



United States
Department of
Agriculture

Office of the General Counsel
1400 Independence Ave. SW
Washington, DC 20250-1400

April 25, 2022

Delivered via Electronic Mail

Reed D. Rubinstein
America First Legal Foundation
611 Pennsylvania Ave SE #231
Washington, DC 20003
FOIA@aflegal.org

**Re: Freedom of Information Act (FOIA) Request No. 2022-OSEC-02946-F
Final Response**

Dear Mr. Rubinstein:

This is the Office of Information Affairs' (OIA) final response to the above-referenced FOIA request, which sought:

- 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.

Your request has been processed under the FOIA, 5 U.S.C. § 552.

A search for responsive records was conducted by the OIA in collaboration with the Office of the Secretary (OSEC). The OIA is under the purview of the Office of the General Counsel (OGC) and serves as the focal point for USDA's FOIA program. It provides coordination and ensures agency-wide compliance with the FOIA. Additionally, the OIA processes requests and appeals on behalf of the Office of the Secretary (OSEC), the Under Secretaries, USDA's staff offices, and the Research, Education and Economics and Trade and Foreign Agricultural Affairs mission areas.

Regarding Part A of your request, OSEC provided the OIA with the link to the "Equity Action Plan" that was submitted to the White House on February 10, 2022, and is publicly available here: [USDA Equity Action Plan](#).

In addition, the OSEC search located a twenty (20) page record responsive to Part B of your request.

Following a review of the responsive record, the OIA has determined to fully withhold the record responsive to Part B of your request pursuant to 5 U.S.C. § 552(b)(5) (FOIA Exemption 5). Additionally, certain information contained therein should also be withheld pursuant to 5 U.S.C. § 552 (b)(6) (FOIA Exemption 6). Below are explanations of the information that has been withheld.

FOIA Exemption 5 - Deliberative

FOIA Exemption 5 protects from disclosure those “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” One of the frequently invoked FOIA Exemption 5 privileges is the deliberative process privilege. To fall within FOIA’s deliberative process privilege, the records must be both pre-decisional and deliberative; the records must precede the adoption of an agency policy and include the opinions, recommendations, or deliberations on a legal or policy matter.

In this instance, the OIA is categorically withholding, under the deliberative process privilege, the pre-decisional, inter-agency equity assessment report submitted to the Office of Management and Budget (OMB) on August 9, 2021.

Upon review, the record includes certain key agenda items, planning work and strategic initiatives to advance the goals of EO 13985 developed by the USDA. The withheld information includes forward-looking strategies, plans, and goals developed by specific sub-working groups and their co-leads. These groups are responsible for launching and executing agency-wide initiatives which themselves have not yet been completed nor made public. The information withheld also incorporates plans for internal and external stakeholder engagement programs which are still under development.

This information reflects pre-decisional and deliberative strategic approaches by agency components which have not been incorporated into official USDA policy. The initiatives and strategic approaches remain subject to further discussion and change, and thus are deliberative.

Release of the information would cause harm to the agency’s ability to execute its responsibilities under EO 13985 because public knowledge of strategic goals and initiatives would inhibit the agency’s ability to gather data on systemic barriers to benefits and opportunities and discourage frank discussions with stakeholders on ways to remedy existing barriers. Release of the information would also result in public confusion from disclosure of reasons and rationales that were not in fact the grounds for agency action.

FOIA Exemption 5 – Presidential Communications Privilege

FOIA Exemption 5 protects from disclosure those “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Exemption 5 may incorporate virtually all civil discovery privileges; if a document

is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA. Rule 501 of the Federal Rules of Evidence allows courts to create privileges as necessary, which may be thereafter recognized under Exemption 5. The presidential communications privilege is one such privilege that has been recognized by courts under Exemption 5.

The presidential communications privilege protects communications among the President and his advisors. It applies to documents in their entirety and covers final and post-decisional materials as well as pre-deliberative ones.

The record being withheld here is a report, which itself was solicited and received by the President and/or his immediate White House advisers. The report is sent to the Domestic Policy Council (DPC) located within the Executive Office of the President. The DPC drives the development and implementation of the President's domestic policy agenda in the White House and across the Federal government, ensuring that domestic policy decisions and programs are consistent with the President's stated goals. Accordingly, upon the advice of the White House Counsel's Office, the records are being withheld in full because they fall under the presidential communications privilege.

FOIA Exemption 6

Exemption 6 generally is referred to as the "personal privacy" exemption. It provides that the disclosure requirements of FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Please note, an invasion of privacy need not occur immediately upon disclosure in order to be considered "clearly unwarranted". Application of the exemption involves balancing the public's interest in disclosure against individuals' privacy interests.

The information withheld under Exemption 6 consists of mobile phone numbers. This information qualifies as "similar files" because it is information in which individuals have a privacy interest. Moreover, releasing the information could subject the individuals to unwarranted or unsolicited communications. Because there is a viable privacy interest that would be threatened by disclosure, Exemption 6 authorizes this office to withhold the information. Accordingly, we have determined that the public interest in the information's release does not outweigh the overriding privacy interests in keeping it confidential.

You may appeal this response by email at USDAFOIA@usda.gov. Your appeal must be in writing, and it must be received electronically no later than 90 calendar days from the date of this letter. The OGC will not consider appeals received after the 90 calendar-day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number, a copy of the original request, the OIA's response to your original request, and a statement explaining the basis of your appeal. For quickest possible handling, the subject line of your email and the appeal letter should be marked "Freedom of Information Act Appeal" and reference FOIA No. 2022-OSEC-02946-F.

Reed D. Rubinstein

FOIA Case No. 2022-OSEC-02946-F

Page 4

You may seek dispute resolution services from the OIA's FOIA Public Liaison, Ms. Melanie Enciso. Ms. Enciso may be contacted by telephone at (202) 720-9425, or electronically at Melanie.Enciso@usda.gov or USDAFOIA@usda.gov.

You also have the option to seek assistance from the Office of Government Information Services (OGIS). Please visit <https://www.archives.gov/ogis/mediation-program/request-assistance> for information about how to request OGIS assistance in relation to a FOIA request.

Provisions of the FOIA allow us to recover part of the cost of processing your request. In this instance, no fees will be charged.

If you have any questions regarding the processing of this request, please contact Ms. Melanie Enciso at Melanie.Enciso@usda.gov or USDAFOIA@usda.gov.

For additional information regarding USDA FOIA regulations and processes, please refer to the information available online at [Freedom of Information Act Division | USDA](#).

The OIA appreciates the opportunity to assist you with this matter.

Sincerely,

A handwritten signature in black ink that reads "Alexis R. Graves". The signature is written in a cursive style with a large, stylized 'A' and 'G'.

Alexis R. Graves

Director

Office of Information Affairs