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United States  
Department of  
Agriculture

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

November 23, 2022

Delivered via Electronic Mail

Re: Response to Freedom of Information Act (FOIA) Appeal No. 2022-OGC-00131-A

This is the U.S. Department of Agriculture's (USDA) Office of Information Affairs' (OIA) final response to FOIA Appeal No. 2022-OGC-00131-A. You are appealing the OIA's September 29, 2022, determination regarding your request 2021-OSEC-05281-F.

Your appeal was received by the OIA on September 29, 2022. For the reasons explained below, the USDA reverses its original determinations and is releasing the record to you in full.

The subject FOIA request was received on August 3, 2021, and sought:

[t]alking points prepared for the Secretary of Agriculture (with the help of the USDA Office of General Counsel – Civil Rights, Labor and Employment Law Policy Section) ahead of his briefing with all 50 State Attorney Generals on the steps that USDA took to protect the safety of meat and poultry inspectors.

Response by the OIA

The OIA responded to your request on September 29, 2022 ("OIA Response"). In its response, the OIA determined to withhold 6 pages of responsive records in part pursuant to 5 U.S.C. § 552(b)(5).

1. FOIA Exemption 5 – Deliberative Process Privilege (DPP)

The OIA withheld information under the deliberative process privilege of Exemption 5, specifically, "a pre-decisional intra-agency record regarding the USDA's talking points on the Defense Production Act (DPA), made in preparation for the National Association of Attorneys General (NAAG) briefing." OIA Response at page 2.

The OIA noted that "[t]his record is pre-decisional, as these talking points were drafted in preparation for the Secretary's briefing to the NAAG. This item is also deliberative in that it reflects the agency's opinions regarding the presentation of its substantive policies

to the public, which often involves an ongoing assessment of alternative public relations policies.” OIA Response at page 2.

## 2. FOIA Exemption 5 – Attorney-Client Privilege (ACP)

The OIA withheld information under the attorney-client privilege (ACP) of Exemption 5, specifically, “information shared internally whereby legal advice is being sought from and provided by the Department’s counsel.” OIA Response at page 2.

The OIA noted that “[t]his confidential record is shielded from disclosure in order to encourage open and frank discussions between the Department and its legal advisors. Ensuring the Department receives sound legal advice promotes public policy, and this advice depends on counsel being fully informed. The release of this confidential record would inhibit the Department’s ability to provide pertinent information and would impair the Department’s counsel from making well-informed legal decisions.” OIA Response at page 2.

## FOIA Appeal

Your appeal of the OIA Response was received September 29, 2022. The appeal claimed that: 1) the OIA misapplied the foreseeable harm test; 2) the talking points are factual and not deliberative under FOIA Exemption 5; and 3) the talking points are not exempt under the attorney-client privilege of Exemption 5.

### 1.) FOIA Exemption 5 – Deliberative Process Privilege

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, the 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.

#### a.) Application of Exemption 5 – Deliberative Process Privilege.

The OIA reverses its withholding of information under the deliberative process privilege of Exemption 5 as it relates to Secretary’s talking points. The talking points reflect a factual summary of the Defense Production Act (DPA) and its intersection with various executive orders to ensure continuous operations of the nation’s food supply chain resources.

The talking points further discuss the agency’s plans for safely reopening the nation’s meat and poultry processing facilities as well as additional nutritional assistance

programs available to the public. Finally, the talking points briefly refer to antitrust concerns in the cattle market and the agency's investigation into anti-competitive practices spurred by the COVID-19 pandemic.

The talking points do not encompass opinions, recommendations, or deliberations on a legal or policy matter under consideration by the agency. Rather, the information reflects a factual recitation of the legislative authority for the agency to take certain actions in light of the pandemic and steps the agency has taken to safeguard the nation's food processing facilities and employees.

Moreover, these talking points were shared with a public audience of state attorneys general, which further supports the conclusion that the talking points are final agency positions. In sum, the talking points describe actions that were already taken or were being taken, rather than policies or proposals that were part of a decision-making process by the agency or antecedent to the adoption of an agency policy.

