U.S. Department of Transportation

General Counsel

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

Office of the Secretary of Transportation

Michael Ding
America First Legal Foundation
611 Pennsylvania Ave. SE #231
Washington, DC 20003

Re: FOIA Appeal 22-0036

Dear Mr. Ding:

This letter responds to your July 21, 2022 Freedom of Information Act (FOIA) administrative appeal related to America First Legal Foundation's March 30, 2022 FOIA request (OST-2022-0269) submitted by Reed D. Rubinstein to the U.S. Department of Transportation (DOT), Office of the Secretary of Transportation (OST). The initial request sought the DOT "Equity Action Plan" required by Section 7 of Executive Order (E.O.)13985, as well as the DOT "Equity Assessment" required by Section 5 of that same E.O.

The OST FOIA Office responded to the initial request on April 22, 2022, providing you with a link to the Equity Action Plan which was already publicly available. The OST FOIA Officer withheld the Equity Assessment (Assessment) in full because it qualified for the deliberative process privilege. 5 U.S.C. § 552(b)(5); 49 CFR § 7.23(c)(5).

In your appeal, you challenge DOT's initial determination to withhold the Assessment pursuant to Exemption 5. You state that the E.O. directed DOT to conduct a review of certain programs and policies and provide a report to the Assistant to the President for Domestic Policy, and that no analysis or rationale was required. You state that the final Assessment is not pre-decisional, because under the terms of the EO, the Secretary of Transportation must reflect certain findings, which express DOT's official position. You claim that because the role of the White House, per the EO, was to conduct interagency coordination, not make changes to the Assessment or use it for higher decision making.

You also state that the final Assessment is not deliberative. You state that there is nothing subjective about the final Assessment; 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." You further state that disclosure of the

Assessment will not cause harm to the deliberative process—the EO did not require analysis or rationales, and America First Legal did not seek them. You also state that DOT failed to take steps to segregate and release nonexempt information from portions of the document that may be properly withheld.

I have reviewed the withholding of the responsive documents considering your appeal letter, the FOIA, and applicable case law, and deny your appeal. I find that the Assessment in its entirety qualifies for the presidential communications privilege, and may be withheld under FOIA Exemption 5 in its entirety. I also find that portions of the Assessment are both predecisional and deliberative, as the Assessment goes beyond the requirements of the EO and makes recommendations for policies, many of which were either not adopted or were adopted in modified form in the Action Plan.

Exemption 5—Presidential Communications

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." 5 U.S.C. § 552(b)(5). Among the privileges qualifying documents for withholding under Exemption 5 is the presidential communications privilege. *Loving v. Dep't of Defense*, 550 F. 3d 32, 38 (D.C. Cir. 2008). The presidential communications privilege and the deliberative process privilege "are closely affiliated," although distinct and with different scopes. *In re Sealed Case*, 121 F. 3d 729, 745 (D.C. Cir. 1997). The presidential communications privilege is "limited to communications in performance of [a President's] responsibilities" of his office and "made 'in the process of shaping policies and making decisions.'" *Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425, 449 (1977) (citing *U.S. v. Nixon*, 418 U.S. 683, 708, 711, 713 (1974).). "Unlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *In re Sealed Case*, 121 F. 3d at 745. The privilege only applies to documents that were "solicited or received by immediate or key advisors to the President." *Elec. Priv. Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 80 (D.D.C. 2008) (citing *Judicial Watch v. DOJ*, 365 F. 3d 1108, 1116 (D.C. Cir. 2004).). These advisors must be "members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President." *Id.* at 81 (citing *In re Sealed Case*, 121 F. 3d at 752).

