



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF GENERAL COUNSEL

October 1, 2022

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

RE: Freedom of Information Act Appeal
FOIA Control No. 22-FI-HQ-01341
FOIA Appeal No. 22-A-HQ-00054

Dear Mr. Ding:

This letter responds to your Freedom of Information Act (FOIA) appeal dated and received by our office on September 23, 2022. Your FOIA request was dated and received on June 10, 2022. You requested the “Department’s ‘strategic plan,’ that was required by Section 3(b) of Executive Order 14019 (March 7, 2021) (the “EO”) on “Promoting Access to Voting,” to be submitted to the Assistant to the President for Domestic Policy (the “APDP”) by September 23, 2021.” By letter dated September 21, 2022, HUD informed you an eight (8) page document was located and was being withheld in full pursuant to Exemption 5 of the FOIA, specifically deliberative process privilege.

In your appeal, you assert the strategic plan is not protected under the deliberative process privilege within the scope of Exemption 5, which 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. You contend the strategic plan is not pre-decisional or deliberative and no foreseeable harm would result from disclosure. After review, we deny your appeal.

Exemption 5 protects documents that are inter-agency or intra-agency that would not be available by law to a party, other than a party in litigation with the agency. 5 U.S.C. § 552(b)(5). Under Exemption 5, the Department may withhold documents that are both pre-decisional and deliberative in nature. *Nat’l Labor Relations Bd. V. Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975). The exemption is designed to preserve free and candid internal agency deliberations leading to executive decision making. *Id.* at 151. A pre-decisional document is one that is prepared to assist any agency decision-maker in arriving at a decision and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinion of the writer.” *Formaldehyde Institute v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). The Supreme Court has specifically held that FOIA Exemption 5

protects “communications received by the decision-maker on the subject of the decision prior to the time the decision was made.” *NLRB*, 421 U.S. at 151.

We have determined the Department correctly withheld the strategic plan under Exemption 5. In order to invoke Exemption 5, an agency must first meet the threshold requirement that the records in question are “inter-agency or intra-agency memorandums or letters.” *United States Dep’t of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 9 (2001). Here, the strategic plan is both an inter-agency and intra-agency document. Second, we find the strategic plan falls under the deliberative process privilege. For the privilege to apply, the communication must be pre-decisional and deliberative. *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). The strategic plan was prepared to explore and consider ways in which the Department can expand access to voter registration and election information. Further, after conferring with the appropriate offices, we have determined this document is pre-decisional as it outlines proposed actions which other government agencies would review and potentially edit. Therefore, HUD was correct in withholding this document under Exemption 5. For these reasons, your appeal is denied.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Judicial review of this determination under 5 U.S.C. § 552(a)(4) is available in the United States Court for the judicial district in which you reside or have your principal place of business, in the District of Columbia, or in the judicial district where the records you seek are located.

Sincerely,

A handwritten signature in black ink that reads "Keisha Dawn Bell". The signature is written in a cursive, flowing style.

Keisha Dawn Bell
Associate General Counsel
Ethics, Appeals, and Personnel Law

cc: Bao-Anh V. Trinh, Director of FOIA/Privacy
John Shumway, Assistant General Counsel, Administrative Law Division