For the reasons stated above, the foreseeable harm from the release of the information is also minimal and warrants disclosure.

## 2.) FOIA Exemption 5 - Attorney-Client Privilege

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." The deliberative process and the attorney-client privileges are two of the frequently invoked privileges under Exemption 5.

The attorney-client privilege protects confidential communications between attorneys and clients 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 their attorney, this privilege also encompasses any opinion given by an attorney to the client based upon those facts, as well as communications between attorneys that reflect client-supplied information.

### a.) Application of Exemption 5 – Attorney-Client Privilege

The OIA reverses its withholding of information under the attorney-client privilege of Exemption 5, as it relates to the talking points.

The information does not encompass facts divulged to an attorney by a client nor the opinions of an attorney based upon those facts. Rather, the information reflects only a factual summary of the Defense Production Act (DPA) and its intersection with various executive orders to ensure continuous operations of the nation's food supply chain resources. There are no indicia of any opinions solicited or provided by agency counsel or communications between attorneys that reflect client-supplied information.

Similarly, the references to the agency's plans for safely reopening the nation's meat and poultry processing facilities, additional nutritional assistance programs, and references to antitrust concerns and the agency's investigation into anti-competitive practices are not the type of confidential communications between an attorney and client that the privilege was intended to protect.

For the reasons stated above, the foreseeable harm from the release of the information is also minimal and warrants disclosure.

Therefore, we reverse in full the OIA's withholding of information based on Exemption 5 (deliberative process privilege and attorney-client privilege). We are providing the records (6 pages) to you in full without redactions.

If you are dissatisfied with this final decision on your appeal, you may seek judicial review of our response in the appropriate U.S. District Court.

You may seek dispute resolution services from the OIA's FOIA Public Liaison, Ms. Melanie Enciso. Ms. Enciso may be contacted by telephone at (202) 720-9425, or electronically at [Melanie.Enciso@usda.gov](mailto:Melanie.Enciso@usda.gov) or [USDAFOIA@usda.gov](mailto:USDAFOIA@usda.gov).

Additionally, 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. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll-free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,



Alexis R. Graves  
Director  
Office of Information Affairs  
Office of the General Counsel

Enclosures: FOIA Request  
FOIA Appeal  
Appeal Records (6 pages)



## DEFENSE PRODUCTION ACT TALKING POINTS

### General Talking Points

- The Defense Production Act (DPA) of 1950 authorizes the President to (1) establish **priorities** under contracts which the President deems necessary or appropriate to promote the national defense and (2) to **allocate** materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense. “National defense” includes natural disasters and events such as COVID-19.
- A **priority** is an order to a company to move to the front of the line an order to fulfill an order requested by a buyer. An **allocation** is an order to devote an entire production sector to a particular purpose of national defense. Allocations have been rarely ever ordered in the US. The example of an allocation would be the Soviet Union dedicating all concrete production to the containment of the Chernobyl disaster with domes.
- Since the Cold War, the Secretary of Agriculture has been delegated the authority to the President in section 101 of the DPA (50 U.S.C. 4511) by Executive Order (most recently in 2012 under Executive Order 13603) to place priority ratings on contracts or orders (and issue allocations orders) with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer.
- The “Agriculture Priorities and Allocations System” (APAS) (7 CFR part 789), implemented these DPA authorities for USDA with respect to USDA’s delegated areas of jurisdiction. The Secretary for years has had agreements with the Department of Commerce to use this authority for meals ready to eat for the Department of Defense and procurement of food for disasters with the Department of Homeland Security.
- Notwithstanding Executive Order 13603, on April 28 the President issued Executive Order 13917 to provide a further delegation of authority under the DPA to the Secretary of Agriculture to ensure continued production of “food supply chain resources, **including meat and poultry**, during the national emergency caused by the outbreak of COVID–19 within the United States.”
- Executive Order 13917 includes the requirement that any orders thereunder be issued “**consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the Centers for Disease Control (CDC) and the Occupational Safety and Health Administration (OSHA).**”

