



September 23, 2022

VIA Email: HUDFOIAappeals@hud.gov

U.S. Department of Housing and Urban Development
Office of Ethics and Appeals Law Division
Office of General Counsel
451 Sevent Street, SW, Room 2130
Washington, DC 20410

Freedom of Information Act Appeal: 22-FI-HQ-01341 Determination to Withhold Release of Strategic Plan Required by Section 3(b) of Executive Order 14019

To Whom It May Concern:

On June 10, 2022, America First Legal Foundation (“AFL”) submitted to the United States Department of Housing and Urban Development (the “Department”) under the Freedom of Information Act (“FOIA”) a request for only one document, which was required pursuant to the March 7, 2021 Executive Order 14019 entitled “Promoting Access to Voting” (the “EO”): the Department’s Strategic Plan “that was required by Section 3(b) of [the EO]” (the “Strategic Plan”). Exhibit 1. The Department assigned the request tracking number: 22-FI-HQ-01341.

In the Department’s determination, dated September 21, 2022, it withheld eight (8) pages in full, stating it was “withholding this document in full under the deliberative process privilege of Exemption 5 of the FOIA, 5 U.S.C. § 552 (b)(5).” Exhibit 2. According to the Department’s justification, disclosure of this internal information would reflect HUD’s pre-decisional, deliberative process, and would discourage open and candid advice, recommendations, and exchanges of views within the Department, which could bring about public scrutiny of the individuals and the need to justify in public their tentative opinions.”¹ Without elaborating, the Department also stated that it “has considered the foreseeable harm standard.”²

Because the Strategic Plan is not protected under the deliberative process privilege within the scope of Exemption 5, however, AFL appeals the Department’s determination to withhold it in full.

¹ Exhibit 2 at 1.

² *Id.*

The Strategic Plan as Described by Executive Order 14019

Section 3 of the EO directed each agency to “consider ways to expand citizens’ opportunities to register to vote and to obtain information about, and participate in, the electoral process.”³ Under Section 3(a) of the EO, the Secretary of the Department of Housing and Urban Development (the “Secretary”) was required to “evaluate the ways in which the agency can, as appropriate and consistent with applicable law, promote voter registration and voter participation.”⁴ Section 3(a) then listed five categories of ways which the Secretary must consider as part of its evaluation.⁵ Under Section 3(b) of the EO, the Secretary was required to, within 200 days, “submit to the Assistant to the President for Domestic Policy [APDP] a strategic plan outlining the ways identified under [the review described in Section 3(a)] that the agency can promote voter registration and voter participation.”⁶

AFL specifically requested the post-decisional Strategic Plan, as it was disclosed to the APDP. AFL did not request any pre-decisional considerations conducted by the Secretary in the course of her evaluation of various ways to promote voter registration and voter participation as directed under Section 3(a) of the EO, her deliberations with her staff within the Department, nor any other communications leading up to the Strategic Plan.

FOIA Exemption 5 Under the Deliberative Process Privilege

FOIA requires the Department to disclose records upon request unless the records fall within one or more enumerated exemptions.⁷ The exemptions are narrowly construed so as not to “obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”⁸ As a threshold consideration, Exemption 5 covers “inter-agency or intra-agency memorandums.”⁹ “The deliberative process privilege protects agencies from being ‘forced to operate in a fishbowl.’”¹⁰ 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.’”¹¹ The Department asserted FOIA Exemption 5 under the deliberative process privilege to justify withholding the Strategic Plan in full, but the Strategic Plan is neither pre-decisional nor deliberative.

³ Exec. Order No. 14,019, 86 Fed. Reg. 13,623 (Mar. 10, 2021).

⁴ *Id.*

⁵ *Id.* at 13,623-24.

⁶ *Id.* at 13,624.

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

⁸ *Id.* (quoting *Dept’ of Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (internal quotations omitted).

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

¹⁰ *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

¹¹ *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989).

The Strategic Plan Is Not Pre-decisional

The Strategic Plan 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.”¹² Under the Section 3(b) of the EO, agency strategic plans must be submitted by “[t]he head of each agency ... to the [APDP].” Accordingly, the Secretary authored the Strategic Plan.

Under Section 3(a) of the EO, the Secretary was required to evaluate and consider:

- (i) ways to provide relevant information in the course of activities or services that directly engage with the public—including through agency materials, websites, online forms, social media platforms, and other points of public access—about how to register to vote, how to request a vote-by-mail ballot, and how to cast a ballot in upcoming elections;
- (ii) ways to facilitate seamless transition from agencies’ websites directly to State online voter registration systems or appropriate Federal websites, such as Vote.gov;
- (iii) ways to provides access to voter registration services and vote-by-mail ballot applications in the course of activities or services that directly engage with the public,
.....
- (iv) ways to promote and expand access to multilingual voter registration and election information, to promote equal participation in the electoral process for all eligible citizens of all backgrounds; and
- (v) whether, consistent with applicable law, any identity documents issued by the agency to members of the public can be issued in a form that satisfies State voter identification laws.¹³

As required by Section 3(b) of the EO, the Secretary’s Strategic Plan outlined the ways the Department can promote voter registration and voter participation, which it had identified under the review she was required to conduct under Section 3(a) of the EO. The Strategic Plan’s outline of the various ways identified during the Secretaries evaluation required by Section 3(a) of the EO necessarily occurred at the top of the Department’s chain of command, and it expressed the Department’s official position regarding, among other things: the Department’s ability to provide

¹² 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).

