



July 22, 2022

VIA email: USDAFOIA@usda.gov

Alexis Graves, OIA Director
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
South Building, Room 4104
Washington, DC 20250-0706

Freedom of Information Act Appeal: 2022-OSEC-02946-F Determination to Withhold Release of the Final Report Required by Section 5 of Executive Order 13985

Dear Ms. Graves:

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 Agriculture (“USDA”) 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) USDA’s Equity Action Plan “that was required by Section 7 of [the EO],” and (2) USDA’s report “that was required by Section 5 of [the EO]” (“Final Report”). Exhibit 1. USDA assigned this FOIA request File No: 2022-OSEC-02946-F.

In USDA’s final response letter, dated April 25, 2022, USDA withheld the Final Report in full (20 pages) “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).” Exhibit 2. USDA asserted both the deliberative process privilege and the presidential communications privilege under Exemption 5 to justify its determination to withhold the Final Report.¹ “The information withheld under Exemption 6 consists of mobile phone numbers.”² AFL does not appeal USDA’s determination to withhold mobile phone numbers under Exemption 6. Because the Final Report is not protected under either the deliberative process privilege or the presidential communications privilege within the scope of

¹ Exhibit 2 at 2-3.

² *Id.* at 3.

Exemption 5, however, AFL appeals USDA’s initial determination 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.”³ Specifically, within 200 days, the Secretary of Agriculture (“Secretary”) was required to “in consultation with the Director of OMB, select certain [USDA] 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.”⁴ Section 5 of the EO did not require USDA to provide its analysis or rationales to support those findings, nor did it require USDA 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 my Administration’s domestic policy objectives.”⁵

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 USDA 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 USDA to disclose records upon request unless the records fall within one or more enumerated exemptions.⁶ The exemptions are narrowly construed so as not to “obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”⁷ As a threshold consideration, Exemption 5 covers “inter-agency or intra-agency memorandums.”⁸ “The deliberative process privilege protects agencies from being ‘forced to operate in a fishbowl.’”⁹ To qualify for Exemption 5 protection under the deliberative process privilege, “an agency’s materials must be both ‘predecisional’

³ Exec. Order No. 13985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

⁴ *Id.* at 7010.

⁵ 86 Fed. Reg. at 70,10 (Jan. 25, 2021).

⁶ *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7 (2001).

⁷ *Id.* (quoting *Dept’ of Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (internal quotations omitted).

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

⁹ *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.’”¹⁰ USDA 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.”¹¹ 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 my face to enrollment in and access to benefits and services in [USDA] programs;
- (b) Potential barriers that underserved communities and individuals may face in taking advantage of [USDA] procurement and contracting opportunities;
- (c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in [USDA] actions and programs; and
- (d) The operational status and level of institutional resources available to offices or divisions within [USDA] that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.¹²

The Secretary’s report reflecting those findings—which ultimately became USDA’s Final Report—necessarily occurred at the top of USDA’s chain of command, and it expressed USDA’s official position regarding: USDA’s programs; USDA’s procurement and contracting opportunities; USDA’s policies, regulations and guidance documents; and USDA’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.”¹³ As such, the Secretary submitted the Final Report to the APDP merely for interagency coordination, not for additional drafting or higher decision making.

¹⁰ Formaldehyde Inst. v. Dep’t of Health and Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989).

¹¹ 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).

¹² 86 Fed. Reg. at 7,010 (Jan. 25, 2021).

¹³ *Id.* (emphasis added).

AFL specifically requested the Final Report, as “required by Section 5 of [the EO] to be submitted to the [APDP]”.¹⁴ 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 USDA 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 USDA’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.¹⁵ “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.”¹⁶ “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.”¹⁷ 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.”¹⁸ There is nothing subjective or personal about the Final Report; it is simply an objective compilation of findings on USDA programs, USDA procurement and contracting, USDA policies and regulations, and USDA 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 USDA 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 USDA to provide its analyses or forward-looking plans, and AFL did not seek them. AFL only requested the Secretary’s final, as submitted, version of the document containing USDA’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.’”¹⁹ 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.²⁰ Even if the Final Report were somehow pre-decisional, it is certainly not deliberative, and it

¹⁴ Exhibit 1 at 1.

¹⁵ *McKinley v. Bd. of Governors of Fed. Res. Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

¹⁶ *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)).

²⁰ *See Id.*

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. USDA 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."²¹ In its final response letter, USDA suggested that release of the Final Report "would cause harm to the agency's ability to execute its responsibilities under EO 13985 ... [and] inhibit the agency's ability to gather data [and] discourage frank discussions with stakeholders."²² 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 Department of Interior proactively disclosed its own report.²³ Moreover, USDA itself proactively disclosed the summary findings from its Request for Information (RFI) calling on diverse stakeholders and customers to comment on virtually identical issues.²⁴ No identifiable harm has resulted from any of these disclosures. Unless USDA has unique institutional characteristics that distinguish its inter-agency or intra-agency memorandums from those of other departments and agencies, it is unreasonable that USDA'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, USDA must "take reasonable steps necessary to segregate and release nonexempt information."²⁵ By withholding the Final Report in full, it is apparent that USDA 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 USDA offices would reflect the agency give-and-take of the consultative process, would reflect his personal opinions rather than the USDA'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.

