



July 21, 2022

**VIA email:** [ost.foia.appeals@dot.gov](mailto:ost.foia.appeals@dot.gov)

Judith S. Kaleta, Deputy General Counsel  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
W94-122  
Washington, DC 20590

**Freedom of Information Act Appeal: OST-2022-0269 Determination to Withhold Release of the Final Report Required by Section 7 of Executive Order 13985**

Dear Ms. Kaleta:

This is an appeal under the Freedom of Information Act.

On March 30, 2022, America First Legal Foundation (“AFL”) submitted to the United States Department of Transportation (“DOT”) 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) DOT’s Equity Action Plan “that was required by Section 7 of [the EO],” and (2) DOT’s report “that was required by Section 5 of [the EO]” (“Final Report”). Exhibit 1. DOT assigned this FOIA request File No: OST-2022-0269.

In DOT’s final response letter, dated April 22, 2022, DOT withheld the Final Report in full (68 pages) “pursuant to the deliberative process privilege outlined in FOIA Exemption 5, which protects materials that are both pre-decisional and deliberative.” Exhibit 2. To support its determination, DOT provided no more than a simple statement: “I have considered the foreseeable harm standard when reviewing these records and in applying any FOIA applicable exemption.”<sup>1</sup>

**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

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<sup>1</sup> Exhibit 2 at 1.

people of color and other underserved groups.”<sup>2</sup> Specifically, within 200 days, the Secretary of Transportation (“Secretary”) was required to “in consultation with the Director of OMB, select certain [DOT] 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>3</sup> The EO did not require DOT to provide its analysis or rationales to support those findings.

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 DOT programs and policies for review, nor any other communications leading up to the Final Report. Because the Final Report is not protected under the deliberative process privilege, AFL appeals DOT’s initial determination to withhold the record from disclosure.

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

FOIA requires DOT 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’ [sic] and part of the ‘deliberative process.’”<sup>8</sup> DOT asserted only 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

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<sup>2</sup> Exec. Order No. 13985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

<sup>3</sup> *Id.* at 7010.

<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)).

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

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 the Section 5 of the EO, agency reports must be submitted by "[t]he head of each agency, or designee ... to the [APDP]." Accordingly, the Secretary, or a designee under his authority, authored the Final Report. Under Section 5 of the EO, the Secretary'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 [DOT] programs;
- (b) Potential barriers that underserved communities and individuals may face in taking advantage of [DOT] procurement and contracting opportunities;
- (c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in [DOT] actions and programs; and
- (d) The operational status and level of institutional resources available to offices or divisions within [DOT] that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.<sup>10</sup>

The Secretary's report reflecting those findings—which ultimately became DOT's Final Report—necessarily occurred at the top of DOT's chain of command, and it expressed DOT's official position regarding: DOT's programs; DOT's procurement and contracting opportunities; DOT's policies, regulations and guidance documents; and DOT's offices and divisions and their respective operational status and level of institutional resources. 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 Secretary submitted the Final Report to the APDP merely for interagency coordination, not for additional drafting or higher decision making.

AFL specifically requested the Final Report, as "required by Section 5 of [the EO] to be submitted to the [APDP]".<sup>12</sup> AFL did not request any pre-decisional drafts that were passed up to the Secretary before the Secretary decided on a final version to submit to the APDP for interagency coordination. AFL did not request the Secretary's consultations with the OMB Director in selecting the DOT 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 DOT's official position.

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<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 70, 10 (Jan. 25, 2021).

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

<sup>12</sup> Exhibit 1 at 1.

## **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>13</sup> “In deciding whether a document should be protected by the privilege,” the D.C. Circuit looks to “whether the document is ‘deliberative’ whether it 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>14</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>15</sup> There is nothing subjective or personal about the Final Report; it is simply an objective compilation of findings on DOT programs, DOT procurement and contracting, DOT policies and regulations, and DOT offices and divisions’ operational status 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 DOT employees to be less frank or honest when compiling similarly objective findings in the future. AFL did not request their drafts or communications. The EO did not require DOT to provide its analysis or rationales, and AFL did not seek it. AFL only requested the Secretary’s final, as submitted, version of the document.

