



# PROTECT the PUBLIC'S TRUST

VIA ELECTRONIC MAIL

December 30, 2021

US Department of Agriculture  
FOIA Appeals Officer  
1400 Independence Avenue, SW South Building  
Room 4104  
Washington, DC 20250-0706

## **Re: Freedom of Information Act Appeal for FOIA No. 2021-OGC-05946-F**

Dear FOIA Officer,

This is an appeal of the “Final Response to Freedom of Information Act (FOIA) Request 2021-OGC-05946-F,” dated October 13, 2021 (“Final Response”).

While the production of this tranche of documents is styled as a final response, it appears that the Department is continuing to wrongfully withhold responsive documents or parts thereof. Specifically, what is included in the Final Response and what is not suggests two issues:

- The search for responsive documents appears to have been inadequate; and
- Exemption 5 (Pre-Decisional/Deliberative Process) is being used to improperly withhold final agency actions from production.

### **I. The Search for Responsive Documents Appears to Be Inadequate**

The documents that are not included in the Final Response suggest that the search for responsive documents was inadequate.

Our request asked for “all waivers, impartiality determinations, or any other guidance issued to political appointees of the Biden Administration” as well as “any records and communications between employees of the Office of General Counsel, as well as any records and communications between the Office of the General Counsel and any political appointees regarding waivers or impartiality determinations.”<sup>1</sup>

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<sup>1</sup> PPT Request at 1.



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On April 5, 2021, Secretary Vilsack certified his “Certification of Ethics Agreement Compliance”.<sup>2</sup> On this Certification, Secretary Vilsack indicated that he received a waiver pursuant to 18 U.S.C. § 208 on February 23, 2021 related to “CRP Payments.” Inexplicably, neither this waiver, nor any communications regarding this waiver, were included in the Department’s Final Response.

It appears that one of two things is necessarily true: either Secretary Vilsack filed an inaccurate Certification of Ethics Agreement, or the Department failed to find and produce all relevant documents. Of the two, we believe that the latter is more likely. It strains credulity that an adequate search would miss an ethics waiver for the highest ranking official in the Department that has been reported elsewhere. Thus, it appears that the Department’s search was inadequate.

In addition, our initial request asked for “any records” including, but not limited to “digital logs such as those produced by Microsoft Teams (including Teams file folders or collaborative work documents housed in Teams).”<sup>3</sup>

The second page of responsive documents includes an email from Mr. Jeremy Adamson to Mr. Donald Lobeda, dated May 18, 2021, which states “Got to the Teams message first. Let me know if you need me to reply via email as well.”

This email strongly suggests that there are responsive Teams messages. No Teams messages were included in the tranche of responsive documents provided by the Department, nor did the Department identify a specific, individualized basis for withholding any Teams messages. If such messages were not examined by the FOIA office, then it appears that the search was inadequate. Alternatively, if such messages were examined by the FOIA office, then it appears they have been improperly withheld, particularly since the Department has not identified them and cited any exemption to justify withholding them.

## **II. Exemption 5 (Pre-Decisional/Deliberative Process) is Being Used to Improperly Withhold Final Agency Actions from Production**

The Department has made extensive use of Exemption 5 (Pre-Decisional Deliberative Documents). In doing so, the Department appears to have withheld the substance of several communications that constitute final guidance in and of themselves.

For example, on page 65 of the responsive documents, there is an email chain between Mr. Andrew Tobin and Ms. Maribel Duran. In the course of this chain, Mr. Tobin

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[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/99D7A088740E8831852586B0002C217F/\\$FILE/Vilsack%20EA%20Certification%201%20of%201.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/99D7A088740E8831852586B0002C217F/$FILE/Vilsack%20EA%20Certification%201%20of%201.pdf)

<sup>3</sup> PPT FOIA Request at 1-2.



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provides several pages of guidance, which is entirely redacted except for a greeting and the words “I took a look at these and I believe.” Ms. Duran responds “Thank you very much for this guidance. I will share with both organizations.” Thus, Ms. Duran clearly seems to believe she received final guidance that she could not only rely upon but distribute to others to rely on.

This is not an isolated occurrence. On page 62, there is an email chain between Ms. Erin Auger and Ms. Alyssa Charney. After receiving a lengthy email from Ms. Auger, Ms. Charney replied “I’ll communicate this guidance internally with NRCS . . . .”

