge duplication fees when records are not sought for a commercial use and the request is made by an educational institution, non-commercial scientific institution, or representative of the news media.

(1) If OSTP determines that unusual circumstances, as defined by the FOIA, apply and provides timely written notice to the requester in accordance with the FOIA, then a failure to comply with the statutory time limit shall be excused for an additional ten (10) days.

(2) If OSTP determines that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, then OSTP may charge search fees and duplication fees, where applicable, if the following steps are taken. OSTP must:

(i) Provide timely written notice of unusual circumstances to the requester in accordance with the FOIA; and

(ii) Discuss with the requester via postal mail, email, or telephone (made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(3) If a court determines that exceptional circumstances exist, as defined by the FOIA, then a failure to comply with the statutory time limits shall be excused for the length of time provided by the court order.

§ 2402.11 Maintenance of statistics.

(a) OSTP shall maintain records sufficient to allow accurate reporting of FOIA processing statistics, as required under 5 U.S.C. 552(e) and all guidelines for the preparation of annual FOIA reports issued by the Department of Justice.

(b) OSTP shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report compiling the statistics maintained in accordance with paragraph (a) of this section for the previous fiscal year. A copy of the report will be available for public inspection on the OSTP website.
ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

Trinexapac-ethyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of trinexapac-ethyl in or on sugarcane, cane and sugarcane molasses. Syngenta Crop Protection, LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 4, 2020. Objections and requests for hearings must be received on or before January 4, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the SUPPLEMENTARY INFORMATION).

ADDRESS: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2020–0046, is available at http://www.regulations.gov or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–8805. Due to public health concerns related to COVID–19, the OPP Docket Center and Public Reading Room are closed for the time being, although EPA staff are continuing to provide remote assistance. Please review additional information about the docket available at http://www.epa.gov/dockets.

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7900; email address: RDFRNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me? You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following listing of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

• Crop production (NAICS code 111).
• Animal production (NAICS code 112).
• Food manufacturing (NAICS code 311).
• Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information? You may access a frequently updated version of EPA’s tolerance regulations at 40 CFR part 180 through the Government Publishing Office’s e-CFR site at http://www.ecfr.gov/cgi-bin/textidx?&c=ecfr&tpl=/ecfrbrowse/CFR/textidx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.

C. How can I file an objection or hearing request? Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2020–0046 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 4, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2020–0046, by one of the following methods:

• Federal eRulemaking Portal: http://www.regulations.gov. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
• Mail: OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), 2800 Jackson CBR, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
• Hand Delivery: To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at http://www.epa.gov/dockets/contacts.html. Additional instructions on commenting or visiting the docket, along with more information about docket generally, is available at http://www.epa.gov/dockets.

II. Summary of Petitioned-For Tolerance

In the Federal Register of March 3, 2020 (85 FR 12454) (FRL–10005–58), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F8761) by Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. The petition requested that 40 CFR part 178.662 be amended by establishing tolerances for residues of the herbicide trinexapac-ethyl, (4-(cyclopropyl-α-hydroxy-methylene)-3,5-dioxo-cyclohexanecarboxylic acid ethyl ester), and its primary metabolite CGA-179500 in or on sugarcane, cane at 1.5 parts per million (ppm) and sugarcane molasses at 5.0 ppm. That document referenced a summary of the petition prepared by Syngenta Crop Protection, LLC, the registrant, which is available in the docket, http://www.regulations.gov. Comments were received on the notice of filing. EPA’s response to these comments is discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA is modifying the tolerance expression and the tolerance for sugarcane, molasses at a different level than petitioned-for. The reasons for these are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA
EXHIBIT 2

CAIDP FOIA Request
(June 20, 2022)
VIA EMAIL

June 20, 2022

Office of Science and Technology Policy
Rachel Wallace
Deputy Counsel and Chief Operating Officer
1650 Pennsylvania Ave, NW
Washington, D.C., 20504
Email: ostpfoia@ostp.eop.gov

Dear Ms. Wallace:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552a, 32 C.F.R. § 2402 (2020) (Office of Science and Technology Policy Regulations Implementing the Freedom of Information Act) and is submitted on behalf of the Center for AI and Digital Policy (“CAIDP”) to the Office of Science and Technology Policy (“OSTP”).

About CAIDP

The Center for AI and Digital Policy (CAIDP) is a non-profit, educational organization, incorporated in Washington, DC. The mission of the Center is “to promote a better society, more fair, more just — a world where technology promotes broad social inclusion based on fundamental rights, democratic institutions, and the rule of law.”

The Center has expressed strong support for the OSTP’s proposed AI Bill of Rights. Shortly after the OSTP announced the initiative, Dr. Lorraine Kisselburgh and Marc Rotenberg, two members of the CAIDP board of directors, wrote, “[t]he President’s science advisors have launched a critical initiative. Their recommendations should build on earlier work and lead to concrete outcomes” In May 2022, the Center organized a public campaign in support of the AI Bill of Rights, and gathered signatures from leading experts in the field of AI.

1 Center for AI and Digital Policy, https://www.caidp.org
2 The authors also warned against delay. “There is an urgent need now to make automated hiring and performance decisions fairer and more transparent.” Lorraine Kisselburgh and Marc Rotenberg, Next Steps on the U.S. AI Bill of Rights, Washington Spectator, November 2, 2021, https://washingtonspectator.org/ai-bill-of-rights/
3 “We are writing to you regarding the need to move forward the proposal for a Bill of Rights for the Age of Artificial Intelligence.” CAIDP Statement to the US Office of Science and Technology Policy, Support the OSTP AI Bill of Rights, May 18, 2022, https://www.caidp.org/statements/ostp/
Documents Requested

1) All records, possessed by the agency, concerning the AI Bill of Rights

2) All records, possessed by the agency, concerning Eric Schmidt’s involvement in the development of the AI Bill of Rights and related AI policy initiatives, including but not limited to, communications involving representatives of Schmidt Futures / Schmidt Ventures, which includes those on the OSTP staff who received funding from Schmidt Futures / Schmidt Ventures

3) All records, possessed by the agency, concerning the agency’s use of AI to process FOIA requests

Background

1) All records, possessed by the agency concerning the AI Bill of Rights

On October 22, 2021, the President’s Science Advisor and Director of the White House Office of Science & Technology Policy (OSTP) Dr. Eric Lander and OSTP Deputy Director for Science & Society Dr. Alondra Nelson published a column in Wired titled “Americans Need a Bill of Rights for an AI-Powered World: The White House Office of Science and Technology Policy is developing principles to guard against powerful technologies—with input from the public,”4 The column was subsequently published on the White House website.5 The initiative received widespread, positive coverage.6

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6 See, e.g., Anjana Ahuja, A global AI bill of rights is desperately needed, Algorithmic decision-making has long put technology first, with due diligence an afterthought, Financial Times, October 11, 2021, https://www.ft.com/content/7e42c58e-b3d4-4db5-9ddf-7e6c4b853366; Makenzie Holland, Biden's top science advisor working on AI bill of rights: A national AI bill of rights could include the rights to transparency and data governance, Tech Target, November 9, 2021, https://www.techtarget.com/searchenterpriseai/news/252509301/Bidens-top-science-advisor-working-on-AI-bill-of-right;, Steve Ritter, The U.S. urgently needs an A.I. Bill of Rights, Fortune, November 12, 2021, (“The nation’s leading scientists believe that artificial intelligence is such a risk that we need another Bill of Rights to protect what makes us human. They are right.”), https://fortune.com/2021/11/12/ai-bill-of-rights-biden-artificial-intelligence-steve-ritter-mitek-systems/
In the article, the President’s top science advisors warned that the deployment of artificial intelligence has “led to serious problems.”\(^7\) They explained that “training machines based on earlier examples can embed past prejudice and enable present-day discrimination.”\(^8\) They warned that hiring tools can reject applicants who are dissimilar from existing staff despite being well qualified.\(^9\) They described how mortgage approval algorithms could extend decades of housing discrimination into the digital age.\(^10\) They also highlighted the fact that the failings of AI disproportionately affect marginalized individuals and communities. They concluded:

Americans have a right to expect better. Powerful technologies should be required to respect our democratic values and abide by the central tenet that everyone should be treated fairly. Codifying these ideas can help ensure that.\(^11\)

The President’s top science advisors outlined several key elements for the AI Bill of Rights:

- Your right to know when and how AI is influencing a decision that affects your civil rights and civil liberties;
- Your freedom from being subjected to AI that hasn’t been carefully audited to ensure that it’s accurate, unbiased, and has been trained on sufficiently representative data sets;
- Your freedom from pervasive or discriminatory surveillance and monitoring in your home, community, and workplace; and
- Your right to meaningful recourse if the use of an algorithm harms you.