## TALKING POINTS FOR SECRETARY

### Reopening of Meat and Poultry Processing Plants Safely; Protecting Essential Agriculture Workers Such as Meatpacking Employees; Ensuring Food Safety

- Our nation's meat and poultry processing facilities play an integral role in the continuity of our food supply chain. They must remain operational to ensure America's producers and ranchers will be able to bring their product to market and aid in maintaining food security during the COVID-19 pandemic.
- I want to emphasize that while the impetus for the Executive Order was to keep meat and poultry processors operating, the delegation of authority to the Secretary of Agriculture extends to all **"food supply chain resources."**
- Our philosophy is to work cooperatively and collaboratively with meat, poultry, other food processors and supply chain resources, and States, tribes, and localities to ensure the continued production of food for American consumers during COVID-19. We coordinate this effort with our Federal partners, particularly the Departments of Labor and Health and Human Services.
- To this end:
  - With respect to meat and poultry processors, we sent letters on May 1 to then closed plants and governors of the States where they were located encouraging them to resume operations with the April 26 guidance issued by CDC and OSHA in accordance with the Executive Order.
  - On May 5, we issued letters to affected Governors across the nation establishing clear expectations for the implementation of the Executive order.
  - Also on May 5, we issued letters to the leadership of major meat and poultry processing companies exhorting them to utilize the CDC and OSHA guidance specific to the meat and poultry processing industry to implement practices and protocols for safeguarding the health of the workers and the community while staying operational or resuming operations.
  - On May 18 we signed a memorandum of understanding with the Food and Drug Administration (FDA) that allows FDA to take the lead on similar efforts with respect to food processors under their jurisdiction and to refer any disputes to the Secretary of Agriculture to consider issuance of a DPA priority or allocation order.

- Be assured, as directed by the President, we stand ready to issue DPA orders as necessary to ensure the continued production of food resources for the American people.

### **Food Safety, FSIS, and AMS**

- Throughout this crisis, USDA's Food Safety Inspection Service (FSIS) has been focused on the safety of our workforce while simultaneously providing the required inspection services to keep meat and poultry available for consumers.
- FSIS continues to meet all its inspection responsibilities even though some inspectors are absent from work due to a positive diagnosis or because of self-quarantine.
- FSIS and Agriculture Marketing Service (AMS) are partnering with meat and poultry processing companies to protect the health and safety of all our employees and minimizing disruptions to the food supply.
- USDA is now providing face coverings (cloth and disposable masks), face shields, and hand sanitizer to FSIS field employees.
- FSIS employees are now required to wear a face covering in conjunction with a face shield and supervisors have been instructed to enforce this policy.
- USDA is now providing face masks and hand sanitizer to AMS field employees.
- In addition, meat and poultry establishments have been directed by the President's Executive Order and invocation of the Defense Production Act to implement [CDC and OSHA's Guidance for Meat and Poultry Processing Workers and Employers](#).
- In response to the pandemic, CDC and OSHA have published guidance specifically created for the meat and poultry sector. President Trump's Executive order dated April 28, 2020, directs the Secretary of Agriculture to take all appropriate action to ensure that meat and poultry processors continue operations consistent with the CDC and OSHA guidelines.
- USDA will continue to work with the CDC, OSHA, FDA, and state and local officials to ensure that facilities use the meat and poultry sector guidance to implement practices and protocols for safeguarding the health of the workers and the community while continuing to operate.
- The USDA is working around the clock in coordination with the CDC and state and local health officials to ensure a safe and stable supply of protein is available for American consumers while keeping employees safe.



- The safety and well-being of our employees is our top priority. Since the early days of the outbreak, USDA has taken steps to protect our workforce.
- USDA employees who are in CDC-defined high-risk categories can self-certify and are excused from inspection duties until the risk from COVID-19 decreases or is mitigated.