On page 72, there is an email chain including Ms. Katherine Ferguson, Mr. Andrew Tobin, and Mr. Stuart Bender. As with the other examples above, there is a lengthy email that is largely redacted, followed by a response from Ms. Ferguson stating in part “Thanks to both of you for the guidance and follow-up specific to Aspen. I appreciate your thoroughness and the detail. I’ll find you with any specific questions, but think this should do the trick.”

In all of these cases, the recipients appear to believe that they received final guidance from the Ethics office, and appear to be relying upon and further disseminating that guidance. Accordingly, this guidance is not pre-decisional or deliberative.

Furthermore, as the Department of Justice has summarized, “the D.C. Circuit held that if a final decision is accompanied by an explanation from the decisionmaker discussing the basis of the decision, that explanation would be considered part of the final decision and must be disclosed.”<sup>4</sup>

In its Final Response, the Department provided copies of Ethics Agreements for numerous officials. However, it extensively redacted cover emails. These cover emails appear to provide the basis for the final decisions embodied in the Ethics Agreements. For example, page one of the responsive documents includes an email from Mr. Donald Lobeda to Mr. Jeremy Adamson, dated May 19, 2021. This email appears to send the final copy of Mr. Adamson’s Ethics Agreement. It also appears to provide explanation for the decisions embodied in the Ethics Agreement. For example, in this email, Mr. Lodeba says “Normally I would recommend,” suggesting that there is an explanation for the deviation from the norm. This information is redacted as “(b)(5) Pre-decisional/Deliberative.” In this and other similar documents, the Department appears to be claiming an exemption for materials that explain a final decision and should properly be considered part of the final decision itself, subject to disclosure.

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<sup>4</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Exemption 5* at 22 (citing *Rockwell Int’l Corp. v. DOJ*, 235 F.3d 598, 603 (D.C. Cir. 2001)).



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## III. Conclusion

As described above, the Department appears to be improperly withholding responsive documents. In order to rectify this situation, the Department should withdraw its Final Response, conduct a proper search for responsive records, and reevaluate its exemption claims immediately.

If you have any questions, please contact me at [foia@protectpublictrust.org](mailto:foia@protectpublictrust.org). All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Morgan Yardis  
Research and Publication Associate  
[foia@protectpublictrust.org](mailto:foia@protectpublictrust.org)

Addendum 1  
Original Request



# PROTECT the PUBLIC'S TRUST

VIA ELECTRONIC MAIL

June 2, 2021

Alexis R. Graves  
Departmental FOIA Officer  
US Department of Agriculture  
1400 Independence Avenue, SW  
South Building  
Room 4104  
Washington, DC 20250-0706  
Email: [USDAFOIA@ocio.usda.gov](mailto:USDAFOIA@ocio.usda.gov)

**Re: Ethics waivers or impartiality determinations for political appointees**

Dear FOIA Officer,

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (FOIA), from the Protect the Public's Trust (PPT), a non-profit organization dedicated to promoting ethics in government and restoring the public's trust in government officials.

**Records Requested**

PPT requests the following records from the U.S. Department of Agriculture (USDA)'s Office of the General Counsel:

From November 23, 2020 through the date this request is processed, all waivers, impartiality determinations, or any other guidance issued to political appointees of the Biden Administration exempting them from any part of their obligations as defined in relevant laws, regulations, rules, and/or the Biden Administration's Ethics Pledge. This request also includes any records and communications between employees of the Office of General Counsel, as well as any records and communications between the Office of the General Counsel and any political appointees regarding waivers or impartiality determinations.

For this request, the term "all records" refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, text messages letters, notes, telephone records, telephone notes,



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minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, digital logs such as those produced by Microsoft Teams (including Teams file folders or collaborative work documents housed in Teams), papers published, and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other request that, although not specifically requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

PPT is willing to receive records on a rolling basis.

These communications could be very relevant to understanding the ethics compliance of political leadership at the USDA and educate the public about any appointees who have



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been granted exemptions from any part of their ethical obligations, the reason for such exemptions, and which particular matters those appointees are now permitted to participate in as a result of receiving the exemptions. If applicable, we request that the FOIA office use the email Enterprise Records and Document Management System (eERDMS) to search and process this request.

