



U.S. Department of Veterans Affairs
Office of General Counsel
Information and Administrative Law Group

810 Vermont Avenue NW
Washington DC 20420
www.va.gov/ogc

In Reply Refer To: 024E
OGC Case #: 161353
FOIA Request #: 22-04535-F

September 26, 2022

Michael Ding
America First Legal Foundation

Via Email Only: foia@aflegal.org

Dear Mr. Ding:

This letter serves as the Department of Veterans Affairs (VA) final agency decision under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in response to America First Legal Foundation's (AFL) July 26, 2022, appeal of FOIA Request 22-04535-F.

Procedural History

Initial request. On March 30, 2022, AFL submitted a FOIA request for the following:

- A. The Department's "Equity Action Plan," that was required by Section 7 of Executive Order 13985 (January 20, 2021) on "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," to be submitted to the Assistant to the President for Domestic Policy and the Director of the Office of Management and Budget by January 20, 22.
- B. The Department's "Equity Assessment," that was required by Section 5 of Executive Order 13985 (January 20, 2021) on "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," to be submitted to the Assistant to the President for Domestic Policy by August 8, 2021.

Fees. VA did not charge AFL any fees for processing its FOIA request.

Search. We examined the administrative record of VA's Office of Resolution Management, Diversity & Inclusion's (ORMDI) FOIA Officer, and determined she made a reasonable search to find the specific information AFL requested.

Initial Agency Decision (IAD). On April 27, 2022, ORMDI's FOIA Officer issued AFL an IAD in response to its March 30, 2022, FOIA request. In her response, the FOIA Officer disclosed VA's Equity Action Plan (14 pages) in full, but withheld VA's "200-Day Progress Reports of Racial Equity Assessments" (21 pages) in its entirety under FOIA Exemptions 5, 6 and 7(C).

Appeal. On July 26, 2022, AFL appealed ORMDI's withholding of VA's 200-Day Progress Reports of Racial Equity Assessments" (200-Day Assessments) and presented the following arguments which OGC summarizes as follows:

- 1) That Executive Order (EO) 13985 called for VA, within 200 days, to conduct a review of its policies and programs to assess to whether and to what extent the same perpetuated system barriers to opportunities and benefits for people of color;
- 2) That Section 5 of the EO did not call for VA to provide its analysis or rationale to support its findings;
- 3) That AFL was requesting the post-decisional Final Report, as disclosed to the Assistant to the President for Domestic Policy (ADPD) rather than any pre-decisional drafts;
- 4) That the Final Report was not pre-decisional because it was supposed to reflect findings that would make up the Final Report expressing VA's final position;
- 5) That AFL specifically requested the Final Report as "required by Section 5 of [the EO] to be submitted to the [APDP], and not the Secretary's discussions with OMB relating to the process;
- 6) That the Final Report is not Deliberative because there is nothing subjective or personal about the Final Report and it is simply an objective compilation of findings on VA programs;
- 7) That Section 5 of the EO "did not require the VA to provide its analyses or forward-looking plans, and AFL did not seek them;"
- 8) That Exemption 5 should be applied narrowly;
- 9) That even if the Final Report was in fact deliberative, VA must comply with guidelines issues by Attorney General Garland not to withhold information unless VA could identity a foreseeable harm;
- 10) That even if parts of the Final Report could be withheld, the entire document should not have been withheld in full; and
- 11) That VA should be able to disclose its findings without revealing deliberative communications and take steps to segregate pre-decisional and deliberative information.

Relevant Law Governing This FOIA Appeal.

OGC reviewed AFL's appeal for the full release of VA's 200-day Assessments under the provisions of the statutory language of FOIA, its supporting case law and AFL's specific arguments on appeal. When Congress enacted FOIA, it codified into

law “a general philosophy of full agency disclosure.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting S. Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). “Within FOIA, ‘Congress provided a number of exemptions that permit an agency to withhold certain documents from release.’” *Moradi v. Morgan*, 527 F. Supp.3d 144, 154 (D. Mass. 2021) quoting *Johnson v. Cent. Intelligence Agency*, 330 F. Supp. 3d 628, 644 (D. Mass. 2018) (quoting *Stalcup v. C.I.A.*, 768 F.3d 65, 69 (1st Cir. 2014)). FOIA requires federal agencies to disclose records requested unless they may be withheld in accordance with one or more of the nine statutory exemptions found in the statute. 5 U.S.C. § 552(b).

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Generally speaking, the exemption incorporates privileges available to an agency in a civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The exemption “protect[s] the decision making processes of government agencies,” including “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Id.* at 150 (internal quotation marks omitted); see also *Loving v. Dep’t of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008). Exemption 5 is intended to “improve[] agency decision making” by “encourag[ing] candor” and “blunt[ing] the chilling effect that accompanies the prospect of disclosure.” *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021).

The incorporated privileges in Exemption 5 include those recognized as components of executive privilege, including the deliberative process privilege and presidential communications privilege. *Protect Democracy Project, Inc. v. Nat’l Sec. Agency*, 10 F.4th 879, 885 (D.C. Cir. 2021). For the deliberative-process privilege to apply, a document must be both “predecisional” and “deliberative.” *U.S. Fish & Wildlife Serv.* at 785–86; see also *Mapother v. Dep’t of Just.*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). Material is “predecisional” if “it was generated before the adoption of an agency policy,” and it is “deliberative” if “it reflects the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The presidential communications privilege was first recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974). In *Nixon*, the Court analyzed that a “President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions to do so in a way many would be unwilling to express except privately.” *Id.* at 708. “At core, the presidential communications privilege is rooted in the President’s need for confidentiality in the communications of his office, in order to effectively and faithfully carry out his Article II duties and to protect the effectiveness of the executive decision-making process.” *Protect the Democracy Project*, at 885 quoting *Judicial Watch, Inc. v. Dep’t of Justice* (*Judicial Watch 1*), 365 F.3d 1108, 1115 (D.C. Cir. 2004). The scope of this privilege cannot be shrunk by invoking FOIA’s requirement to release segregable information. *Id.* at 882.

