



United States
Department of
Agriculture

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

August 18, 2021

Delivered via Electronic Mail

Hans Bader
Trustee, Bader Family Foundation
Writer, Liberty Unyielding
1236 N. Stafford Street
Arlington, Virginia 22201
Email: hfb138@yahoo.com

**Re: Freedom of Information Act (FOIA) Request No. 2021-OSEC-03930-F
Final Response**

Dear Mr. Bader:

This is the Office of Information Affairs, FOIA Division's **final response** to the above-referenced FOIA request. This correspondence also responds to the matter of *Bader Family Foundation v. U.S. Department of Agriculture*, Civil Action No. 21-1846-CRC, currently pending in the U.S. District Court for the District of Columbia.

The pending Complaint in the above referenced matter is based on USDA's alleged failure to comply with the applicable time-limit provisions of the FOIA in response to the Bader Family Foundation's request for the following:

1. *Emails in the covered date range about loan payments to socially disadvantaged borrowers under American Rescue Plan Act Section 1005 sent or received by Senator Raphael Warnock or the office of Senator Raphael Warnock, that were also are sent or received by the Secretary of Agriculture or the General Counsel of the U.S. Department of Agriculture or anyone in the Secretary's office or the General Counsel's office or any deputy or assistant secretary of Agriculture or the Deputy Assistant Secretary for Civil Rights.*
2. *Emails in the covered date range about debt relief for black or non-white borrowers sent or received by Senator Raphael Warnock or the office of Senator Raphael Warnock, that were also are sent or received by the Secretary of Agriculture or the General Counsel of the U.S. Department of Agriculture or anyone in the Secretary's office or the General Counsel's office or any deputy or assistant secretary of Agriculture or the Deputy Assistant Secretary for Civil Rights.*
3. *Emails in the covered date range about the constitutionality or unconstitutionality of debt relief or debt forgiveness for black or non-white borrowers, or for socially disadvantaged borrowers*

under the American Rescue Plan, sent or received by the Secretary of Agriculture or the Deputy Secretary of Agriculture or the Deputy Assistant Secretary for Civil Rights or the General Counsel of the U.S. Department of Agriculture or anyone in the Secretary's office or the General Counsel's office, that were also sent or received by anyone outside the U.S. Department of Agriculture or sent or received by anyone not using an official U.S. Department of Agriculture email account.

The "covered date range" begins on January 23, 2021 and ends on the date on which you process this request, or June 18, 2021, whichever is earlier.

In an email dated on June 7, 2021, you agreed to limit the search to certain records custodians, specifically, the Secretary of Agriculture (or acting), the Deputy Secretary, and Assistant Secretaries – including the Assistant Secretary for Civil Rights and General Counsel. Moreover, for Items 1 and 2, you accepted the OIA's recommendation to search for emails to and from the domain @warnock.senate.gov and using the search terms: Section 1005, socially disadvantaged borrowers, non-white borrowers, debt relief, loan payments, black farmers, and black borrowers. Finally, for Item 3 you agreed that OIA search for emails to and from all domains other than @usda.gov using the search terms: constitutionality, strict scrutiny, equal protection, unconstitutional, constitution, and constitutional.

Your request is being processed under the FOIA, 5 U.S.C. § 552.

Search Efforts

Electronic searches for responsive records were conducted by the Client Experience Center's (CEC) eComply team. The OIA reviewed a total of two hundred fifty-four (254) pages of emails and the accompanying attachments. These pages are being released today with Bates numbers 0001-0254.

The OIA has determined certain information contained in the records released in this final response should be withheld pursuant to 5 U.S.C. § 552 (b)(5) and (b)(6) (FOIA Exemptions 5 and 6). Additionally, nineteen (19) pages of records have been withheld in full under Exemption 5. Below are explanations of the information that has been withheld.

Application of 5 U.S.C §552(b)(5) "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." 5 U.S.C. §552(b)(5). This language is construed to protect records that are normally privileged in the civil discovery context, including through the deliberative process privilege and the attorney-client privilege. As an initial matter, the information withheld meets the threshold requirement because it is contained in internal emails sent between federal employees. Where possible, the OIA has determined to make discretionary releases of

information that falls within the protection of Exemption 5.

In this instance, the OIA is withholding, under the deliberative process privilege, pre-decisional inter- and intra-agency discussions and briefings on actions and programs relating to Section 1005 of the American Rescue Plan. These items are pre-decisional in that they are antecedent to any final agency decision. These items are also deliberative in that they reflect the evolving, back-and-forth process between agency employees that is so integral to the Executive Branch decision-making process. Disclosure of such information would have a chilling effect on the ability of agency officials to engage in free and frank discussions regarding policy but also may cause confusion on the agency's actual position on the policy at issue.

The OIA is also withholding information under the attorney-client privilege. This privilege protects confidential communication between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. Although this privilege fundamentally applies to facts divulged by a client to his/her attorney, this privilege also encompasses any opinion given by an attorney to his/her client based upon those facts, as well as communications between attorneys that reflect client supplied information. In this instance, the OIA is withholding information shared internally whereby legal advice is being sought from and provided by the Department's counsel.

The OIA is further withholding information under the attorney work product. The attorney work-product protects materials prepared by an attorney or others in anticipation of litigation by shielding materials which would disclose the attorney's theory of the case or trial strategy. The privilege is available once specific claims have been identified that make litigation probable.

The materials that have been withheld under the attorney work-product privilege were prepared by or for a Department attorney in reasonable anticipation of litigation and reflect the parties' pre-litigation thoughts and evaluation of matters related to ongoing litigation regarding Section 1005 of the American Rescue Plan. We conclude that the withheld materials are protected in full from disclosure by the attorney work-product privilege of Exemption 5.

Application of 5 U.S.C. §552(b)(6) "FOIA Exemption 6"

FOIA Exemption 6 permits the government to withhold information regarding individuals in "personnel, medical and similar files" when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy and where such privacy interests outweigh any public interest that would be advanced by disclosure. For purposes of the FOIA, the public interest is advanced when disclosure of the requested information educates the public about the activities of the government.

The information withheld under Exemption 6 consists of personal email addresses, mobile phone numbers, and teleconference access codes. This information qualifies as "similar files" because it is information in which individuals have a privacy interest. Moreover, releasing the information could subject the individuals to unwarranted or unsolicited communications. As for the teleconference access codes, participants have a privacy interest in ensuring no uninvited individual is listening in on the call. Since there is a viable privacy interest that would be

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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.

In light of the matter *Bader Family Foundation v. U.S. Department of Agriculture*, Civil Action No. 21-1846-CRC, currently pending in the U.S. District Court for the District of Columbia, administrative appeal rights are not being provided in this response letter.

If you have any questions or concerns about this final response or the pending civil action, please contact Michael A. Tilghman, Assistant United States Attorney, U.S. Department of Justice at michael.tilghman@usdoj.gov.

Sincerely,

Handwritten signature of Alexis R. Graves in cursive script.

Alexis R. Graves

Director

Office of Information Affairs

Enclosures: Responsive records (235 pages)