The number of records requested should be of such limited number and in the custody of a select group of ethics officials that the request should be placed in the Simple track. If for some reason, you determine that another track is more suitable, please identify the reason for the decision and track.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(I). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

## **Format of Requested Records**

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any "portfolios" or "embedded files." Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or "batched," .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide



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all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

## Fee Waiver Request

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as PPT access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ...." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

### I. PPT Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "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 [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). The USDA FOIA regulations at 7 C.F.R. § 1.12(p)(3)-(4) establish the same standard.

Thus, USDA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 7 C.F.R. § 1.12(p)(3)-(4). As shown below, PPT meets each of these factors.

#### A. The Subject of This Request Concerns "The Operations and Activities of the Government."



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The subject matter of this request concerns the operations and activities of the USDA. This request asks for: All waivers, impartiality determinations, or any other guidance issued to political appointees of the Biden Administration exempting them from any part of their obligations as defined in relevant laws, regulations, rules, and/or the Biden Administration's Ethics Pledge. This request also includes any records and communications between employees of the Office of General Counsel, as well as any records and communications between the Office of General Counsel and any political appointees regarding waivers or impartiality determinations.

## B. Disclosure is "Likely to Contribute" to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow PPT to convey to the public information about any appointees who have been granted waivers or impartiality determinations from any part of their ethical obligations, the reason for such waivers or determinations, and which particular matters those appointees are now permitted to participate in as a result of receiving those waivers or determinations. After disclosing the requesting records, PPT will inform the public about their findings in order to ensure decisions are being made consistent with the law. Once the information is made available, PPT will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of the USDA's operations and activities.

## C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of the Ethics Obligations of Non-Career Appointees at the USDA.

The requested records will contribute to public understanding of the ethics compliance of political appointees at the USDA. As explained above, the records will contribute to public understanding of this topic.

Ethics obligations exist to reduce the likelihood that senior government officials are making decisions in a biased or arbitrary manner or to benefit the interests of former employers, clients or related parties. Ensuring the avoidance of conflicts of interest or the appearance of bias is of interest to a reasonably broad segment of the public. Any exemptions granted to political appointees from those obligations are also of interest to many members of the public. PPT will use the information it obtains from the disclosed records to educate the public at large about any ethics waivers or impartiality determinations granted to those individuals making the most important decisions at the



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USDA. See *W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through PPT’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter.

*Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern waivers and impartiality determinations granted to political appointees. We are also unaware of any previous release to the public of these or similar records. See *Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....”

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of which political appointees have received waivers or impartiality determination releasing them from any part of their ethical obligations. The public is always well served when it knows how the government conducts its activities, particularly matters touching on ethics questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the ethics waivers and impartiality determinations issued to those charged with running the USDA.

## D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

PPT is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of any ethics waivers or impartiality determinations granted to Biden Administration political appointees exempting them from any part of their ethical obligations as



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compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on USDA's compliance with its own mission and responsibility to provide leadership on food, agriculture, natural resources, rural development, nutrition, and related issues. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, PPT meets this factor as well.

## II. PPT has the Ability to Disseminate the Requested Information Broadly.

PPT is a non-profit organization that informs, educates, and counsels the public about the importance of government officials acting consistently with their ethics obligations. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates what obligations exist for senior government officials. PPT intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms. PPT also has a robust network of reporters, bloggers, and media publications interested in its content and that have durable relationships with the organization. PPT intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Through these means, PPT will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that PPT possesses the expertise to explain the requested information to the public; (4) that PPT possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes PPT as a reliable source in the field of government ethics and conduct.

Public oversight and enhanced understanding of USDA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). PPT need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for PPT to show how it distributes information to the public generally. *Id.*

## III. Obtaining the Requested Records is of No Commercial Interest to PPT.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to PPT's role of educating the general public. PPT is a 501(c)(3)



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nonprofit organization with supporters and members of the public who seek a transparent, ethical and impartial government that makes decisions in the best interests of all Americans, not former employers and special interests. PPT has no commercial interest and will realize no commercial benefit from the release of the requested records.