The also outlined several strategies to implement these rights:

- The federal government could refuse to buy software or technology products that fail to respect these rights;
- Federal contractors could be required to use technologies that adhere to this “bill of rights,” and
- New laws and regulations could be adopted.

The White House subsequently encouraged public participation in the development of the AI Bill of Rights.\(^12\) The White House announced several ways for the public to “join this mission and share their perspectives,” including responses to a Request for Information and emails to

\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
OSTP. As the OSTP stated, “If you would like to provide input into the OSTP Bill of Rights for an Automated Society policy process, email us at AI-equity@ostp.eop.gov.”

The OSTP also announced public listening sessions and “six public events that will bring together stakeholders to discuss the risks and benefits artificial intelligence holds for democratic participation.” The public events highlighted:

- Consumer Rights and Protections
- The Criminal Justice System
- Equal Opportunities and Civil Justice
- Artificial Intelligence and Democratic Values
- Social Welfare and Development
- The Healthcare System

On information and belief, the listening sessions were held as were the public events. But to date there has been no report published and no outcomes from these meeting.

These has been no summary provided regarding the public request for comments to OSTP regarding AI.

The Request for Information on Public and Private Sector Uses of Biometric Technologies opened on October 8, 2021, and closed on January 15, 2022. No further information has been provided regarding this initiative.

There was a brief mention of the OSTP AI Bill of Rights in early February 2022 blog post:

OSTP has issued a call for the development of an AI Bill of Rights, and is working closely with both domestic and international partners across bilateral and multilateral venues to advance development, adoption, and oversight of AI in a manner that aligns with our democratic values.

13 Id.
15 Lynne Parker, Director, National AI Initiative Office, and Rashida Richardson, Senior Policy Advisor for Data and Democracy, OSTP’s Continuing Work on AI Technology and Uses that Can Benefit Us All, February 3, 2022, https://www.whitehouse.gov/ostp/news-updates/2021/10/22/icymi-wired-opinion-americans-need-a-bill-of-rights-for-an-ai-powered-world/
In a recent interview with the OSTP Director, the AI Bill of Rights was described as OSTP’s “biggest policy push.” According to the interview, “the bill of rights [was] due out in early May.”

The problems with the deployment of AI identified by Dr. Nelson and Dr. Lander in the October 2021 article have not subsided. By all accounts, these problems are growing worse. As Timnit Gebru and Margaret Mitchell, two leading experts on Artificial Intelligence, wrote recently in The Washington Post, “The race toward deploying larger and larger models without sufficient guardrails, regulation, understanding of how they work, or documentation of the training data has further accelerated across tech companies.”

CAIDP seeks all records, possessed by the agency, concerning the AI Bill of Rights, including, but not limited to, emails, reports, memoranda, and presentations.

2) Request for records concerning Eric Schmidt’s involvement in the development of OSTP policy priorities

The record request for the communications with Eric Schmidt, and his representatives, follows from the reporting of the role that Mr. Schmidt played in the policy work of OSTP. According to POLITICO, “A foundation controlled by Eric Schmidt, the multi-billionaire former CEO of Google, has played an extraordinary, albeit private, role in shaping the White House Office of Science and Technology Policy over the past year.” The POLITICO article continued:

Schmidt maintained a close relationship with the president’s former science adviser, Eric Lander, and other Biden appointees. And his charity arm, Schmidt Futures, indirectly paid the salaries of two science-office employees, including, for six weeks, that of the

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17 Timnit Gebru and Margaret Mitchell, Opinion We warned Google that people might believe AI was sentient. Now it’s happening, The Washington Post, June 17, 2022, https://www.washingtonpost.com/opinions/2022/06/17/google-ai-ethics-sentient-lemoine-warning/

18 Alex Thomson, A Google billionaire's fingerprints are all over Biden's science office: Eric Schmidt has long sought influence over U.S. science policy. Under Biden’s former science chief, Eric Lander, Schmidt’s foundation helped cover officials’ salaries, even as the office’s general counsel raised ethical flags, POLITICO, March 28, 2022, https://www.politico.com/news/2022/03/28/google-billionaire-joe-biden-science-office-00020712. Mr. Schmidt contested the POLITICO report in a blog post.
current chief of staff, Marc Aidinoff, who is now one of the most senior officials in the office following Lander’s resignation in February.

The POLITICO article further explained, “The White House science office sets strategic priorities for the nation’s more than $1.4 trillion in annual health and science spending. It has also been increasingly focused on federal policy on artificial intelligence.”

Mr. Schmidt contested the POLITICO report in a blog post. He stated that Schmidt Futures has “no authority” to make any policy decisions and also that OSTP “retain[s] full discretion” over policy decisions. There was no discussion of the extent of influence that Mr. Schmidt or Schmidt Futures may have exercised over the AI Bill of Rights initiative or AI generally.

Mr. Schmidt’s opposition to the regulation of artificial intelligence is well known. Mr. Schmidt has opposed the EU Artificial Intelligence Act. He chaired the National Security Commission on Artificial Intelligence, which called for a national framework to enable the use of biometric identification technologies. He has an investment fund with deep ties to national security. He published a book that mostly argues that humans should not stand in the way of AI deployment, which he called “negligent perhaps reckless.” He even suggested in *The Age of AI*

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19 Id.
23 Whizy Kim, *Google CEO Eric Schmidt’s new investment fund deepens his ties to national security interests America’s Frontier Fund exemplifies the revolving door between the tech industry and government*, Recode, June 9, 2022, (“He’s an investor and chair of Sandbox AQ, an AI software development company spun off from Google’s parent company, Alphabet — and In-Q-Tel recently announced it was backing Sandbox AQ, saying it hopes to eventually sell the software to US intelligence agencies.”), https://www.vox.com/recode/2022/6/9/23160588/eric-schmidt-americas-frontier-fund-google-alphabet-tech-government-revolving-door
that AI will determine “what is relevant to our lives,” — a dangerous invitation to disarm the human intellect.

CAIDP request all records, possessed by the agency, such as emails, reports, memoranda, and presentations, concerning Eric Schmidt’s involvement in the development of the AI Bill of Rights and related AI policy initiatives, including but not limited to, communications involving representatives of Schmidt Futures / Schmidt Ventures, which includes those on the OSTP staff who received funding from Schmidt Futures / Schmidt Ventures.

3) Request for Records Concerning the Agency’s Use of AI to Process FOIA Requests

The 2022 Chief Freedom of Information Act Officer Annual Report for OSTP states “We encourage the use of AI tools that would allow for real time reporting, something that would benefit both requestors and agencies.” According to the Report, OSTP led an AI training event for federal agencies on November 5, 2020. “The AI 101 training session afforded OSTP the opportunity to provide extensive information on how Federal FOIA programs could effectively and efficiently maximize AI to meet their FOIA processing obligations. Additionally, it provided an avenue for attendees to share information regarding technologies currently in use at various agencies.”

CAIDP requests all records, possessed by the agency, concerning the agency’s use of AI to process FOIA requests, including, but not limited to, emails, reports, memoranda, and presentations.

Note that we request that record categories (1) and (2) be processed on an expedited basis. We do not make this request for this record category.

Request for Expedited Processing

The CAIDP is entitled to expedited processing of this request because there is a “compelling need” to “inform the public” about the status of the OSTP AI Bill of Rights. 32 C.F.R. § 2402.6(d) (“Expedited processing of requests”).

27 Id at. 3.
First, CAIDP is an organization “primarily engaged in disseminating information.” 32 C.F.R. § 2402.6(d)(ii). The Center for AI and Digital Policy is non-profit educational organization, incorporated in Washington, DC in 2021. CAIDP has received a 501(c)(3) determination. CAIDP maintains a public website caidp.org concerning AI policy which is one of the top-rated websites in the world for a search on “AI policy.” CAIDP also publishes annually Artificial Intelligence and Democratic Values, a comprehensive review of AI policies and practices. The 2022 AI and Democratic Values report included a specific discussion about the status of the OSTP Bill of Rights initiative.28 The Center also publishes the CAIDP Update.

Second, there is an “urgency to inform the public concerning [an] actual . . . Government activity.” 32 C.F.R. § 2402.6(d)(ii). The OSTP AI Bill of Rights initiative is an “actual . . . Government activity” as the OSTP itself has acknowledged and Mr. Schmidt’s role in funding the OSTP has been widely reported. The urgency arises from the ongoing delay in the finalization and publication of the previously announced AI Bill of Rights, following the agency’s prior public consultations, the White House endorsement, the receipt of public comments, and ongoing concern about the fairness of AI-based decision-making, as noted, for example, in the recent Gebru/Mitchell commentary in The Washington Post.

In submitting this request for expedited processing, CAIDP certifies that this explanation is true and correct. 32 C.F.R § 2402.6(d)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

Request for “News Media” Fee Status

CAIDP is a “representative of the news media” for fee classification purposes because CAIDP “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.”