¹³ 86 Fed. Reg. 13,623-24.

information in the course of activities and services that directly engage with the public, including its materials, websites, online forms, social media platforms, and other points of public access; the Department's ability to facilitate seamless transition from its websites directly to others; and whether any identity documents issued by the Department to members of the public can be issued in a form that satisfies State voter identification laws.

AFL specifically requested the Strategic Plan, as "required by Section 3(b) 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, nor did AFL request the Department's internal evaluations and considerations of various ways to promote voter registration and voter participation, which was required by Section 3(a) of the EO. AFL only requested the final outline required by Section (b) that was intended to express the Department's official position on the ways it had identified, after conducting the review that was required by Section (a).

The Strategic Plan 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. 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."¹⁶ 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."¹⁷

There is nothing subjective or personal about the Strategic Plan; it is simply an objective outline of its lawful capabilities identified relating to the Department's websites and other activities and services that directly engage with the public; the Department's solicitation of third-party organizations; and the Department's issuance of identity documents. Nor does it reflect agency give-and-take of the consultative process. Disclosure of the Strategic Plan will not cause rank and file Department employees to be less frank or honest when compiling similarly objective findings in the future. AFL did not request their drafts or communications. Section 3(b) of the EO did not require the Department to provide its evaluations or considerations, and AFL did not seek them. AFL only requested the Secretary's final, as submitted, version of the document containing the Department's final outline.

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.*

The construction of the EO also supports the conclusion that the Strategic Plan submitted by the Secretary to the APDP was intended to express the Department's final, official position. Section 3(c) of the EO described actions that other executive branch officials would take to "coordinate efforts across agencies" and "support agencies in implementing the strategic plans directed in [Section 3(b) of the EO]."¹⁸ The EO did not direct the Secretary to engage in further deliberations with the APDP or anyone else to consider changing the conclusions it outlined in the Strategic Plan. For comparison, the Director of the Office of Personnel Management was required under Section 6 of the EO to "provide recommendations to the President, through the [APDP], on strategies to expand the Federal Government's policy of granting employees time off to vote [during] elections," and to "provide recommendations to the President, through the [APDP], on strategies to better support Federal employees who wish to volunteer [as poll workers and observers]."¹⁹ In contrast, Section 3 of the EO's direction to the heads of all agencies to submit their strategic plans to the APDP did not describe them as mere recommendations on strategies to the President, but rather as each agency's affirmative outline of its own plans, which other executive branch officials would later support them in implementing.

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.'"²⁰ Public knowledge of the Strategic Plan will not affect either the efficient Government operation or any one of the various policies to be served by the Exemption.²¹ Even if the Strategic Plan 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 Strategic Plan were pre-decisional and deliberative, it should still be disclosed. The Department 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."²² In its initial determination, the Department provided no articulation how it had considered the foreseeable harm standard when reviewing the record and applying the FOIA exemption, as it was required to.²³

¹⁸ 86 Fed. Reg. 13,624.

¹⁹ *Id.* at 13,625.

²⁰ *Coastal States Gas Corp.* at 866 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)).

²¹ *See Id.*

²² U.S. DEP'T OF JUST. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

²³ *See Id.* at 1.

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, the Department must “take reasonable steps necessary to segregate and release nonexempt information.”²⁴ By withholding the Strategic plan in full, it is apparent that the Department made no effort to take any steps necessary to segregate and release nonexempt information.

It is inconceivable, for example, that the Secretary’s identification of the Department’s ability to link its website with Vote.gov would reflect the agency give-and-take of the consultative process, would reflect her personal opinions rather than the Department’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 or agency actions might be withheld from disclosure in some circumstances, the mere identification of the Department’s ability to implement such a policy or take such an action is neither pre-decisional nor deliberative. Certainly, the Department could disclose the Strategic Report’s outline identifying the Department’s ability to link its website with Vote.gov without revealing communications of a deliberative nature.

If the Strategic Plan also included extraneous pre-decisional and deliberative information, the Department must take any steps necessary to segregate it from the nonexempt information.

The Department Must Disclose the Strategic Plan

Because the Strategic Plan is not exempt from disclosure under the deliberative process privilege within the scope of Exemption 5, and harm would not reasonably result from its disclosure, we respectfully request that the Department reverse its initial determination and release the Strategic Plan in full.