FOIA's Exemption 6 allows agencies to withhold information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" in Exemption 6 is meant to "have a broad, rather than a narrow, meaning." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982). This exemption is not intended to apply "to a narrow class of files" containing only a discrete kind of personal information. Rather, the exemption was intended to cover detailed Government records on an individual which can be identified as applying to that individual." *Id.* at 602. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court provided the following step-by-step analysis to determine when Exemption 6 applies: (1) determine whether a personal privacy interest is involved; (2) determine whether disclosure would serve the public interest; and (3) balance the personal privacy interest against the public interest. An analysis regarding disclosure of information under Exemption 6 also includes consideration of whether disclosure would serve the public interest. As noted in *Reporters Committee*, once a personal privacy interest has been ascertained, there must then be a balance of the personal privacy interest against the public interest and a consideration as to whether disclosure of the requested information, or portions thereof that have been withheld, would "open agency action to the light of public scrutiny" rather than focus on the particular purpose for which the document is being requested. *Reporters Committee*, 489 U.S. at 772.

Exemption 7(C) protects information compiled for law enforcement purposes, where the release of the information could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C). In order to evaluate the propriety of these deletions, the court must balance the privacy interests involved against the public interest in disclosure. *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989).

Analysis.

OGC conducted a line-by-line review of VA's 200-Day Assessments and of the information withheld in full by VA's ORMDI through a combination of the use of FOIA Exemptions 5, 6 and 7(C). If VA's 200-day Assessments had in fact been a final report containing only objective information, OGC would be releasing this document in full. This was not the case.

First, OGC considered the use of Exemption 5. As suggested by the title of this document and Section 5 of EO 13985 calling for an "assessment," the 21 pages contained much information which was an estimation of the quality or state of equity within certain VA programs identifying some potential barriers and possible solutions. Much of the information within the 200-Day Assessments is deliberative under Exemption 5 in the form of hypotheses, rationales, future projections, plans, analysis as to what may be or may not be a cause of certain problems, as well as potential ways VA may want to explore to achieve the aspirational goals listed. OGC

considered the foreseeable harm of releasing the document's deliberative and pre-decisional information and found its release would in fact chill VA's ability to make future open and frank recommendations as well as brainstorm ideas as to how it may approach the challenges in its continued mission to achieve equity for Veterans of color. Therefore, the deliberative process privilege was properly invoked to withhold portions of the record.

As part of its administrative appellate review, OGC consulted with the White House and was advised that all 21 pages 200-day Assessments should be withheld in full under the presidential communications privilege. Specifically, OGC was advised the 200-day Assessments was created and sent to the White House for it to be compiled with other such reports and provided to the Assistant to the President for Domestic Policy, one of the President's immediate advisors for review. With this clarifying information, OGC additionally finds the entire 200-day Assessments to be subject to the presidential communications privilege incorporated by Exemption 5. *See Elec. Privacy Info. Ctr. v. DOJ*, 320 F. Supp. 3d 110, 117 (D.D.C. 2018) (finding that agency has authority to invoke presidential communications privilege when making Exemption 5 withholdings), *Protect the Democracy Project*, at 886 (segregability inapplicable to privilege).

Lastly, OGC also reviewed information in the 200-day Assessments under FOIA Exemptions 6 and 7(C). Whereas OGC found Exemption 7(C) not to apply, Exemption 6 was applicable. OGC did find VA employees had a privacy interest in their direct contact information - direct email and telephone numbers. On the other hand, there is no counterbalancing public interest in the release of this information. In other words, a public release of the drafters' direct contact information would not help the public understand how VA conducts its business but would expose the individuals to harassment for the hypotheses and ideas expressed in the document. Therefore, OGC upholds that direct email addresses and telephone numbers should be withheld from public disclosure under Exemption 6.

Conclusion. Based on the discussion above, AFL's appeal for VA's release of all 21 pages of VA's 200-Day Progress Reports on Racial Equity Assessments or even a segregable portion of the document is denied.

Mediation and Appeal Rights. This final agency decision concludes the administrative processing of your appeal.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

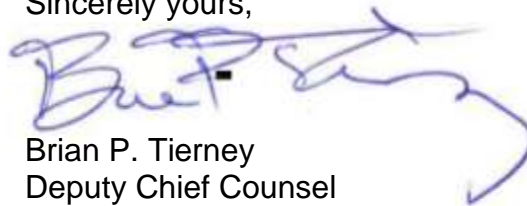
E-mail: ogis@nara.gov
Telephone: 202-741-5770
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With respect to any information denied to you by this final agency decision, FOIA requires us to advise you that if you believe the Department erred in this decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely yours,



Brian P. Tierney
Deputy Chief Counsel
Information & Administrative Law Group

CC: Madeline Stephens, FOIA Officer, VA's Office of Resolution Management,
Diversity & Inclusion
Michael Sarich, VA FOIA Public Liaison