As explained above, the Center for AI and Digital Policy is non-profit educational organization, incorporated in Washington, DC in 2021. CAIDP has received a 501(c)(3) determination. CAIDP maintains a public website caidp.org concerning AI policy which is one of the top-rated websites in the world for a search on “AI policy.” CAIDP also publishes annually Artificial Intelligence and Democratic Values, a comprehensive review of AI policies and practices. The 2022 AI and Democratic Values report included a specific discussion about the status of the OSTP Bill of Rights initiative.29 The Center also publishes the CAIDP Update.

As such, “No search fee shall be charged if the request is not sought for a commercial use and is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.” 32 C.F.R. § 2402.6(d)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

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28 Artificial Intelligence and Democratic Values 480-81 (CAIDP 2022) (“Although the OSTP issued an update on its ‘continuing work’ on AI that ‘aligns with our democratic values’ in February 2022, progress on the AI Bill of Rights and its impact remain unclear.”)
29 Artificial Intelligence and Democratic Values 480-81 (CAIDP 2022),
2402.9(b)(1)(i) (Fees - Educational, scientific, or news media requests). Moreover, review fees should not be charged as “Review fees shall be assessed only with respect to those requesters who seek records for a commercial use.” 32 C.F.R. § 2402.9(b)(2) (Review fees) CAIDP is engaged in only non-commercial activity.

Further, any duplication fees should also be waived because “disclosure of the information is in the public interest.” 32 C.F.R. § 2402.10(a)

Request for Public Interest Fee Waiver

Further, CAIDP requests a waiver of all fees because the “disclosure of the requested information is in the public interest. 32 CFR § 2402.10(a). “Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations or activities and is not primarily for commercial purposes.” Id. To determine whether a fee waiver requirement is met, OSTP considers several factors. Id.

First, disclosure of the requested documents is in the public interest because it is “likely to shed light on the operations or activities of government.” § 2402.10(a)(1). Disclosure of records concerning the development and status of the AI Bill of Rights, one of the OSTP’s top priorities, will necessarily shed light on the operations or activities of government.

Second, disclosure of the requested documents “is likely to contribute significantly to public understanding of those operations or activities.” § 2402.10(a)(2). This factor is satisfied because (1) the release of the requested records will be “meaningful informative,” as information already in the public domain is not requested, § 2402.10(a)(2)(i), and (2) the release of the requested records will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” as the activities of the Office of Science and Technology Policy, particularly concerning AI, are of widespread public interest. § 2402.10(a)(2)(ii)

Third, the disclosure is not “primarily in the commercial interest of the requester.” § 2402.10(a)(3). CAIDP is a non-profit, educational organization that routinely publishes, without charge, news concerning AI policy.

For these reasons, CAIDP should be granted a public interest fee waiver.

Conclusion

We anticipate your response within ten (10) calendar days. 32 C.F.R. § 2402.6(d)(2). Contact information for the requester, 32 C.F.R. § 2402.4(d): rotenberg@caidp.org, (email)

Center for AI and Digital Policy
1100 13th St. NW
Suite 800
Washington, DC 20005
Note that this FOIA request is contained in an email and not as an attachment as per 32 CFR § 2402.4(a)(3).

This FOIA request may also be downloaded from the CAIDP website: https://www.caidp.org/app/download/8398565063/CAIDP-OSTP-FOIArequest-20062022.pdf

Thank you for your assistance with the processing of this request.

Sincerely,

Marc Rotenberg, President
Center for AI and Digital Policy
EXHIBIT 3

OSTP Response
(June 28, 2022)
June 28, 2022

Marc Rotenberg  
Center for AI and Digital Policy  
1100 13th St. NW  
Suite 800  
Washington, DC 20005

Re: OSTP-FOIA # 22-080

Dear Mr. Rotenberg:

This letter acknowledges a Freedom of Information Act (henceforth “FOIA”)\(^1\) request submitted to the Office of Science and Technology Policy (hereinafter “OSTP”) on June 20, 2022. The request specifically sought:

“1) All records, possessed by the agency, concerning the AI Bill of Rights
2) All records, possessed by the agency, concerning Eric Schmidt’s involvement in the development of the AI Bill of Rights and related AI policy initiatives, including but not limited to, communications involving representatives of Schmidt Futures / Schmidt Ventures, which includes those on the OSTP staff who received funding from Schmidt Futures / Schmidt Ventures
3) All records, possessed by the agency, concerning the agency’s use of AI to process FOIA requests.”

The request is for processing on an expedited basis. OSTP’s determination is articulated below.

In accordance with the FOIA, OSTP uses a multitrack processing system when reviewing FOIA requests.\(^2\) Requests within each track are processed on a “first-in, first-out” basis.\(^3\) “Track one is made up of requests that sought and received expedited processing.”\(^4\) “Track two is for requests of simple to moderate complexity that do not require consultations with other entities and do not involve voluminous records.”\(^5\) And “[t]rack three is for complex requests that involve voluminous records, require lengthy or

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\(^1\) 5 U.S.C. § 552.
\(^2\) 5 U.S.C. § 552(a)(6)(D); 32 C.F.R. § 2402.6(e).
\(^3\) 32 C.F.R. § 2402.6(e)(1).
\(^4\) Id. at § 2402.6(e)(1)(i).
\(^5\) Id. at § 2402.6(e)(1)(ii).
numerous consultations, raise unique or novel legal questions, or require submitter review under § 2402.7.\textsuperscript{6}

To qualify for expedited processing, one of the following compelling needs must be met:

(i) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists.\textsuperscript{7}

**REQUEST FOR EXPEDITED PROCESSING**

Here, requestor is not alleging that “failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.”\textsuperscript{8} Thus, the analysis will focus on the “urgency to inform the public” requirement.\textsuperscript{9}

**NEED TO INFORM THE PUBLIC**

In order to qualify for expedited processing under the urgent need to inform the public type of compelling need, the requestor has to be “a person primarily engaged in disseminating information.”\textsuperscript{10} To establish the preceding requirement, requestor noted that the Center for AI and Digital Policy “publishes annually *Artificial Intelligence and Democratic Values*, a comprehensive review of AI policies and practices. The 2022 *AI and Democratic Values* report included a specific discussion about the status of the OSTP Bill of Rights initiative. The Center also publishes the *CAIDP Update.*”

In deciding whether “an urgency to inform the public exists in a given situation,” courts consider at least three factors:

‘(1) whether the request concerns a matter of current exigency to the American public;

\textsuperscript{6} Id. at § 2402.6(e)(1)(iii).
\textsuperscript{7} Id. at § 2402.6(d)(2)(i)-(ii).
\textsuperscript{8} Id. at § 2402.6(d)(2)(i)
\textsuperscript{9} Id. at § 2402.6(d)(2)(ii)
\textsuperscript{10} 32 C.F.R. § 2402.6(d)(2)(ii).
(2) whether the consequences of delaying a response would compromise a significant recognized interest;

(3) whether the request concerns federal government activity.”

Under the first prong, courts have held that a “compelling need” exists when the subject matter of the request is central to a pressing issue of the day. For example, “[news coverage regarding] the renewal of the USA PATRIOT Act” or active discussions over the reauthorization of certain Voting Rights Act provisions.

Here, requestor noted that:

“[t]he urgency arises from the ongoing delay in the finalization and publication of the previously announced AI Bill of Rights, following the agency’s prior public consultations, the White House endorsement, the receipt of public comments, and ongoing concern about the fairness of AI-based decision-making, as noted, for example, in the recent Gebru/Mitchell commentary in The Washington Post.”

When requestor’s statement regarding the alleged “delay in the finalization and publication of the previously announced AI Bill of Rights” is viewed in the light of cases cited above, it falls short of the requirement of a matter that creates “current exigency to the American public.”

Additionally, requestor has not “demonstrated any ‘significant adverse consequence’ that would result if [the] request[] for expedited processing of these or any other documents were denied, and [he] therefore received the documents later rather than sooner. See H.R. REP. NO. 104-795, at 26 (‘By requiring a 'compelling need,' the expedited access procedure is intended to be limited to circumstances in which a delay in obtaining information can reasonably be foreseen to cause a significant adverse consequence to a recognized interest.’).”

Furthermore, the request is devoid of the type of supporting information that is typically used to establish an urgent need for requested information on an expedited

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14 Landmark, 910 F. Supp. 2d at 276.
basis. For instance, evidence of widespread media interest regarding the subject matter sought in the records in the days or weeks leading to the request.\textsuperscript{16}

The D.C. Circuit Court has held that the “‘specified categories for compelling need are intended to be narrowly applied.’”\textsuperscript{17} This request squarely fails to satisfy that requirement, because requestor has not demonstrated that producing the information sought on an expedited basis is a “matter of current exigency to the American public.”\textsuperscript{18}

Thus, the request for expedited process is \textbf{DENIED}.