Section 3 of E.O. 13985 specifically identified the role of the White House Domestic Policy Council to "coordinate the formulation and implementation of [the] Administration's domestic policy objectives," in coordination with the National Security Council and National Economic Council.[1] Section 5 of the E.O. directed agencies to conduct an equity assessment, in

[1] The National Security Council, composed of the President's senior national and cabinet officials, is the President's principal forum for national security and foreign policy decision making and the President's principal arm for coordinating these policies across federal agencies. In addition, the National Economic Council advises the President on U.S. and global economic policy.

consultation with the Director of the Office of Management and Budget. The resulting report was to be provided to the Assistant to the President for Domestic Policy. I find that because DOT's Assessment was solicited by the President and "received" by his "immediate White House advisers [with] . . . broad and significant responsibility for investigating and formulating the advice to be given the President," and it falls squarely within the protective scope of the presidential communications privilege. *Loving*, 550 F.3d at 37 (alteration in original) (*quoting Judicial Watch*, 365 F.3d at 1114). Accordingly, it was appropriate to withhold the entire Assessment under Exemption 5, because the entire Assessment qualifies for the presidential communications privilege.

Exemption 5—Deliberative Process Information

Exemption 5 also protects information qualifying for the deliberative process privilege, which preserves the "integrity of the deliberative process itself where the exposure of that process would result in harm." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988); *see also Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975). To qualify for the deliberative process privilege, a document must be both predecisional and deliberative. A document is predecisional if it is created "antecedent to the adoption of agency policy." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). A document is deliberative if it is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters" or "reflects the give-and-take of the consultative process." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Releasing a deliberative document may discourage candid discussion and effective decision-making within the agency and thus undermine the agency's ability to perform its functions. *Lahr v. NTSB*, 569 F.3d 964, 982 (9th Cir. 2009); *Formaldehyde v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). If a document qualifies for withholding as a deliberative document, an agency may only withhold that document from release if it "reasonably foresees that disclosure would harm an interest protected by the exemption." § 552(a)(8)(A). An agency may not make boilerplate assertions of harm but must articulate the nature of the harm and its link to the specific withheld information. *See Judicial Watch v. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (citation omitted).

To support assertion of the deliberative process privilege, an agency must provide "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F. 4th 350, 370 (D.C. Cir. 2021). Documents that "discuss, describe, or defend an already-determined agency policy" do not advance the purposes of the deliberative process privilege, which is "to allow agency

employees to have the candid discussions necessary to make the best possible policy decisions in the service of the public." *Id.* at 363.

An agency must also "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible." § 552(a)(8)(A)(ii). However, an agency is not required to disclose isolated sentences that have "minimal or no information content," or that are "inextricably intertwined" with exempt information. *Mead Data Center v. Dep't of the Air Force*, 566 F. 2d 242, 260-61 (D.C. Cir. 1977). In the context of the deliberative process privilege, factual information is generally available for release, but not where the facts themselves reflect the agency's deliberative process. *See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F. 2d 1114, 1118 (9th Cir. 1988) (rejecting simplistic fact/opinion distinction, and focusing on whether the documents in question play a role in the agency's deliberative process.). Identifying significant facts, and separating them from insignificant facts, has been found to constitute an exercise of judgment by agency personnel. *Montrose Chemical Corp. v. Train*, 491 F. 2d 63, 68 (D.C. Cir. 1974).

Even if information qualifies for withholding under Exemption 5, the government may not withhold that privileged information unless it "also reasonably foresees that disclosure would harm an interest protected by" the FOIA exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I). An agency may not assert only "generalized assertions" to show foreseeable harm. *Macho Amadis v. U.S. Dep't of State*, 971 F. 3d 364, 371 (D.C. Cir. 2020).

After reviewing the final Equity Assessment, I find that portions of it are both pre-decisional and deliberative. The Assessment does not contain only factual information, but also contains recommendations for actions that DOT could take to improve equity. These recommendations were preliminary in nature, as can be seen by comparing the draft recommendations in the Assessment with the final actions proposed in the Equity Action Plan. I also find that release of the pre-decisional and deliberative portions of the Assessment would cause harm by chilling deliberations about a particularly controversial subject.

For the reasons described in this letter, I deny your appeal. This is the final decision that you will receive from DOT responding to your request. Departmental FOIA Attorney John E. Allread and I are the persons responsible for this decision. You may seek review of this decision in the United States District Court for the district in which you reside or have your principal place of business, where the records are located, or for the District of Columbia.

Sincerely,

JUDITH SUE KALETA
Digitally signed by JUDITH SUE KALETA
Date: 2023.11.16 12:30:23 -05'00'

Judith S. Kaleta
Deputy General Counsel