## **Supplemental Nutrition Assistance Program (SNAP)**

### ***Able-Bodied Adults Without Dependents (ABAWDs):***

- Families First Coronavirus Response Act (FFCRA) temporarily and partially suspends the time limit for ABAWD participation in SNAP, which typically limits an ABAWD from receiving more than 3 months of SNAP benefits during a 3-year period unless the ABAWD meets certain work requirements.
- Under FFCRA, State Agencies are prohibited from limiting ABAWDs' eligibility unless the individual is not complying with a qualifying work opportunity<sup>1</sup> offered by the state. This suspension applies during the period of April 1, 2020, through the end of the month subsequent to the month in which the COVID-19 public health emergency declaration is lifted by the Secretary of HHS.
- If a state offers an ABAWD a slot in a qualifying work or workfare program, including a SNAP Employment and Training (E&T) program, the individual is still subject to the time limit. If the ABAWD fails to comply without good cause, that month will count towards the 3-month ABAWD time limit.

### ***Emergency Allotments (EA):***

- EA, allowed for by the FFCRA, are supplements to a household's SNAP benefits. States may request these supplements to address temporary food needs and increase a household's monthly benefit up to the maximum benefit amount for their household size. Households that already receive the maximum benefit for their household size may not receive an additional EA. USDA has issued EA waivers to 53 State Agencies.
- States that have already received FNS approval for EA issuance may continue issuing EA benefits each month until *either* the Secretary of HHS rescinds the January 27, 2020 Public Health Emergency declaration *or* the State-issued emergency or disaster declaration expires.

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<sup>1</sup> A "qualifying work opportunity" is one in a work or workfare program that meet the standards of Section 6(o)(2)(B) or (C) of the Food and Nutrition Act.

### ***Adjustments/Waivers***

- USDA is permitted to waive or adjust some SNAP requirements as a result of the COVID-19 Public Health Emergency through both our pre-existing regulatory authority and the authority granted to us by the FFCRA.
- As of its latest count, USDA has received 646 requests for such waivers or adjustments. We have approved 567 of those requests, which dealt with topics such as SNAP client interviews, Quality Control reviews, fair hearings= timeframes, certification periods, and periodic reporting deadlines.
- In addition, State agencies have various flexibilities under existing SNAP rules, without making a formal request, including the flexibility to allow applications online (including via mobile app), by mail, or telephone; accept telephonic signatures; exempt individuals from certain work requirements due to medical or physical unfitness, including those related to COVID-19; and consider factors related to COVID-19 in determinations of whether an individual has good cause for failure to comply with a SNAP work requirement.

### ***Pandemic-EBT (P-EBT)***

- The Families First Coronavirus Response Act of 2020 (FFCRA) authorizes USDA to approve state agency plans for temporary emergency standards of eligibility and benefit levels under the Food and Nutrition Act of 2008. P-EBT benefits are available to households with children whose schools have closed for at least five consecutive days when those children would have otherwise received free or reduced-price meals if not for their school closure due to COVID-19.
- On March 20, 2020, the Food and Nutrition Service announced and began accepting state plans for the P-EBT program. Currently, 34 states have been approved to operate P-EBT.
- Because P-EBT is intended to benefit eligible children who lost access to free or reduced-price school meals, due to pandemic-related school closures, the length of P-EBT in each state will depend on how long schools are closed in that State.

### **Antitrust Concerns in the Cattle Market – USDA Investigation**

- USDA has broad powers to investigate violations of the Packers and Stockyards Act, which include matters of an antitrust character, such as price manipulation and collusion.
- AMS Packers and Stockyards Division (PSD) is currently investigating how and whether prices have been affected by the COVID-19 Pandemic since March of 2020. PSD is investigating possible price manipulation, collusion, restriction of competition, and unfair practices.

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- If PSD finds evidence of potential violations of the Packers and Stockyards Act, USDA will take appropriate action that may include initiating an enforcement proceeding.