Based on the denial, OSTP will process the submission as a track three request.\textsuperscript{19} However, there are several pending requests that were received prior to the instant one. Accordingly, it is anticipated that the processing time will extend beyond 20 business days. Once the review process is completed, the responsive records will be immediately released to the extent permitted by any applicable FOIA exemptions.

Requestor is seeking a fee waiver. The waiver request is \textbf{GRANTED}.

Pursuant to the FOIA and OSTP regulations, a requestor may appeal an agency’s decision denying expedited processing.\textsuperscript{20} Any appeal related to the processing of this request must be sent either (1) via email to OSTPFOIA@ostp.eop.gov; or (2) by mail to Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue, NW, Washington, D.C 20504.\textsuperscript{21} In the appeal letter, please specify OSTP-FOIA Control number: \textbf{22-080}. Any appeal must be sent to one of the above listed addresses no later than ninety (90) calendar days after the date of this letter.”\textsuperscript{22}

Please note that requestors have the right to seek dispute resolution services regarding their requests from OSTP’s FOIA Public Liaison or the Office of Government Information Services (hereafter “OGIS”). To employ these services, please contact Rachel Wallace via telephone at (202) 456-4444 or by e-mail at OSTPFOIA@ostp.eop.gov. To contact OGIS, please use the following contact information:

\textbf{Office of Government Information Services}

\textsuperscript{17} \textit{Al-Fayed}, 254 F.3d at 311.
\textsuperscript{18} \textit{Landmark}, 910 F. Supp. 2d at 276.
\textsuperscript{19} 32 C.F.R. § 2402.6(e)(1)(iii).
\textsuperscript{21} 32 C.F.R. § 2402.8(b)(2).
\textsuperscript{22} 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); \textit{Id. at} § 2402.8(b)(1).
If you have any questions, please do not hesitate to contact me via telephone or e-mail.

Sincerely,

Rachel Wallace
Deputy General Counsel
EXHIBIT 4

CAIDP APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR
EXPEDITED PROCESSING
(June 30, 2022)
VIA EMAIL

June 30, 2022

Office of Science and Technology Policy
Rachel Wallace
Deputy Counsel and Chief Operating Officer
1650 Pennsylvania Ave, NW
Washington, D.C., 20504 E
mail: ostpfoia@ostp.eop.gov

OSTP-FOIA Control number: 22-080

APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR EXPEDITED PROCESSING

CAIDP FOIA Request

On June 20, 2022, the Center for AI and Digital Policy (“CAIDP” or “the Center”) sent a Freedom of Information Act (“FOIA”) request to the Office of Science and Technology Policy (“OSTP” or “the Agency”) concerning the OSTP’s proposed AI Bill of Rights.¹ CAIDP described three categories of records in the FOIA Request. Citing the urgency of the AI policy initiative, the widespread public interest, and the OSTP’s prior statements and prior actions, CAIDP requested expedited processing for the first two categories of the FOIA Request. CAIDP also requested a fee waiver. The OSTP responded by email to CAIDP on June 28, 2022.²

Agency Response

The OSTP granted the fee waiver to CAIDP. Moreover, the OSTP did not dispute that CAIDP “is primarily engaged in disseminating information,” 32 C.F.R. § 2402.6(d)(2)(ii), or that CAIDP certified that the explanation, in support of its request for expedition, is “true and correct.” 32 C.F.R § 2402.6(d)(3). However, the OSTP denied CAIDP’s request for expedited processing.

Therefore, the only issue in dispute in this Appeal is whether the Center has “demonstrate[d] that an urgency to inform the public concerning actual or alleged federal government agency exists.” 32 C.F.R. § 2402.6(d)(2)(ii).

¹ The “CAIDP FOIA Request.”
² OSTP Response to CAIDP FOIA Request, June 28, 2028 (“OSTP Response”)
Appeal of Agency Determination and New Request for Expedient Processing

CAIDP both appeals the determination to deny expedited processing, 32 C.F.R. § 2402.8(a), and makes a new request for expedited processing, incorporating the original Request as well as additional facts and arguments presented in this Appeal. “A requester may make a request for expedited processing at any time.” 32 C.F.R § 2402.6(d)(1). As this Appeal also constitutes a new request for expedited processing, CAIDP certifies that this explanation is true and correct. 32 C.F.R § 2402.6(d)(3).

Determination of Expedited Processing

According to the D.C. Circuit, the determination for expedited processing hinges on three factors: (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. Al-Fayed v. CIA, 254 F.3d 300, 310 (2002). See, e.g., Protect Democracy Project, Inc. v. United States DOD, 263 F. Supp. 3d 293 (2017) (ruling that an agency failed to grant expedited processing as required.)

The Agency does not dispute that CAIDP’s request concerns actual or alleged federal government activity, but claims that the “requestor has not demonstrated that producing the information sought on an expedited basis is a ‘matter of current exigency to the American public.’” The Agency makes this claim even after the former Director of the OSTP – the President’s top science advisor -- published an article describing the urgency of the AI Bill of Rights initiative, the initiative that has apparently now stalled, and is the focus of CAIDP’s FOIA Request.

It should be unnecessary for a FOIA requester to make clear the compelling need for an agency to inform the public, on an expedited basis, about an agency initiative when the Agency Director, who is also a Cabinet official and the top advisor to the President in the subject matter domain, has described the importance of the initiative for the American public, (“these tools can embed past prejudice and enable present-day discrimination”), organized the American public in support of the initiative, and indicated that delay that would leave in place “powerful

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3 OSTP Response [at 4]. No page numbers appear on the OSTP Response.
technologies” that fail to “respect our democratic values and abide by the central tenet that everyone should be treated fairly.”

Speaking at the 2021 Stanford University Human-Centered Artificial Intelligence Fall Conference, Dr. Lander said an AI bill of rights will give consumers a right to transparency and explainable AI, a technology approach that provides insight into algorithmic processes.⁵ He also stated that the AI Bill of Rights will provide the basis for regulation and legislation.⁶ Some of the rights could include a right for individuals to govern their personal data and the right to know what data was used to create and test an AI algorithm.⁷

These prior statements and prior actions by the OSTP Director make clear that the OSTP itself has determined that the subject of the FOIA request is (1) “a matter of current exigency to the American public” and (2) “the consequences of delaying a response would compromise a significant recognized interest.” Al-Fayed, 254 F.3d at 310.

But if further elaboration is necessary, CAIDP makes the following additional arguments, supplemented with additional facts, in support of expedited processing, emphasizing the first two prongs of the Al-Fayed factors.

1) The AI Bill of Rights is of widespread interest to the American Public

First, there is no issue of greater interest to the American public, within the purview of the Office of Science and Technology Policy, than the proposed AI Bill of Rights. The agency itself made it of interest to the American public with the decisions to (1) announce the initiative, (2) promote the initiative, (3) organize public events about the initiative, (4) request public comment on the initiative, and (5) promote the initiative on the White House website and with the media.” A search on Lexis in the News file on “Office of Science and Technology Policy” and “Bill of Rights” returned 281 news items. Google Search turned approximately 53,900 items. A sample is attached in Exhibit 1.

As described above, the former Director and current Acting Director have themselves stated the urgency of this policy initiative. The title of their Wired article was literally “Americans Need a Bill of Rights for an AI-Powered World” (emphasis added) The subtitle of the article makes clear that matter “is of current exigency to the American public.” The former Director and the current Acting Director wrote, “The White House Office of Science and

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⁵ Makenzie Holland, Biden's top science advisor working on AI bill of rights: A national AI bill of rights could include the rights to transparency and data governance, according to Biden's top science advisor, TechTarget, Nov. 9, 2021, https://www.techtarget.com/searchenterpriseai/news/252509301/Bidens-top-science-advisor-working-on-AI-bill-of-rights
⁶ Id.
⁷ Id.
Technology Policy is developing principles to guard against powerful technologies—with input from the public.”