## IV. Conclusion

For all of the foregoing reasons, PPT qualifies for a full fee waiver. We hope that the USDA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at [foia@protectpublictrust.org](mailto:foia@protectpublictrust.org). All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Morgan Yardis  
Research and Publication Associate  
[foia@protectpublictrust.org](mailto:foia@protectpublictrust.org)

Addendum 2  
OIA Response to Original Request



United States  
Department of  
Agriculture

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

October 13, 2021

**Delivered via Electronic Mail**

Michael Chamberlain

Protect the Public's Trust

Email: [foia@protectpublictrust.org](mailto:foia@protectpublictrust.org)

**Re: Final Response to Freedom of Information Act (FOIA) Request 2021-OGC-05946-F**

Dear Mr. Chamberlain:

This is the final response to a Freedom of Information Act (FOIA) request submitted to the U.S. Department of Agriculture (USDA) Office of Information Affairs (OIA), FOIA Division. This request is being processed in lieu of FOIA Appeal 2021-OGC-00146-A, submitted on September 13, 2021.

The FOIA appeal, which challenged the OIA's June 25, 2021, "no records" response to FOIA Request No. 2021-OGC-04079-F, was withdrawn on September 14, 2021. The purpose of the withdrawal was to give the OIA another opportunity to process the initial FOIA request, applying a broader interpretation of what was requested. The request sought "ethics waivers and impartiality determinations," as described below:

All waivers, impartiality determinations, or any other guidance issued to political appointees of the Biden Administration exempting them from any part of their obligations as defined in relevant laws, regulations, rules, and/or the Biden Administration's Ethics Pledge, including any records and communications between employees of the Office of the General Counsel, as well as any records and communications between the Office of the General Counsel and any political appointees regarding waivers or impartiality determinations (underscore added).

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

As explained in the OIA's FOIA response to 2021-OGC-04079-F, a search for responsive records was conducted by the Office of Ethics (OE), which is organized under the General Counsel's Office. OE maintains all ethics-related records and communications for the USDA. The OE search located seventy-four (74) pages of ethics records pertaining to political appointees.

Following a review of the responsive records, the OIA has determined that certain information contained in the records should be withheld pursuant to 5 U.S.C. § 552 (b)(5), and (b)(6), (FOIA Exemptions 5 and 6). Below is an explanation of the information that has been withheld.

**FOIA Exemption 5**

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, 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 withholding, under the deliberative process privilege, ethics questions and intra-agency discussions regarding ethics issues and processes. In addition, ethics advice proposed for staff consideration and potential application also has been withheld. This information is pre-decisional in that it is antecedent to any final agency or staff decision. The information is also deliberative in that it reflects the evolving, back-and-forth process between agency employees that is so integral to the Executive Branch decision-making process; more specifically, the development of potential recommendations made by agency advisors for use in making policy decisions.

If these pre-decisional, deliberative communications were released to the public, USDA and other Executive Branch employees would be much more cautious in their discussions with each other, and in candidly discussing and providing all pertinent information and viewpoints in a timely manner to agency decision-makers. This lack of candor would also seriously impair the Department’s ability to engage in forthright, internal discussions necessary for efficient and proper agency decision-making.

### **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.” Application of the exemption involves balancing the public’s interest in disclosure against individuals’ privacy interests.

The information being withheld under FOIA Exemption 6 consists of mobile telephone numbers and an individual’s personal opinions or impressions. This information qualifies as “similar files” because it is information in which individuals have a privacy interest. Releasing mobile phone numbers could subject individuals to unwarranted or unsolicited communications, or even harassment. Individuals’ private opinions are personal in nature. Furthermore, their release does not shed light on governmental operations. 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](mailto: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

Michael Chamberlain  
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handling, the subject line of your email and the appeal letter should be marked “Freedom of Information Act Appeal” and reference FOIA No. 2021-OGC-05946-F.

You may seek dispute resolution services from the OIA’s FOIA Public Liaison, Mr. Harald Fuller-Bennett. Mr. Fuller-Bennett may be contacted by telephone at 202-239-4522, or electronically at [Harald.FullerBennett@usda.gov](mailto:Harald.FullerBennett@usda.gov) or [USDAFOIA@usda.gov](mailto: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.

If you have any questions regarding the processing of this request, please contact Ms. Christine Jordan electronically at [Christine.Jordan@usda.gov](mailto:Christine.Jordan@usda.gov) or [USDAFOIA@usda.gov](mailto:USDAFOIA@usda.gov).

For additional information regarding USDA FOIA regulations and processes, please refer to the information available online at [www.dm.usda.gov/foia](http://www.dm.usda.gov/foia).

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

Sincerely,



Alexis R. Graves  
Director  
Office of Information Affairs  
Enclosures: Responsive Records (74 pages)