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>16</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>17</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.

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

Even if the Final Report were pre-decisional and deliberative, it should still be disclosed. DOT 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>18</sup> Other federal agencies, including NASA and SBA, have determined

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<sup>13</sup> *McKinley v. Bd. of Governors of Fed. Res. Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

<sup>14</sup> *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (quoting S. Rep. No. 813, 89<sup>th</sup> Cong., 1st Sess. 9 (1965)).

<sup>17</sup> *See Id.*

<sup>18</sup> U.S. DEP’T OF JUST. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

that there was no foreseeable harm in releasing their findings and reports in response to FOIA requests. Moreover, the Departments of Agriculture and Interior proactively disclosed theirs.<sup>19</sup> No identifiable harm has occurred as a result. Unless DOT has unique institutional characteristics that distinguish its inter-agency or intra-agency memorandums from those of other departments and agencies, it is unreasonable that DOT'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, DOT must “take reasonable steps necessary to segregate and release nonexempt information.”<sup>20</sup> By withholding the Final Report in full, it is apparent that DOT made no effort to take any steps necessary to segregate and release nonexempt information.

It is inconceivable, for example, that the Secretary's finding on the operational status of certain DOT offices would reflect the agency give-and-take of the consultative process, would reflect his personal opinions rather than the DOT'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, the mere finding on whether they are necessary to advance equity is neither pre-decisional nor deliberative. Certainly, DOT 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.

To the extent that any of the Final Report's findings were identified and addressed in DOT's publicly disclosed Equity Action Plan, DOT waived its justification to withhold that information. Because Section (7)(a) of the EO required DOT'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>21</sup> disclosure of these two findings in the Final Report would not chill DOT's internal deliberations or otherwise affect its ability to provide information on agency policies in a candid manner.

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<sup>19</sup> See e.g., U.S. DEP'T OF AGRIC., *RFI Summary Report*, <https://www.usda.gov/equity/rfi-summary> (last visited July 21, 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 21, 2022).

<sup>20</sup> 5 U.S.C. § 552(a)(8)(A)(ii)(II).

<sup>21</sup> 86 Fed. Reg. 7,009, 7011 (Jan. 25, 2021).

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 DOT policy position that resulted from the Secretary'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, DOT must take any steps necessary to segregate it from the nonexempt information.

### **DOT 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 that DOT reverses its initial determination and release the Final Report in full.

Thank you for your consideration of this appeal.

Sincerely,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

# Exhibit 1



March 30, 2022

**Via Email - [ost.foia@dot.gov](mailto:ost.foia@dot.gov)**

U.S. Department of Transportation  
Office of the Secretary  
Departmental FOIA Office  
1200 New Jersey Ave, SE, W94-122  
Washington, DC 20590

**Freedom of Information Act Request: DOT Equity Action Plan**

Dear FOIA Officer:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we communicate with a national audience through traditional and social media platforms. AFL's email list contains over 30,000 unique addresses, our Facebook page has over 15,000 followers, our Twitter page has over 11,000 followers, the Twitter page of our Founder and President has over 116,000 followers, and we have over 28,000 followers on GETTR.

Pursuant to 5 U.S.C. § 552(a), AFL requests the following records.

**I. Requested Records**

- 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, 2022.
- 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.

## **II. Processing**

The Department of Transportation must comply with the processing guidance in the Attorney General's Memorandum of March 15, 2022, <https://www.justice.gov/ag/page/file/1483516/download>. This means, among other things, the following.

- You may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.
- Information that might technically fall within an exemption should not be withheld unless you can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail.
- If you cannot make full disclosure of a requested record, then the FOIA requires that you consider whether partial disclosure of information is possible and take reasonable steps necessary to segregate and release nonexempt information.
- You must properly apply the foreseeable harm standard by confirming for and demonstrating to AFL that you have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.
- Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then you must disclose the entire record, as a single record cannot be split into responsive and non-responsive bits. AFL's request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please give full effect to all applicable authorities and broadly construe our Item and your obligations to provide responsive records.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such

as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move records to official systems within a certain time. AFL has a right to records in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.