As the former Director and current Acting Director explained (which CAIDP highlighted in the FOIA Request):

[T]he deployment of artificial intelligence has “led to serious problems.” They [Dr. Lander and Dr. Nelson] explained that “training machines based on earlier examples can embed past prejudice and enable present-day discrimination.” They warned that hiring tools can reject applicants who are dissimilar from existing staff despite being well qualified. They described how mortgage approval algorithms could extend decades of housing discrimination into the digital age. They also highlighted the fact that the failings of AI disproportionately affect marginalized individuals and communities.8

Having alerted the public to the risks of AI and proposed an AI Bill of Rights, the OSTP cannot now argue that there is no compelling need to provide information to the public about the status of the initiative. In their own words, “Powerful technologies should be required to respect our democratic values and abide by the central tenet that everyone should be treated fairly.”9

2) The American Public provided many comments in response to the OSTP Request for Information

Second, there was widespread public response to the OSTP request for comments on the proposal, underscoring the current exigency to the American public of the Bill of Rights initiative. For example, a coalition of artists, scientists, journalists, media-makers and human rights activists who actively engage with Artificial Intelligence submitted a detailed statement to the OSTP along with a list of reports and projects “created by members of our communities that use or address AI technologies.”10 They wrote, “We urge the process of developing an AI Bill of Rights be actively animated and informed by this work, and our community.”11

A brief Internet search reveals that many other organizations submitted comments to the OSTP in response to the Agency’s request for comments on the AI Bill of Rights initiative. The Business Software Alliance. The HR Policy Association wrote, “Large employers are committed to the prevention of bias in the workplace, and use cases for AI in the workplace vary widely. If not implemented and used responsibly, artificial intelligence has the potential to produce adverse

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8 CAIDP FOIA Request at 3 (footnotes omitted).
9 Id.
11 A public statement submitted to the Office of Science and Technology Policy

Id.
outcomes and negate diversity efforts.” In comments to the Agency, the Bipartisan Policy Center noted that “OSTP will play a vital role in defining the future of AI-enabled biometric technologies.” The US Chamber of Commerce Technology Engagement Center wrote in support of the initiative, stating “the Chamber stands committed to working with the Office of Science Technology Policy around its work to develop an AI Bill of Rights that allows for the ‘equitable harnessing’ of the benefits of AI and Biometrics technology.” The Software and Information Industry Association (“SIIA”) wrote:

SIIA commends OSTP’s efforts to develop a Bill of Rights for an Automated Society and appreciate the steps that OSTP has taken, through this RFI and a series of roundtables and listening sessions, to hear from consumers, businesses, academics, and the American public. Artificial intelligence (AI) is having a profound impact on all aspects of society and the impact will only continue. Leadership in developing policy to ensure that AI technologies are developed and used responsibly and in accordance with societal expectations is critical.

But the full extent of the public response to the proposed AI Bill of Rights – which would further establish the “compelling need” for expedited processing -- is difficult to determine precisely because the OSTP has failed to disclose the comments it received. In these circumstances, equitable interests also favor the grant of expedited processing of a FOIA request.

3) The nomination of a new Director for OSTP establishes a date certain for “public and congressional debates about issues of vital national importance”

Third, and this fact is subsequent to the filing of the initial FOIA request, on June 21, 2022, President Biden announced that he would nominate Dr. Arati Prabhakar to head the Office

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12 HR Policy Provides Comments to White House on AI-Enabled Biometric Technologies in the Workplace, Jan. 21, 2022, https://www.hrpolicy.org/insight-and-research/resources/2022/hr-workforce/public/01/hr-policy-provides-comments-to-white-house-on-ai-e/


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June 30, 2022
of Science of Technology Policy. As a consequence, Dr. Prabhakar will appear before the Senate Commerce to discuss her views regarding the future of the agency and the program priorities. The current status of the AI Bill of Rights initiative could well provide the basis for an exchange between the Committee members and the Nominee regarding the future work of the Office of Science and Technology Policy. And it is likely that the hearing will be held soon as both the Chair and Ranking Member of the Senate Commerce Committee previously urged President Biden to “nominate a new Director of OSTP as soon as possible.”

Give these circumstances, the delay in release would "compromise a significant recognized interest." Project Democracy, 263 F.Supp. 3d at 299, citing Al-Fayed, 254 F.3d at 310. As the Project Democracy Court explained:

In particular, if production is unduly delayed, both Protect Democracy and the public at large will be "precluded . . . from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of" a high-profile government action, [EPIC v. Dept. of Justice, 416 F. Supp. 2d, 30, 41] . . . Being closed off from such a debate is itself a harm in an open democracy. See Elec. Frontier Found. v. Office of Dir. of Nat. Intelligence, 2007 U.S. Dist. LEXIS 89585, 2007 WL 4208311, at *7 (N.D. Cal.


17 See, e.g., U.S. Senate Committee on Commerce, Science and Transportation, Nomination Hearing of Dr. Eric S. Lander, of Massachusetts, to be Director of the Office of Science and Technology Policy (OSTP), April 29, 2021 (“America’s future depends on science and technology like never before. We see amazing opportunities ahead, but also unprecedented challenges. The choices we make now will determine our path for the generations to come.”) https://www.commerce.senate.gov/2021/4/nomination-hearing/cfae127c-0c1f-4e0d-8492-32ba7671c3c9. Senator Wicker remarked (emphasis added):

The Director of the OSTP has been a critically important position since it was first created. The person occupying this role directly advises the President on the scientific, engineering, and technological aspects of a wide range of federal government activity. In addition, it falls to the Director of the OSTP to coordinate science and technology policy across all federal agencies. Notably, under the Industries of the Future Act – which I had the opportunity to author and see enacted last congress – the Director of the OSTP is required to submit a report on federal government research and development investments, infrastructure, and workforce development. The report must include a plan to advance U.S. leadership in industries of the future such as artificial intelligence and quantum science, . . .


CAIDP FOIA Appeal: 22-080 Office of Science and Technology Policy June 30, 2022 AI Bill of Rights
Given that the Senate Commerce Committee will set a date for the hearing for the next OSTP Director, “this is the rare case where after a date certain, the value of the information sought by the [FOIA requester] to inform the public about these matters would be materially lessened or lost.” Brennan Center for Justice at NYU School of Law v. Department of Commerce, 498 F. Supp. 3d 87 (D.D.C. 2020) (granting expedited processing).

4) “The subject matter of the request[s] - the nation’s policy for Artificial Intelligence- [is] central to a pressing issue of the day.”

Fourth, Artificial Intelligence is of widespread interest to the American public. “There is little doubt, in other words, that ‘the subject matter of the request[s] is central to a pressing issue of the day.’” Project Democracy, 263 F.Supp. 3d at 299, citing Wadelton v. Dep’t of State, 941 F. Supp. 2d 120, 123 (D.D.C. 2013). At issue in the CAIDP FOIA Request is not simply the current status of the proposed AI Bill of Rights but more broadly, the response of the lead science agency in the United States to the policy challenges posed by the deployment of AI systems. This topic is the focus of numerous books, articles, conferences, and movies.19

The OSTP AI Bill of Rights initiative also implicates other activities across the federal government. For example, lawmakers working in related fields of Artificial Intelligence policy anticipated that the OSTP AI Bill of Rights would have a foundational role in the development of the US Artificial Intelligence research strategy. In January 2022, lawmakers urged officials from the Office of Science and Technology Policy (OSTP) and the National Science Foundation (NSF) to staff the National Artificial Intelligence Research Resource (NAIRR) task force with AI experts.20 In a letter to the OSTP Director and the NSF Director, Senators Rob Portman, R-Ohio, and Martin Heinrich, D-N.M., and Reps. Anthony Gonzalez, R-Ohio, and Anna Eshoo, D-Calif., wrote, “We also are pleased to see your efforts to design an Artificial Intelligence (AI) Bill of Rights to protect civil rights in our high-tech age, and believe there are unique synergies


between the work of the Task Force and the development of the AI Bill of Rights.”

The lawmakers continued, we “hope that assessment by the Task Force draws from your work to articulate rules for the ethical use of AI with the AI Bill of Rights.” The lawmakers further said:

Additionally, the NAIRR should be used as a means to test and improve AI along the lines of the requirements associated with an AI Bill of Rights. As a federated, heterogeneous system-of-systems, the NAIRR should include a number of testbeds suited for conducting evaluations and research with implications for ethical AI across myriad disciplines and implementations. In this way the NAIRR can be used to operationalize aims of the AI Bill of Rights, while imbuing the AI Bill of Rights with the NAIRR’s core tenet of leveling the playing field for American’s access to technology.

Thus, the current status of the AI Bill of Rights implicates a wide range of policy activities across the federal government, which further implicates the interests of researchers, universities, businesses, and developers, all constituents of the “American public.”

5) The CAIDP FOIA Request concerns also alleged government conduct

Fifth, the CAIDP FOIA Request concerns both actual government conduct (the development and current status of the AI Bill of Rights) and alleged government conduct (the influence of Eric Schmidt’s payments to OSTP on OSTP policy). The concern that a government agency acted improperly provides a separate and independent reason to grant expedited processing. Indeed, many federal agencies also expedite FOIA requests when the request concerns "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." See, e.g. 28 C.F.R. §§ 16.5(e)(1) (Department of Justice provision for expedited processing.)

As one D.C. District Court recently made clear, “[n]either FOIA nor the departmental regulations require the requester to prove wrongdoing by the government in order to obtain documents on an expedited basis. The request must simply provide grounds to support the contention that the matter is time sensitive, and that it is a 'matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.' 28 C.F.R. § 16.5(e)(1).’”