²¹ U.S. DEP'T OF JUST. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

²² Exhibit 2 at 2.

²³ See e.g., 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).

²⁴ U.S. DEP'T OF AGRIC., *RFI Summary Report*, <https://www.usda.gov/equity/rfi-summary> (last visited July 21, 2022).

²⁵ 5 U.S.C. § 552(a)(8)(A)(ii)(II).

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, USDA 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 USDA's publicly disclosed Equity Action Plan or its RFI Summary Report, USDA waived its justification to withhold that information. Because Section (7)(a) of the EO required USDA'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],"²⁶ disclosure of these two findings in the Final Report would not chill USDA'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 USDA 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, USDA must take any steps necessary to segregate it from the nonexempt information.

The Presidential Communications Privilege Does Not Cover the Final Report

USDA's initial determination to withhold the Final Report also relied on the assertion of the presidential communications privilege. It explained the final Report "was solicited and received by the President and/or his immediate White House advisors [and was] sent to the Domestic Policy Council (DPC) [which] drives the development and implementation of the President's domestic policy agenda."²⁷

The presidential communications privilege "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions

²⁶ 86 Fed. Reg. 7,009, 7011 (Jan. 25, 2021).

²⁷ Exhibit 2 at 3.

confidentially.”²⁸ “[T]he privilege itself is rooted in the need for confidentiality to ensure that presidential decisionmaking [sic] is of the highest caliber, informed by honest advice and full knowledge.”²⁹ “[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President’s decision-making process is adequately protected.”³⁰ “[T]he court [must] strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President’s ability to obtain candid, informed advice.”³¹ “In so doing, the Court must bear in mind that ‘[t]he very reason that presidential communications deserve special protection, namely the President’s unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance.’”³²

The Final Report was not a communication made to provide candid and informed opinions to the President and his advisors and ensure that presidential decision-making is of the highest caliber. While the Final Report was submitted by the Secretary to the APDP, the EO specified that the DPC’s role in this context is merely *coordination* of the interagency process, not advising the President nor issuing directives to the Secretary. The President had already formulated his Administration’s policy on the subject matter and publicly delivered it to the heads of all agencies through Section 1 of the EO, including the objective that “executive departments ... must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.”³³ The President then ordered the Secretary to achieve this objective by complying with Section 5 of the EO. The Final Report is not “revelatory of the President’s deliberations” such that its public disclosure would undermine future decision-making.³⁴ Moreover, “this is not a case involving ‘a quintessential and nondelegable Presidential power’—such as appointment and removal of Executive Branch officials ... where separation of powers concerns are at their highest.”³⁵ Instead, the work to redress inequities in USDA policies and programs can be and is “exercised or performed without the President’s direct involvement.”³⁶

²⁸ *Loving v. Dep’t of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008)

²⁹ *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997)

³⁰ *Jud. Watch, Inc. v. Dep’t of Just.*, 365 F.3d 1108, 1116 (D.C. Cir. 2004) (quoting *In re Sealed Case*, 121 F.3d at 572) (internal quotations omitted).

³¹ *Jud. Watch*, 365 F.3d at 1112.

³² *Ctr. for Effective Gov’t v. U.S. Dep’t of State*, 7 F. Supp. 3d 16, 24 (D.D.C. 2013) (quoting *In re Sealed Case*, 121 F.3d at 749).

³³ 86 Fed. Reg. at 7,009 (Jan. 25, 2021).

³⁴ *Cf. In re Sealed Case*, 121 F.3d at 745-46.

³⁵ *Ctr. For Effective Gov’t*, 7 F. Supp. 2d at 25 (quoting *In re Sealed Case*, 121 F.3d at 752-53).

³⁶ *See Id.*

Finally, there is no indication that the findings in the Final Report were intended to be hidden from public view, rather than openly shared for accountability and transparency. The OMB Director's report to the President, required under Section 4 of the EO, was proactively disclosed.³⁷ Other department and agency reports, required under Section 5 of the EO, were proactively disclosed or released under FOIA.³⁸ None of these disclosures impacted the President's ability to obtain candid, informed advice. Likewise, USDA's Final Report may not be uniquely exempt from disclosure.

USDA Must Disclose the Final Report

Because the Final Report is not exempt from disclosure under the deliberative process privilege or the presidential communications privilege within the scope of Exemption 5, and harm would not reasonably result from its disclosure, we respectfully request that USDA reverses its initial determination and release the Final Report—subject to the withholding of mobile phone numbers under Exemption 6.

Thank you for your consideration of this appeal.

Sincerely,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

³⁷ OFF. OF MGMT. AND BUDGET, *Study to Identify Methods to Assess Equity: Report to the President* (July 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf.

³⁸ See e.g., 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).

EXHIBIT 1



March 30, 2022

VIA Electronic Submission

Departmental FOIA Officer
United States Department of Agriculture
1400 Independence Avenue, SW
South Building, Room 4104
Washington, D 20250-0706

Freedom of Information Act Request: USDA 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

USDA 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. 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



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

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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, flowing style.

Alexis R. Graves
Director
Office of Information Affairs