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VIA email: [OGCAtty@opm.gov](mailto:OGCAtty@opm.gov)

Office of Personnel Management  
Office of the General Counsel  
1900 E Street NW  
Washington, DC 20415

**Freedom of Information Act Appeal: 2022-00489 Initial Agency Decision to Withhold Release of Report Required by Section 5 of Executive Order 13985**

Dear Mr. Mizer:

This is an appeal under the Freedom of Information Act.

On March 30, 2022, America First Legal Foundation (“AFL”) submitted to the United States Office of Personnel Management (“OPM”) under the Freedom of Information Act (“FOIA”) a request for only two documents, both of which were required pursuant to the January 20, 2021 Executive Order 13985 entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” (the “EO”): (1) OPM’s Equity Action Plan “that was required by Section 7 of [the EO],” and (2) OPM’s report “that was required by Section 5 of [the EO]” (“Final Report”). OPM assigned the request tracking number 2022-00489.

In OPM’s initial agency decision, dated April 27, 2022, Chief Management Officer Dennis Coleman indicated that 22 pages were located in response to AFL’s request for the Final Report, but “determined to withhold these records in full, pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5).” To justify his withholding of the document under Exemption 5, he noted the “information being withheld is intra-agency because it was exchanged within OPM and inter-agency because it was exchanged between OPM and another/other federal executive government agency/agencies.” He further cited the deliberative process privilege and asserted the “information that has been withheld ... is predecisional [sic] because it is antecedent to the adoption of an agency policy [and] also deliberative because it reflects the give-and-take of the consultative process.” However, because the Final Report is not protected under the deliberative process privilege within the scope of Exemption 5, AFL appeals OPM’s initial agency decision to withhold it in full.

## **The Final Report as Described by Executive Order 13985**

Section 5 of the EO directed each agency to “assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups.”<sup>1</sup> Specifically, within 200 days, the OPM Director was required to, “in consultation with the Director of [the Office of Management and Budget], select certain [OPM] programs and policies for a review that will assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities pursuant to those policies and programs,” to “conduct such a review,” and to “provide a report to the Assistant to the President for Domestic Policy (APDP) reflecting findings” on “potential barriers that underserved communities and individuals may face ... [w]hether new policies, regulations, or guidance documents may be necessary ... [and t]he operational status and level of institutional resources available.”<sup>2</sup> Section 5 of the EO did not require OPM Director to provide its analyses or rationales to support those findings, nor did it require OPM to report any forward-looking strategies, plans, or goals. Section 3 of the EO clarified “[t]he role of the White House Domestic Policy Council (DPC) [led by the APDP] is to coordinate the formulation and implementation of Administration’s domestic policy objectives.”<sup>3</sup>

AFL specifically requested the post-decisional Final Report, as disclosed to the APDP. AFL did not request any pre-decisional drafts of the Final Report, any consultations with the OMB Director in selecting the OPM programs and policies for review, nor any other communications leading up to the Final Report.

## **FOIA Exemption 5 Under the Deliberative Process Privilege**

FOIA requires OPM to disclose records upon request unless the records fall within one or more enumerated exemptions.<sup>4</sup> The exemptions are narrowly construed so as not to “obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”<sup>5</sup> As a threshold consideration, Exemption 5 covers “inter-agency or intra-agency memorandums.”<sup>6</sup> “The deliberative process privilege protects agencies from being ‘forced to operate in a fishbowl.’”<sup>7</sup> To qualify for Exemption 5 protection under the deliberative process privilege, “an agency’s materials must be both ‘predecisional’

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<sup>1</sup> Exec. Order No. 13985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

<sup>2</sup> *Id.* at 7,010.

<sup>3</sup> *Id.*

<sup>4</sup> *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7 (2001).

<sup>5</sup> *Id.* (quoting *Dept’ of Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (internal quotations omitted).

<sup>6</sup> 5 U.S.C. § 552(b)(5); See *Shapiro v. DOJ*, 969 F. Supp. 2d. 18, 25 (D.D.C. 2013).

<sup>7</sup> *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

[sic] and part of the ‘deliberative process.’”<sup>8</sup> OPM asserted FOIA Exemption 5 under the deliberative process privilege to justify withholding the Final Report in full, but the Final Report is neither pre-decisional nor deliberative.

