



United States
Department of
Agriculture

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

September 8, 2020

Delivered via Electronic Mail

Adam R. Pulver
Public Citizen
1600 20th Street NW
Washington, DC 20009
apulver@citizen.org

Re: Interim Response for Freedom of Information Act (FOIA) Request No. 2020-OSEC-04055-F

Dear Mr. Pulver:

This is a second interim response to the above-referenced FOIA request received by the Departmental FOIA Office (DFO). The request sought:

1. Any communications related to COVID-19, the coronavirus, and/or plant closures, slowdowns, or openings related to the pandemic between USDA officials or staff and representatives of Smithfield Foods, Tysons Food, Cargill, Pilgrim's Pride, JBS, the National Pork Producers Council, the National Chicken Council, and the National Meat Association.
2. Any communications between USDA officials or USDA staff and Department of Labor (DOL) officials or staff, including, but not limited to officials or staff at the Occupational Safety and Health Administration, relating to poultry, beef, and pork slaughter and/or processing facilities, and COVID-19 or the coronavirus.
3. All records concerning worker safety or occupational health at poultry, beef, and pork slaughter and/or processing facilities, in connection with COVID-19 or the coronavirus.

In an email dated May 26, 2020, you agreed to modify the three portions of your request as follows:

1. Agreed to accept the results of a search the USDA has already conducted in response to a prior FOIA request. The search we conducted was for emails between a list of USDA officials and a list of domains associated with meatpacking operations. Specifically, the search was conducted within the accounts of Sonny Perdue, Joby Young, Matthew Christianson, Jannine Miller, Wesley Gwinn, Jacob French, Misty Giles, Peter Bachmann, Lauren Sullivan, Hailey Ghee, Ashton Saunders, Courtney Knupp, Andrew D. Fisher, Juan Caro, Stephen Censky, Mindy Brashears, Paul Kiecker, Terri Nintemann, Janet Stevens, Nathan Greenwell, Carol Blake, Denise Eblen, and Philip Bronstein for emails exchanged with the following domains: @smithfield.com, @smithfieldfoods.com, @consumerbrandsassociation.org, @tysonfoods.com, @tyson.com, @cargill.com, @pilgrims.com, @jbssa.com, @npcc.org, @aamp.com, @nationalchickencouncil.org, @chickenusa.org, @meatinstitute.org, @ncba.org, @sysco.com,

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@corp.sysco.com, @perduefarms.com, @perdue.com, @gapf.org, @gov.georgia.gov, @governor.alabama.gov, @sd.gov, @state.sd.us, @siouxfalls.org, and @siouxfalls.gov, within the date range March 13, 2020 through June 2, 2020.

2. Agreed to a manual search conducted by the Food Safety Inspection Service (FSIS) for communications between Paul Kiecker, FSIS Administrator; Terri Nintemann, FSIS Deputy Administrator; Jeremy Todd Reed, FSIS Chief Operations Officer; Yolanda Chambers, Director in Office of Management and employees of the DOL regarding meatpacking plants and COVID-19, and to an electronic search of non-FSIS USDA officials emails exchanged with DOL.

3. Agreed to limit the search to the same list of USDA officials referred to in item #1, and to the following search terms: worker, employee, union, employment, or labor AND Coronavirus, Corona, COVID, COVID-19, opening, closing, closure, PPE, transmission, testing, outbreak, pandemic.

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

On August 28, 2020, we sent you a first interim response which included 660 pages of records responsive to item #2 of your request. With this response, we are providing records responsive to item #1 of your request.