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21 Letter from Lawmakers to Sethuraman Panchanathan, Director, National Science Foundation and Dr. Eric S. Lander, Director, The White House Office of Science and Technology Policy, Jan. 25, 2022, https://www.hsgac.senate.gov/imo/media/doc/NAIRR%20Letter%20Final.pdf
22 Id.
23 Id.
CAIDP’s FOIA Request set out the background concerning Mr. Schmidt’s involvement in the OSTP and provided citations to many news stories regarding the conflict of interest. These facts satisfy the “widespread and exceptional media interest” standard as the story of Mr. Schmidt’s involvement in the OSTP was widely reported, and these activities led to the resignation of the OSTP Director, which is certainly exceptional.

As POLITICO reported, Schmidt’s “foundation’s involvement in funding positions for specific figures raised repeated red flags from internal White House watchdogs. . . . The science office’s efforts to arrange for Schmidt Futures to pay the salaries of Lander’s staff sparked ‘significant’ ethical concerns, given Schmidt’s financial interests in areas overlapping with OSTP’s responsibilities . . .” POLITICO reported that internal emails show that members of the science office’s legal team regularly flagged potential conflicts of interests related to Schmidt and Schmidt Futures. The former OSTP General Counsel stated, “I and others on the legal team had been noticing a large number of staff with financial connections to Schmidt Futures and were increasingly concerned about the influence this organization was able to have through these individuals.” The POLITICO investigation emphasizes, in several places, Eric Schmidt’s particular interest in Artificial Intelligence:

Schmidt sits on the boards of a wide variety of technology companies, particularly those focused on artificial intelligence. He maintains a 20 percent stake in the hedge fund DE Shaw that boasts over $60 billion in investments and committed capital, sits on the board of the AI-focused defense contractor Rebellion Defense, is an investor in Abacus.AI and this month invested in and became chair of Sandbox AQ – a new company that is a spin-off of an internal Google software team that says it will combine “AI + Quantum tech to solve hard problems impacting society.”

There is, therefore, an additional and independent reason to grant expedited processing for CAIDP’s FOIA Request. The Request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which

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24 CAIDP FOIA Request at 5-7.
26 Alex Thompson, A Google billionaire’s fingerprints are all over Biden’s science office: Eric Schmidt has long sought influence over U.S. science policy. Under Biden’s former science chief, Eric Lander, Schmidt’s foundation helped cover officials’ salaries, even as the office’s general counsel raised ethical flags, POLITICO, March 28, 2022, https://www.politico.com/news/2022/03/28/google-billionaire-joe-biden-science-office-00020712
27 Id.
28 Id.
29 Id.

6) In accord with the Al-Fayed analysis, CAIDP’s FOIA Request is specifically focused on “a currently unfolding story”

Sixth, the Agency claims that the requester “squarely fails to satisfy” the Al-Fayed reference to “specified categories for compelling need are to be narrowly applied.”30 In the Al-Fayed case the D.C. Circuit denied the request for expedited processing because, as Judge Garland explained, “All of the events and alleged events occurred two to three years before plaintiffs made their requests for expedited processing. Although these topics may continue to be newsworthy, none of the events at issue is the subject of a currently unfolding story.” At 311.

CAIDP FOIA’s Request is directly focused on a “currently unfolding story,” beginning with the OSTP’s October 2021 announcement of the AI Bill of Rights initiative,31 the subsequent solicitation of public comments, the organization of public events, the controversy surrounding the funding provided to OSTP by Eric Schmidt (an opponent of AI regulation),32 a public campaign to move forward Bill of Rights initiative,33 the statement by the Acting Director that the AI Bill of Rights would be released “in early-May,”34 further delay, and now the upcoming Congressional hearing for the next OSTP director and Congressional review of the Agency’s activities.

This is almost precisely the circumstances that the drafters of the 1996 amendments anticipated when they set out the standard for expedited processing, as described by Judge Garland in Al-Fayed and applied by lower courts in such cases as Project Democracy. Moreover, in Leadership Conf. on Civil Rights v. Gonzales, 404 F.Supp.2d 246 (D.D.C. 2005), Judge Lamberth, who ruled in favor of expedited processing, observed that “Plaintiff’s FOIA request could have a vital impact on development of the substantive record in favor of re-authorizing or

30 OSTP Response at 4.
33 CAIDP, Support the OSTP Bill of Rights, https://www.caidp.org/statements/ostp/
making permanent the special provisions of the Voting Rights Act.” *Leadership Conf.*, 404 F.Supp.2d at 260. Similarly, the expeditious processing of CAIDP’s FOIA Request could help move forward the single most important AI policy initiative currently under consideration in the United States.

Conclusion

The OSTP claimed that the “requestor has not demonstrated that producing the information sought on an expedited basis is a ‘matter of current exigency to the American public.’” This was not correct as a matter of law at the time the CAIDP FOIA Request was submitted to the OSTP for the reasons stated above. The nomination of a new OSTP Director and the upcoming Congressional hearing further buttresses CAIDP’s arguments for expedited processing.

“FOIA directs the agencies to provide expedited processing where a requestor demonstrates "compelling need," id. § 552(a)(6)(E)(i)(II).” *Al Fayed* 254 F.3d at 306. The OSTP should reverse its earlier determination, grant expedited processing, and process the CAIDP FOIA Request as soon as practicable.

This FOIA Appeal is included as an email. 32 CFR § 2402.4(a)(3). For your convenience, it is also provided as an attachment. The Appeal will also be posted at the CAIDP website – caidp.org.

We anticipate your expeditious consideration of this appeal. 32 C.F.R § 2402.6(d)(4).

Thank you for your assistance with the processing of this request.

Sincerely,

Marc Rotenberg, President
Center for AI and Digital Policy
EXHIBIT 1

SAMPLE NEWS ARTICLES CONTAINING
“Office of Science and Technology Policy” and “Bill of Rights”
(URLs provided where readily available)

*Americans Need a Bill of Rights for an AI-Powered World: The White House Office of Science and Technology Policy is developing principles to guard against powerful technologies—with input from the public.*
Eric Lander and Alondra Nelson, Wired, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
Newsbank - Arkansas News Sources, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
ABC News, October 8, 2021

*White House Proposes Tech 'Bill of Rights' to Limit AI Harms*
US News, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
The Independent (United Kingdom), October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
The Canadian Press, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
Associated Press, International, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
Associated Press, Financial Wire, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
The Associated Press, October 8, 2021

*White House proposes tech 'bill of rights' to limit AI harms*
Siliconeer, October 8, 2021
White House proposes tech 'bill of rights' to limit AI harms
NBCMontana, October 8, 2021

White House proposes tech 'bill of rights' to limit AI harms
Newstex Blogs, MarketBeat, October 8, 2021

White House proposes tech 'bill of rights' to safeguard against harmful use of biometric data
PBS NewsHour, October 8, 2021

White House proposes tech 'bill of rights' to limit AI harms
ABCNews4, October 8, 2021

White House proposes tech 'bill of rights' to limit AI harms
CBS6Albany, October 8, 2021

White House science advisers call for AI 'bill of rights'
The Hill, October 8, 2021

White House 'Bill of Rights' to Protect Citizens Against AI Technology | Public Comments from AI Developers, Experts, and Affected Needed
Tech Times, October 8, 2021

White House science advisers call for an "AI Bill of Rights"
Bryan Walsh, Axios, October 9, 2021

White House proposes tech 'bill of rights' to limit AI harms
The China Post, October 9, 2021

White House science advisers call for an "AI Bill of Rights"
Newstex Blogs, October 9, 2021
White House proposes tech 'bill of rights' to limit AI harms
Times Colonist (Victoria), October 9, 2021

Concerns about AI bring call for a bill of rights
The Houston Chronicle, October 9, 2022

White House proposes tech 'bill of rights' to limit AI harms
Dayton Daily News (Ohio) October 10, 2021

Biden administration says we need a Bill of Rights for AI
Mashable.com, October 10, 2021

US planning a ‘Bill of Rights’ for AI to guard against algorithmic bias
Ben Wodecki, AI Business, October 11, 2021

A global AI bill of rights is desperately needed
Financial Times (London, England), October 12, 2021
https://www.ft.com/content/7e42c58e-b3d4-4db5-9ddf-7e6c4b853366

Bill of Rights: The US wants to set the law for artificial intelligence: The White House wants standards in the AI industries with the Bill of Rights for AI.
Dashveenjit Kaur, TechHq, October 12, 2021

Biden Administration Takes First Steps Towards an AI Bill of Rights
FindBiometrics, October 15, 2021

New Bill Would Secure Government Contractors' Use of AI
Cyber Security Monitor Worldwide, October 23, 2021

Next Steps on the U.S. AI Bill of Rights
Dr. Lorraine Kisselburgh and Marc Rotenberg, Washington Spectator, November 2, 2021
https://washingtonspectator.org/ai-bill-of-rights/