### **The Final Report Is Not Pre-decisional**

The Final Report is final, not pre-decisional. To determine whether a document is pre-decisional or “a final, official agency position,” the D.C. Circuit considers: “1) the decision-making authority, or lack thereof of the document’s author; 2) the position of the document in the chain of command; and 3) whether the document is intended as an expression of the individual author’s views or as an expression of the agency’s official position.”<sup>9</sup> Under Section 5 of the EO, agency reports must be submitted by “[t]he head of each agency, or designee ... to the [APDP].” Accordingly, the OPM Director, or a designee under her authority, authored the Final Report. Under Section 5 of the EO, the OPM Director’s report must reflect findings on:

- (a) Potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in [OPM] programs;
- (b) Potential barriers that underserved communities and individuals may face in taking advantage of [OPM] procurement and contracting opportunities;
- (c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in [OPM] actions and programs; and
- (d) The operational status and level of institutional resources available to offices or divisions within [OPM] that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.<sup>10</sup>

The OPM Director’s report reflecting those findings—which ultimately became the OPM’s Final Report—necessarily occurred at the top of OPM’s chain of command, and it expressed OPM’s official position regarding: OPM’s programs; OPM’s procurement and contracting opportunities; OPM’s policies, regulations and guidance documents; and OPM’s offices and divisions, and their respective operational statuses and resource levels. Pointedly, the EO clarified that “[t]he role of the White House Domestic Policy Council (DPC) is to *coordinate* the formulation and implementation of my Administration’s domestic policy objectives.”<sup>11</sup> As such, the OPM Director submitted the Final Report to the APDP merely for interagency coordination, not for additional drafting or higher decision making.

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<sup>8</sup> *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989).

<sup>9</sup> See *Pfieffer v. CIA*, 721 F. Supp. 337, 339 (D.D.C. 1989) (citing *Authur Anderson & Co. v. IRS*, 679 F.2d 254, 257-59 (D.C. Cir. 1982).

<sup>10</sup> 86 Fed. Reg. at 7,010 (Jan. 25, 2021).

<sup>11</sup> *Id.* (emphasis added).

AFL specifically requested the Final Report, as “required by Section 5 of [the EO] to be submitted to the [APDP].” AFL did not request any pre-decisional drafts that were passed up to the OPM Director before she decided on a final version to submit to the APDP for interagency coordination. AFL did not request her consultations with the OMB Director in selecting the OPM programs and policies for review. AFL did not request any communications relating to either of those processes. AFL only requested the final document that was intended to express OPM’s official position.

### **The Final Report Is Not Deliberative**

In addition to being pre-decisional, the withheld material must be “deliberative” in order to fall within the deliberative process privilege.<sup>12</sup> “In deciding whether a document should be protected by the privilege,” the D.C. Circuit looks to “whether [the document] reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”<sup>13</sup> Courts also “ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.”<sup>14</sup> There is nothing subjective or personal about the Final Report; it is simply an objective compilation of findings on OPM programs, procurement and contracting, policies and regulations, and offices and divisions’ operational statuses and resource levels. Nor does it reflect agency give-and-take of the consultative process. Disclosure of the Final Report will not cause rank and file OPM employees to be less frank or honest when compiling similarly objective findings in the future. AFL did not request their drafts or communications. Section 5 of the EO did not require OPM to provide its analyses or forward-looking plans, and AFL did not seek them. AFL only requested the OPM Director’s final, as submitted, version of the document containing the agency’s official findings.

Exemption 5 has a “narrow scope” and FOIA has a “strong policy ... that the public is entitled to know what the government is doing and why. The exemption is to be applied ‘as narrowly as consistent with efficient Government operation.’”<sup>15</sup> Public knowledge of the Final Report will not affect either the efficient Government operation or any one of the various policies to be served by the Exemption.<sup>16</sup> Even if the Final Report were somehow pre-decisional, it is certainly not deliberative, and it may not be withheld under the deliberative process privilege within the scope of Exemption 5.

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<sup>12</sup> *McKinley v. Bd. of Governors of Fed. Res. Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

<sup>13</sup> *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (quoting S. Rep. No. 813, 89<sup>th</sup> Cong., 1st Sess. 9 (1965)).