Thank you for your consideration of this appeal.

Sincerely,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

²⁴ 5 U.S.C. § 552(a)(8)(A)(ii)(II).

EXHIBIT 1



June 10, 2022

VIA Electronic Submission

U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, DC 20410

Freedom of Information Act Request: HUD Voting EO Strategic 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 33,000 unique addresses, our Facebook page has over 35,000 followers, our Twitter page has over 14,000 followers, the Twitter page of our Founder and President has over 182,000 followers, and we have another 29,000 followers on GETTR.

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

I. Requested Records

- A. The Department's "strategic plan," that was required by Section 3(b) of Executive Order 14019 (March 7, 2021) on "Promoting Access to Voting," to be submitted to the Assistant to the President for Domestic Policy by September 23, 2021.

II. Processing

The Department must comply with the processing guidance in the Attorney General's Memorandum on Freedom of Information Guidelines.¹ 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

¹ U.S. Dep't Just. (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

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 associated with this request.

First, 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 through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public’s understanding of your policies and practices will be enhanced through AFL’s analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL’s financial interest. This has previously been recognized by the Departments of Defense, Education, Energy, Interior, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”² 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 to expand access to voter registration and election information.

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,

/s/ Michael Ding

Michael Ding

America First Legal Foundation

² 5 U.S.C. § 552(a)(4)(A)(iii).

EXHIBIT 2



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-3000

OFFICE OF ADMINISTRATION

TRANSMITTED VIA EMAIL
foia@aflegal.org

September 21, 2022

Mr. Reed Rubinstein
America First Legal
611 Pennsylvania Ave SE
#231
Washington, DC 20003

RE: Freedom of Information Act Request
FOIA Control No.: 22-FI-HQ-01341

Dear: Mr. Rubenstein:

This letter is in response to your Freedom of Information Act (FOIA) request dated September 12, 2021, to the Department of Housing and Urban Development's (HUD) FOIA Branch. You requested the Department's "strategic plan," that was required by Section 3(b) of Executive Order 14019 (March 7, 2021) on "Promoting Access to Voting," to be submitted to the Assistant to the President for Domestic Policy by September 23, 2021.

A search was conducted by HUD's Office of Public Affairs, the Office of Congressional and Intergovernmental Relations, the Office of the Secretary, the Office of the Chief Information Officer and the Office of Fair Housing and Equal Opportunity by knowledgeable staff and an eight (8) page document was located. I am withholding this document in full under the deliberative process privilege of Exemption 5 of the FOIA, 5 U.S.C. § 552 (b)(5). Exemption 5 protects from disclosure those inter- or intra-agency documents which would not be available by law to a party other than an agency in litigation with HUD. The deliberative process privilege exempts from disclosure agency documents that are part of the agency's pre-decisional, deliberative process. The release of this internal information would reflect HUD's pre-decisional, deliberative process, and would discourage open and candid advice, recommendations, and exchanges of views within the Department, which could bring about public scrutiny of the individuals and the need to justify in public their tentative opinions. The purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions by (1) encouraging frank and open discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before final adoption; and (3) protecting against public confusion that might result from disclosures of reasons and rationales that were not in fact ultimately the grounds for an agency's actions.

In reviewing the enclosed records and applying FOIA exemptions, HUD has considered the foreseeable harm standard.

This determination was based on the information provided by the Office of Public Affairs, the Office of Congressional and Intergovernmental Relations, the Office of the Secretary and the Office of the Chief Information Officer and the Office of Fair Housing and Equal Opportunity. You may appeal this determination within 90 days from the date of this letter. If you decide to appeal, your appeal should include copies of your original request and this response, as well as a discussion of the reasons supporting the appeal. The envelope should be plainly marked to indicate that it contains a FOIA appeal and addressed to:

U.S. Department of Housing and Urban Development
Office of Ethics and Appeals Law Division
Office of General Counsel
451 Seventh Street, SW, Room 2130
Washington, DC 20410

Telephone: (202) 708-3815

You may also submit your appeal online at: HUDFOIAappeals@hud.gov

In addition, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001

Telephone: 202-741-5770; Toll free: 1-877-684-6448

Fax: 202-741-5769

E-mail: ogis@nara.gov

The FOIA Public Liaison is responsible for increasing transparency, understanding the status of requests, and resolving disputes between you and the agency. If you need assistance in any of these matters, please send an email to FOIA@hud.gov.

For your information, your FOIA request, including your identity and any information made available, is releasable to the public under subsequent FOIA requests. In responding to these requests, the Department does not release personal information, such as home address, telephone number, or Social Security number, all of which are protected from disclosure under FOIA Exemption 6.

If you have any questions regarding this request, please contact Nakia Scott at nakia.n.scott@hud.gov. Thank you for your interest in the Department's programs and policies.

Sincerely,

~~Nakia Scott for~~
Deborah R. Snowden
Chief, FOIA Branch
Office of Administration