White House technology policy chief says AI bill of rights needs ‘teeth,
FedScoop, Nov. 4, 2021

Creating an AI Bill of Rights for Automated Society (Online Event)
New America, November 18, 2022
Biden's top science advisor working on AI bill of rights: A national AI bill of rights could include the rights to transparency and data governance, according to Biden's top science advisor.
Makenzie Holland, TechTarget, November 9, 2021

White House Seeks to Develop AI Bill of Rights and Calls for Feedback on Use of Biometric Data
J.D. Supra, Dec. 6, 2021
https://www.jdsupra.com/legalnews/white-house-seeks-to-develop-ai-bill-of-9731750/

White House Seeks to Develop AI Bill of Rights and Calls for Feedback on Use of Biometric Data
Wiley, December 2021

The AI Bill Of Rights: Protecting Americans From The Dangers Of Artificial Intelligence
Glenn Gow, Forbes, January 9, 2022

Employee monitoring risks 'spiraling out of control,' union group warns
Computerworld (US), March 4, 2022

How the U.S. is taking cues from Europe on tech policy
Newstex Blogs, December 16, 2021

OSTP’s Continuing Work on AI Technology and Uses that Can Benefit Us All
February 3, 2022
Lynne Parker, Director, National AI Initiative Office, and Rashida Richardson, Senior Policy Advisor for Data and Democracy

(A search on Lexis for "office of science and technology policy" and "bill of rights" produced 281 results in the News file. A similar search on Google Search produced approximately 53,900 results. Illustration below.)
Join the Effort to Create A Bill of Rights for an Automated Society

Nov 10, 2021 — The White House Office of Science and Technology Policy (OSTP) ... in the process of developing a Bill of Rights for an Automated Society.

ICYMI: WIRED (Opinion): Americans Need a Bill of Rights for ... 

Oct 22, 2021 — In the coming months, the White House Office of Science and Technology Policy (which we lead) will be developing such a bill of rights, ...

White House Developing AI "bill of rights"

Oct 21, 2021 — The White House Office of Science and Technology Policy announced a plan to develop a "bill of rights" to protect against potentially ...

Support the OSTP AI Bill of Rights

May 18, 2022 — US Office of Science and Technology Policy ... to move forward the proposal for a Bill of Rights for the Age of Artificial Intelligence.
A Google billionaire's fingerprints are all over Biden's science office: Eric Schmidt has long sought influence over U.S. science policy. Under Biden's former science chief, Eric Lander, Schmidt's foundation helped cover officials' salaries, even as the office's general counsel raised ethical flags.

Alex Thompson, POLITICO, March 28, 2022

**Exhibit 2**

**SAMPLE NEWS ARTICLES CONTAINING**

“Office of Science and Technology Policy” and “Eric Schmidt”

(URLs provided where readily available)

Whistleblower Alleges Former Google CEO Has Unprecedented Sway Over White House Science Office

Anna Venarchik, Daily Beast, March 28, 2022
https://www.thedailybeast.com/eric-schmidt-former-google-ceo-has-unprecedented-sway-over-white-house-science-office-whistleblower-alleges

Ex-Google CEO Eric Schmidt's charity paid salaries of 2 Biden science advisors, Politico reports

Rebecca Cohen, Business Insider India, March 28, 2022

Google billionaire Eric Schmidt denies channeling money into Biden's science office, directly paying staff salaries and having 'undue influence' on policy

Morgan Phillips, The Daily Mall, March 28, 2022

Ex-Google CEO funneled money into the White House science office: Eric Schmidt's contributions raised ethical concerns, Politico reported

Nicole Westman, The Verge, March 28, 2022

Ex-Google CEO Schmidt's charity helped fund WH science office: report

Mark, Moore, N.Y. Post, March 28, 2022
https://nypost.com/2022/03/28/ex-google-ceo-schmidts-charity-funded-wh-science-office-report/

Ethical flags raised by former Google CEO's influence over Biden science office

Nihal Krishan, Washington Examiner, March 28, 2022
Eric Schmidt Reportedly Donated To The White House Science Office
Hamid Ganji, Android Headlines, March 29, 2022

Google billionaire Eric Schmidt has PAID the salaries of staff inside Biden’s science office
Newshunt365, March 29, 2022
https://newshunt365.net/google-billionaire-eric-schmidt-has-paid-the-salaries-of-staff-inside-bidens-science-office/

Ex-Google CEO funneled money into Biden's science office, paid salaries
Business Standard, March 29, 2022

The real scandal behind billionaire Eric Schmidt paying for Biden’s science office:
Maybe government employees should be paid for with tax dollars, not private philanthropy
Whizy Kim, Vox, March 30, 2022

The Ex-Google CEO Inside the White House Science Office
Lizzy O’Leary, Slate, April 4, 2022
https://slate.com/technology/2022/04/eric-schmidt-eric-lander-white-house-science-policy.html

(A search on Lexis for "office of science and technology policy" and "eric schmidt" produced 281 results in the News file. A similar search on Google Search produced approximately 15,400 results.)
EXHIBIT 5

CAIDP-OSTP Email Exchange Regarding
APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR
EXPEDITED PROCESSING
(July 7-14, 2022)
Dear OSTP FOIA,

The document that CAIDP sent to OSTP on June 30 was titled “APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR EXPEDITED PROCESSING.” We have repeatedly referred to the document as both an Appeal of the earlier determination and a New Request for Expedited Processing. In support of the new request, we cited the agency regulations and several new relevant factors including the nomination of a new director.

Your attempt to reinterpret the June 30 document as only an appeal is simply not credible.

Regarding 32 CFR § 2402.8(c), that provision concerns appeals for an underlying record request. Section 5 U.S.C. 552(a)(6)(A)(ii) states:

   (6) (A)Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— . . . ii)make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The governing provision in your agency regulations for appeals of determinations regarding expedited processing, § 2402.6, states:

   (4) Administrative appeals of denials of expedited processing will be given expeditious consideration. If the FOIA Appeals Officer upholds the denial of expedited processing, that decision is immediately subject to judicial review in the appropriate Federal district court.

That provision is notable for at least two reasons. It creates an obligation for “expeditious consideration,” which necessarily means a determination in less time than would occur for routine appeals. 32 CFR § 2402.8(c) That is another reason the agency may not take “20 working days” to consider an appeal regarding expedited processing. The urgency of the appeals process is also made clear by the statement that if the denial is upheld, “that decision is immediately subject to judicial review in the appropriate Federal district court.” That language stands in sharp contrast to the language you cited (for appeals of the record requests) in § 2402.8(c) which says simply “If the denial is wholly or partially upheld, the Chief FOIA Officer shall: (1) Notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(4)(B)–(G);”

*To be clear, the confusion in this matter is that the OSTP FOIA office does not understand that the appeal process for the denial of expedited processing is distinct from the appeal process for the denial (or partial denial) of an underlying record request. The OSTP's regulations, the federal statute, and case law, make clear the need to resolve this appeal as soon as practicable, and certainly more rapidly than for a typical FOIA appeal.*

There is no scenario under which OSTP could claim “20 working days” to resolve an appeal concerning the denial of expedited processing.

*In response to your communication today we are now prepared to file a complaint with the Office of Government Services (OGIS) regarding OSTP's FOIA practices. In addition to the confusion regarding appeals for denial of expedited processing, we have also determined that OGIS may be the only federal agency that prevents FOIA requesters from sending email attachments. 32 CFR § 2402.4(a)(3) (“Procedure for requesting records”). This policy (1) unduly burdens requesters, (2) lacks statutory support, (3) appears to be unique among federal agencies, and (4) is nonsensical as the agency itself routinely sends PDFs in FOIA matters.*

We earlier determined that a response to our appeal was due July 10, 2022. We were prepared to consider the date of July 18, 2022.

*If you are able to confirm today that we will receive a response by July 18, we will hold off on the OGIS complaint described above.*

Thank you for your attention to this matter.

Marc Rotenberg
CAIDP

On Jul 14, 2022, at 12:02 PM, MBX OSTP FOIA <OSTPFOIA@ostp.eop.gov> wrote:

Dear Marc,

I’m afraid there appears to be some lingering confusion regarding your request and appeal. While you have referred to your appeal as a “new request” for expedited processing, you have also noted that it is an appeal. In fact, in your communication from July 7, you stated:

“This appeal concerns only the denial of “20 working days” to consider an appeal regarding expedited processing. The urgency of the appeals process is also made clear by the statement that if the denial is upheld, “that decision is immediately subject to judicial review in the appropriate Federal district court.” That language stands in sharp contrast to the language you cited (for appeals of the record requests) in § 2402.8(c) which says simply “If the denial is wholly or partially upheld, the Chief FOIA Officer shall: (1) Notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(4)(B)–(G);”

To be clear, the confusion in this matter is that the OSTP FOIA office does not understand that the appeal process for the denial of expedited processing is distinct from the appeal process for the denial (or partial denial) of an underlying record request. The OSTP’s regulations, the federal statute, and case law, make clear the need to resolve this appeal as soon as practicable, and certainly more rapidly than for a typical FOIA appeal.

