



August 31, 2022

**VIA Email**

FOIA Appeal  
FOIA and Transparency  
Office of Privacy, Transparency, and Records  
Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, DC 20220

**Freedom of Information Act Appeal: 2022-FOIA-00481 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 the Treasury (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 with tracking number: 2022-FOIA-00481.

In the Department’s initial determination, dated July 27, 2022, it withheld six (6) pages in full, stating “[t]he withheld information is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5).” Exhibit 2. The Department provided no justification for this determination, but merely provided a generic description of the FOIA exemption:

Exemption (b)(5), Permits [sic] withholding information under the deliberative process privilege, including the pre-decisional documents, or information that could be withheld under civil discovery, attorney-client, or attorney-work product privileges.<sup>1</sup>

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<sup>1</sup> Exhibit 2 at 1.

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

### **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.”<sup>2</sup> Under Section 3(a) of the EO, the Secretary of Treasury (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.”<sup>3</sup> Section 3(a) then listed five categories of ways which the Secretary must consider as part of its evaluation.<sup>4</sup> 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.”<sup>5</sup>

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.<sup>6</sup> The exemptions are narrowly construed so as not to “obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”<sup>7</sup> As a threshold consideration, Exemption 5 covers “inter-agency or intra-agency memorandums.”<sup>8</sup> “The deliberative process privilege protects agencies from being ‘forced to operate in a fishbowl.’”<sup>9</sup> 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.’”<sup>10</sup>

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<sup>2</sup> Exec. Order No. 14,019, 86 Fed. Reg. 13,623 (Mar. 10, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 13,623-24.

<sup>5</sup> *Id.* at 13,624.

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

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

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

<sup>9</sup> *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

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

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.

### **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.”<sup>11</sup> 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.<sup>12</sup>

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

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<sup>11</sup> 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).

<sup>12</sup> 86 Fed. Reg. 13,623-24.

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 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]".<sup>13</sup> 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.<sup>14</sup> "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."<sup>15</sup> 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."<sup>16</sup>

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

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<sup>13</sup> Exhibit 1 at 1.

<sup>14</sup> *McKinley v. Bd. of Governors of Fed. Res. Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

<sup>15</sup> *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>16</sup> *Id.*

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.

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]."<sup>17</sup> 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]."<sup>18</sup> 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.'"<sup>19</sup> 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.<sup>20</sup> 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."<sup>21</sup> In its initial determination, the Department provided no

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<sup>17</sup> 86 Fed. Reg. 13,624.

<sup>18</sup> *Id.* at 13,625.

<sup>19</sup> *Coastal States Gas Corp.* at 866 (quoting S. Rep. No. 813, 89<sup>th</sup> Cong., 1st Sess. 9 (1965)).

<sup>20</sup> *See Id.*

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

confirmation that they considered the foreseeable harm standard when reviewing the record and applying the FOIA exemption, as it was required to.<sup>22</sup>

### **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.”<sup>23</sup> 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

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<sup>22</sup> *See Id.* at 1.

<sup>23</sup> 5 U.S.C. § 552(a)(8)(A)(ii)(II).

# EXHIBIT 1



June 10, 2022

**Via Email** - FOIA@treasury.gov

ATTN: Director, FOIA & Transparency  
Department of the Treasury  
1500 Pennsylvania Ave., N.W.  
Washington, D.C. 20220

**Freedom of Information Act Request: Treasury 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.<sup>1</sup> 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

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<sup>1</sup> 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.”<sup>2</sup> 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](mailto: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

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<sup>2</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

# EXHIBIT 2



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

7/27/2022

Michael Ding  
America First Legal Foundation  
611 Pennsylvania Avenue S.E., #231  
Washington, D.C. 20003

*FOIA@aflegal.org*

RE: Your FOIA Request to Treasury, Case Number 2022-FOIA-00481

Dear Mr. Ding:

This is the final response of the Department of the Treasury (Treasury) to your Freedom of Information Act (FOIA) request dated 6/10/2022. You have requested access to the following records:

“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.”

Your request has been processed under the provisions of the FOIA, 5 U.S.C. § 552. A reasonable search was conducted for records responsive to your request. In response to the search, six (6) pages were located within the Departmental Offices of Treasury. After carefully considering these records, I am withholding six (6) pages in full. The withheld information is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5).

**Exemption (b)(5)**, Permits withholding information under the deliberative process privilege, including the pre-decisional documents, or information that could be withheld under civil discovery, attorney-client, or attorney-work product privileges.

There are no fees assessed at this time since allowable charges fell below \$25.

You have the right to appeal this decision within 90 days from the date of this letter. By filing an appeal, you preserve your rights under FOIA and give the agency a chance to review and reconsider your request and the agency’s decision. Your appeal must be in writing, signed by you or your representative, and should contain the rationale for your appeal. Please also cite the FOIA reference number noted above. Your appeal should be addressed to:

FOIA Appeal  
FOIA and Transparency  
Office of Privacy, Transparency, and Records  
Department of the Treasury  
1500 Pennsylvania Ave., N.W.

Washington, D.C. 20220

If you submit your appeal by mail, clearly mark the letter and the envelope with the words "Freedom of Information Act Appeal." Your appeal must be postmarked or electronically transmitted within 90 days from the date of this letter.

If you would like to discuss this response before filing an appeal to attempt to resolve your dispute without going through the appeals process, you may contact our FOIA Public Liaison for assistance via email at [FOIAPL@treasury.gov](mailto:FOIAPL@treasury.gov), or via phone at (202) 622-8098. A FOIA Public Liaison is a supervisory official to whom FOIA requesters can raise questions or concerns about the agency's FOIA process. FOIA Public Liaisons can explain agency records, suggest agency offices that may have responsive records, provide an estimated date of completion, and discuss how to reformulate and/or reduce the scope of requests in order to minimize fees and expedite processing time.

If the FOIA Public Liaison is unable to satisfactorily resolve your question or concern, the Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. If you wish to contact OGIS, you may contact the agency directly by email at [OGIS@nara.gov](mailto:OGIS@nara.gov), by phone at (877) 684-6448, by fax at (202) 741-5769 or by mail at the address below:

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

Please note that contacting any agency official (including the FOIA analyst, FOIA Requester Service Center, FOIA Public Liaison) and/or OGIS is not an alternative to filing an administrative appeal and does not stop the 90-day appeal clock

You may reach me via telephone at 202-622-0930, extension 2; or via e-mail at [FOIA@treasury.gov](mailto:FOIA@treasury.gov). Please reference FOIA case number 2022-FOIA-00481 when contacting our office about this request.

Sincerely,



Mark Bittner  
Director, FOIA and Transparency  
Office of Privacy, Transparency, and Records