- Please use all available tools to conduct a complete and efficient search for potentially responsive records. Many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program or similar policies. These provide options for searching emails and other electronic records in a manner reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, then please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted before our Items are processed. If potentially responsive records are subject to potential deletion, including on a scheduled basis, please prevent deletion by instituting a litigation hold or other appropriate measures.

#### **IV. Fee Waiver**

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees. These authorities provide for fee waivers when, as here, “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

AFL’s request concerns identifiable operations or activities of the government, and the information requested is likely to contribute significantly to the public understanding of the steps taken by the Biden Administration across the federal government in the name of advancing equity.

Also, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content.

As a nonprofit organization primarily engaged in the dissemination of information to educate the public, AFL does not have a commercial purpose and the release of the information requested is not primarily in AFL's financial interest. Our status as a qualified non-commercial public education and news media requester has been recognized by the Departments of Defense, Education, Energy, Interior, Health and Human Services, and Homeland Security, and the Office of the Director of National Intelligence.

## **V. Production**

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

If you have any questions about this request or believe further discussions regarding search and processing will speed the efficient production of records of interest to AFL, then please contact me at [FOIA@aflegal.org](mailto:FOIA@aflegal.org). Finally, please contact us immediately if AFL's request for a fee waiver is not granted in full. Thank you in advance for your cooperation.

Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation

# Exhibit 2



U.S. Department  
of Transportation

Office of the Secretary  
of Transportation (OST)

1200 New Jersey Ave., S.E.  
Washington, DC 20590

OST FOIA Contact Information

FOIA Requester Service Center  
202-366-4542; [ost.foia@dot.gov](mailto:ost.foia@dot.gov)

Michael C. Bell, FOIA Officer  
202-366-5546; [michael.bell1@dot.gov](mailto:michael.bell1@dot.gov)

Fern Kaufman, FOIA Public Liaison  
202-366-8067; [fern.kaufman@dot.gov](mailto:fern.kaufman@dot.gov)

April 22, 2022

Mr. Reed D. Rubinstein  
America First Legal Foundation  
600 14th Street, NW  
5th Floor  
Washington, DC 20005

**File No.: OST-2022-0269**

Dear Mr. Rubinstein:

This is in response to your Freedom of Information Act (FOIA) request received March 30, 2022. You requested the U.S. Department of Transportation's (DOT) *Equity Action Plan* and *Equity Assessment*, both of which were required pursuant to Executive Order 13985.

DOT's *Equity Action Plan* is publicly available at <https://www.transportation.gov/priorities/equity/equity-action-plan>. DOT's *Equity Assessment* is withheld in full (68 pages) pursuant to the deliberative process privilege outlined in FOIA Exemption 5, which protects materials that are both pre-decisional and deliberative. 5 U.S.C. § 552(b)(5) and 49 CFR 7.23(c)(5). I have considered the foreseeable harm standard when reviewing these records and in applying any FOIA applicable exemption.

I am the person responsible for this determination. If you are dissatisfied with this response, you may appeal to Judith S. Kaleta, Deputy General Counsel, U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., W94-122, Washington, D.C. 20590. Should you choose to appeal this determination, we recommend sending your appeal electronically via email to [ost.foia.appeals@dot.gov](mailto:ost.foia.appeals@dot.gov). An appeal must be received within 90 days of the date of this determination and should contain any information and arguments you wish to rely on. The Deputy General Counsel's determination will be administratively final.

You also have the right to seek dispute resolution services from the FOIA Public Liaison (contact information shown above) or the Office of Government Information Services (<https://ogis.archives.gov>) via phone - 202-741-5770/toll-free - 1-877-684-6448; fax - 202-741-5769; or email - [ogis@nara.gov](mailto:ogis@nara.gov).

Sincerely,

Michael C. Bell  
FOIA Officer