<sup>16</sup> *See Id.*

## **No Reasonably Foreseeable Harm Would Result from Disclosure**

Even if the Final Report were pre-decisional and deliberative, it should still be disclosed. OPM must comply with the Attorney General's *Memorandum on Freedom of Information Guidelines*: "Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail."<sup>17</sup> In its initial agency decision, OPM failed to consider whether foreseeable harm would result from disclosure of the Final Report. In contrast, other federal agencies, including NASA and SBA, have determined that there was no foreseeable harm in releasing their findings and reports in response to FOIA requests, and the Departments of Agriculture and Interior made proactive disclosures of the underlying information.<sup>18</sup> No identifiable harm has resulted from any of these disclosures. Unless OPM has unique institutional characteristics that distinguish its inter-agency or intra-agency memorandums from those of other departments and agencies, it is unreasonable that OPM's disclosure of the Final Report would uniquely result in harm.

## **The Final Report May Not Be Withheld in Full**

Even if parts of the Final Report were exempt from disclosure, the document may not be withheld in full. Under FOIA, OPM must "take reasonable steps necessary to segregate and release nonexempt information."<sup>19</sup> By withholding the Final Report in full, it is apparent that OPM made no effort to take any steps necessary to segregate and release nonexempt information.

It is inconceivable, for example, that the OPM Director's finding on the operational status of certain offices would reflect the agency give-and-take of the consultative process, would reflect her personal opinions rather than the agency's official position, or would be so candid or personal in nature that public disclosure would likely stifle honest and frank communication within the agency.

While recommendations for new policies, regulations, or guidance documents might be withheld from disclosure in some circumstances, the mere finding on whether they are necessary to advance equity is neither pre-decisional nor deliberative. Certainly, OPM could disclose the Final Report's finding that new policies are affirmatively necessary or unnecessary without revealing communications of a deliberative nature or information that is not final for agency purposes.

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<sup>17</sup> U.S. DEP'T OF JUST. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

<sup>18</sup> See e.g., U.S. DEP'T OF AGRIC., *RFI Summary Report*, <https://www.usda.gov/equity/rfi-summary> (last visited July 26, 2022); U.S. DEP'T OF THE INTERIOR, *Department of the Interior Executive Order 13985 Final Findings Report*, <https://www.doi.gov/sites/doi.gov/files/final-eo13985-final-report.pdf> (last visited July 26, 2022).

<sup>19</sup> 5 U.S.C. § 552(a)(8)(A)(ii)(II).

To the extent that any of the Final Report's findings were identified and addressed in OPM's publicly disclosed Equity Action Plan, OPM waived its justification to withhold that information. Because Section (7)(a) of the EO required OPM's Equity Action Plan to address "(i) any barriers to full and equal participation in programs identified pursuant to section 5(a) of [the EO]; and (ii) any barriers to full and equal participation in agency procurement and contracting opportunities identified pursuant to section 5(b) of [the EO],"<sup>20</sup> disclosure of these two findings in the Final Report would not chill OPM's internal deliberations or otherwise affect its ability to provide information on agency policies in a candid manner.

As explained above, the Final Report's four core findings, enumerated in Section 5(a)-(d) of the EO, are each final agency positions. Even if they were later utilized in formulating other future agency actions, the findings in the Final Report reflect the fixed, official OPM policy position that resulted from the OPM Director's completion of the EO's directive to select certain programs and policies for review, to conduct such a review, and to provide a report to the APDP reflecting those enumerated findings. As discussed above, Section 3 of the EO clarified that the APDP served merely to coordinate, not to approve or disapprove of the Final Report she received from the Secretary. If the Final Report also included extraneous pre-decisional and deliberative information, then OPM must take any steps necessary to segregate it from the nonexempt information.

### **OPM Must Disclose the Final Report**

Because the Final Report is not exempt from disclosure under Exemption 5, and harm would not reasonably result from its disclosure, we respectfully request OPM to reverse its initial agency decision and release the Final Report.

Thank you for your consideration of this appeal.

Sincerely,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

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<sup>20</sup> 86 Fed. Reg. 7,009, 7011 (Jan. 25, 2021).