There is no scenario under which OSTP could claim “20 working days” to resolve an appeal concerning the denial of expedited processing.

In response to your communication today we are now prepared to file a complaint with the Office of Government Services (OGIS) regarding OSTP’s FOIA practices. In addition to the confusion regarding appeals for denial of expedited processing, we have also determined that OGIS may be the only federal agency that prevents FOIA requesters from sending email attachments. 32 CFR § 2402.4(a)(3) (“Procedure for requesting records”). This policy (1) unduly burdens requesters, (2) lacks statutory support, (3) appears to be unique among federal agencies, and (4) is nonsensical as the agency itself routinely sends PDFs in FOIA matters.

We earlier determined that a response to our appeal was due July 10, 2022. We were prepared to consider the date of July 18, 2022.

If you are able to confirm today that we will receive a response by July 18, we will hold off on the OGIS complaint described above.

Thank you for your attention to this matter.

Marc Rotenberg
CAIDP
communication from July 7, you stated: “This appeal concerns only the denial of expedited processing.” As such, we are respecting your request and note that we are treating your communications below as requesting an appeal of our denial of your request for expedited processing.

As our FOIA regulation states in 32 CFR § 2402.8(c): “The FOIA Appeals Officer shall make a determination in writing on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within twenty (20) working days after the receipt of the appeal.”

As promised in our message from July 11, we will provide a decision regarding your appeal within 20 business days of receipt of your appeal, which will be August 3, 2022. The request for appeal is considered received as of July 7, 2022, the date we received clarification regarding your appeal.

Pursuant to OSTP regulation §§ 2402.4(b) and 2402.4(c), a request that requires additional information “is deemed received when information sufficient to perfect the request is actually received by OSTP.”

§ 2402.4

(c) Date of receipt. A request… is deemed received when information sufficient to perfect the request is actually received by OSTP. [Emphasis not in the original].

OIP guidance on perfection:


“[O]nce the proper FOIA office is in receipt of a FOIA request, if it determines that the request is not reasonably described or otherwise fails to meet a procedural requirement for making a request, the FOIA office should work with the requester to clarify those issues. Until those issues are resolved, the request is not considered to be "received." [Emphasis added].

Thank you.

Regards,

OSTP FOIA
The Freedom of Information Act makes clear that the initial determination for a request for expedited processing “shall be made within 10 days after the date of the request” 5 USC §552(a)(6)(E)(ii)(I) (emphasis added), and that the agency “must ensure . . . expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.” 5 USC §552(a)(6)(E)(ii)(II) (emphasis added)

CAIDP initiated a New Request for Expedited Processing and that determination is due “within 10 days.” CAIDP also appealed the denial of expedited processing. “Expeditious consideration” of the appeal would likely also be due within 10 days.

There is some ambiguity as to the calculation of days in the FOIA. The phrase “business days” does not appear in the statute and the relevant text says simply “within 10 days after the date of the request.” However, your agency regulations state that "OSTP must determine whether to grant the request for expedited processing within ten (10) calendar days of its receipt." 32 CFR § 2402.6(d)(2) (Expedited processing of request) (emphasis added)

CAIDP’s Appeal of the Denial of Expedited Processing / New Request for Expedited Request was sent to the agency on June 30, 2022. According to the OSTP regulation, a determination was due July 10, 2022. However, allowing the agency the most generous calculation of “within 10 days,” 5 USC §552(a)(6)(A) (excluding Saturdays, Sundays, and legal public holidays), a response could be due by July 18, 2022.

Sincerely,

Marc Rotenberg

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Marc Rotenberg, President
Center for AI and Digital Policy (CAIDP),
1100 13th St., NW #800 Washington, DC
Adjunct Professor, Georgetown Law
@MarcRotenberg @theCAIDP

- Recent Commentaries
  - Universal Guidelines for AI (2018)
  - AI Policy Sourcebook (2020)
  - AI and Democratic Values (2022)
  - The Law of AI (West Academic 2023) (forthcoming)
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On Jul 11, 2022, at 12:23 PM, MBX OSTP FOIA <OSTPFOIA@ostp.eop.gov> wrote:

Dear Marc,
Thank you for the clarification. The reference to “new” in your appeal letter created some confusion over whether you were appealing OSTP’s determination regarding 22-080 and/or submitting a new request on the same subject matter. OSTP’s regulation, 32 CFR 2402.6(f),* permits us to aggregate multiple requests for similar information from a single requester.

We will review your appeal and provide a response within 20 business days.

Regards,

OSTP FOIA

*(f) Aggregating requests. OSTP may aggregate requests if it reasonably appears that multiple requests, submitted either by a single requester or by a group of requesters acting in concert, involve related matters and constitute a single request that otherwise would involve unusual circumstances. For example, OSTP may aggregate multiple requests for similar information filed by a single requester within a short period of time. [Emphasis not in the original]

From: Marc Rotenberg <rotenberg@caidp.org>
Sent: Thursday, July 7, 2022 7:28 AM
To: MBX OSTP FOIA <OSTPFOIA@ostp.eop.gov>
Subject: [EXTERNAL] Re: CAIDP FOIA Request (OSTP AI Bill of Rights) - Appeal - Control number: 22-080

Dear OSTP FOIA,

Thank you for your response.

Three key points:

(1) There is nothing in the federal statute or your agency regulations that prevents the processing of duplicate requests from the same requester. 5 USC 552a; 32 CFR § 2402. In fact, such a policy is likely impermissible. See, e.g., Buckovetz v. Dept of the Navy, 2019 U.S. Dist. LEXIS 128052, July 31, 2019 (indicating that administrative closure of duplicate requests may establish a pattern or practice of FOIA violations.)

If you have a different view, please cite your legal authority for that position.

(2) HOWEVER, THIS IS NOT A DUPLICATE REQUEST. The record request is the same. This appeal concerns only the denial of expedited processing. For that purpose, We are claiming both (1) the original denial was wrong as a matter of law, and (2) subsequent facts (particularly the upcoming nomination of a new Director) make it even more clear that expedited processing should be granted. Your regulations explicitly allow us
expedited processing should be granted. Your regulations explicitly allow us to make such a request at any time.

(3) You essentially have three choices:

1. Reverse the earlier denial of expedited processing (which would make it unnecessary to discuss the new facts),
2. Uphold your earlier determination but acknowledge that the new facts require expedited processing, or
3. Uphold your earlier determination and also deny expedited processing, even with the new facts.

We very much hope you will grant expedited processing under either (1) or (2), but if you choose (3) we are prepared to sue the agency in federal court.

Thank you again for your assistance.

Marc Rotenberg

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On Jul 7, 2022, at 7:06 AM, MBX OSTP FOIA <OSTPFOIA@ostp.eop.gov> wrote:

Dear Marc,

Thank you for contacting us. Please note that OSTP cannot process duplicate requests from the same requester. So, let us know whether you would like for us to process your appeal for 22-080 or close it in favor of the new submission.

Your prompt response is required so the appeal or new request can be recorded.

Regards,

OSTP FOIA.

From: Marc Rotenberg <rotenberg@caidp.org>
Sent: Thursday, June 30, 2022 4:44 PM
To: MBX OSTP FOIA <OSTPFOIA@ostp.eop.gov>
Subject: [EXTERNAL] Re: CAIDP FOIA Request (OSTP AI Bill of Rights) - Appeal - Control number: 22-080

Please find below, in the body of the email, the Appeal in this matter.
VIA EMAIL

June 30, 2022

Office of Science and Technology Policy
Rachel Wallace
Deputy Counsel and Chief Operating Officer
1650 Pennsylvania Ave, NW
Washington, D.C., 20504 E
mail: ostpfoia@ostp.eop.gov

OSTP-FOIA Control number: 22-080

APPEAL OF DENIAL OF EXPEDITED PROCESSING AND
NEW REQUEST FOR EXPEDITED PROCESSING

CAIDP FOIA Request

On June 20, 2022, the Center for AI and Digital Policy (“CAIDP” or “the Center”) sent a Freedom of Information Act (“FOIA”) request to the Office of Science and Technology Policy (“OSTP” or “the Agency”) concerning the OSTP’s proposed AI Bill of Rights.[1] CAIDP described three categories of records in the FOIA Request. Citing the urgency of the AI policy initiative, the widespread public interest, and the OSTP’s prior

NOTE - The remainder of the email is the APPEAL OF DENIAL OF EXPEDITED PROCESSING AND NEW REQUEST FOR EXPEDITED PROCESSING, which is attached as Exhibit 3