An electronic search for responsive records was conducted by the Chief Information Office Client Experience Center (CEC). For item 1, the CEC searched in all Outlook email accounts associated with Sonny Perdue, Joby Young, Matthew Christianson, Jannine Miller, Wesley Gwinn, Jacob French, Misty Giles, Peter Bachmann, Lauren Sullivan, Hailey Ghee, Ashton Saunders, Courtney Knupp, Andrew D. Fisher, Juan Caro, Stephen Censky, Mindy Brashears, Paul Kiecker, Terri Nintemann, Janet Stevens, Nathan Greenwell, Carol Blake, Denise Eblen, and Philip Bronstein for emails exchanged with the following domains: @smithfield.com, @smithfieldfoods.com, @consumerbrandsassociation.org, @tysonfoods.com, @tyson.com, @cargill.com, @pilgrims.com, @jbssa.com, @npcc.org, @aamp.com, nationalchickencouncil.org, @chickenusa.org, @meatinstitute.org, @ncba.org, @sysco.com, @corp.sysco.com, @perduefarms.com, @perdue.com, @gapf.org, @gov.georgia.gov, @governor.alabama.gov, @sd.gov, @state.sd.us, @siouxfalls.org, and @siouxfalls.gov, within the date range March 13, 2020 through June 2, 2020.

This interim response concerns 367 pages of records from that search. These records consist of emails exchanged by Sonny Perdue, Joby Young, Stephen Censky, and/or Mindy Brashears.

The DFO continues processing your request and will issue a final response.

Following a review of the responsive records, the DFO has determined that certain information contained therein should be withheld pursuant to U.S.C. § 552(b)(4) (FOIA Exemption 4), U.S.C. § 552(b)(5) (FOIA Exemption 5), and U.S.C. § 552(b)(6) (FOIA Exemption 6). Below is an explanation of the information that has been withheld.

Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). The exemption covers two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. The information was submitted to USDA by several businesses and industry associations. We have sought input from these businesses regarding whether they treat the information they provided as confidential. We have determined that portions of these records contain commercial or financial information customarily treated as private by the business submitters, and we have withheld these portions pursuant to FOIA Exemption 4.

Exemption 5 of the FOIA 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. In this instance, the DFO is withholding, under the deliberative process privilege, a pre-decisional intra-agency comment pertaining to proposed guidance. Disclosure of such information would have a chilling effect on the ability of agency officials to engage in free and frank discussions regarding policy.

The DFO 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 DFO is withholding information shared internally by the Department’s counsel regarding a pending legal issue.

Exemption 6 of the FOIA is generally 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 withheld under Exemption 6 consists of mobile phone numbers, direct phone numbers for third parties, conference line passcodes, email address handles, and alias email addresses for Secretary Sonny Perdue, Deputy Secretary Stephen Censky, and the Governor of South Dakota. 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. Since 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.

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With regard to the alias email address for Secretary Sonny Perdue and Deputy Secretary Stephen Censky, the agency has a significant interest in ensuring that its officials have the capacity to safely perform a full range of official functions, including emergency operations, continuity of operations, and devolution planning and execution. These functions could not be accomplished if public email-writing campaigns impeded communications to the email accounts from which officials operate in emergency situations. In the event of emergency, not only are alias accounts necessary for safe and efficient emergency operations, but also so that family members can reach otherwise unavailable officials. While the existence of such alias email accounts and certain content of emails released therefrom may shed light on agency functions, the actual email addresses do not in and of themselves advance a public interest—particularly when balanced against the critical interest of agency officials in maintaining safe and responsible communication with critical business contacts including those in The White House, during emergency situations and situations presenting potential national security threats. That said, in response to records requests, it is the agency’s policy to process and release responsive documents derived from searches of all agency email accounts (including alias email accounts) to the extent not otherwise exempt or prohibited by law. Furthermore, we note that the disclosure of officials’ primary official email accounts serves as the most appropriate point of contact for the public and poses the least amount of risk or threat in emergency operations.

You have the right to appeal the DFO’s determinations. Due to the need to issue more than one determination in order to fully resolve your request, your appeal rights for all determinations in response to this request will be provided to you in our final response letter. You may seek dispute resolution services from the DFO’s FOIA Public Liaison, Ms. Camille Aponte. Ms. Aponte may be contacted by telephone at 202-505-0271, or electronically at Camille.Aponte@usda.gov or 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. Provisions of the FOIA allow us to recover part of the cost of processing your request. In this instance, no fees will be charged.

If you have any questions regarding the processing of this request, please contact Mr. Harald Fuller-Bennett at 202-239-4522, or electronically at harald.fullerbennett@usda.gov or 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.

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

Sincerely,

Harald Fuller-Bennett
Government Information Specialist
Office of the General Counsel

Enclosure: Responsive records (367 pages)