

EXHIBIT 3



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BY U.S. MAIL

Thomas Marshall, Esq.
General Counsel
U.S. Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260

Re: Administrative Appeal in FOIA Case No.2021-FPRO-03184

Dear Mr. Marshall:

This is an appeal from the Postal Service's October 7, 2021 response to our September 10, 2021 FOIA request for records relating to the ethical conduct communications between the USPS Ethical Conduct Officer and USPS official Douglas G. Veatch. The Postal Service provided 17 pages of material that redacted all but a few lines of text. The redactions were over-broad and not justified by the claimed FOIA exemptions. We ask that the material be provided in unredacted form and that an adequate search be conducted for all responsive materials.

Background

By letter dated September 10, 2021, we requested the following records:

1. All records of guidance pertaining to Mr. Veatch by the USPS Ethical Conduct Officer (or designee) from January 1, 2021 to the present.
2. All records of communications between the USPS Ethical Conduct Officer (or designee) and Mr. Veatch, or pertaining to Mr. Veatch, from January 1, 2021 to present.
3. All ethical guidance, ethics agreements, records of recusals, and screening arrangements pertaining to Mr. Veatch from January 1, 2021 to the present.
4. Any determination granting an exemption to any requirement or subsection under 18 U.S.C. § 208 for Douglas Veatch. [Please note that USPS is also required to produce these documents pursuant to 18 U.S.C. § 208(d).]

(Exhibit 1.) In sum, the FOIA request sought the communications between USPS official Douglas Veatch and the USPS Ethical Conduct Office, including any ethics guidance or recusals he received, and any exemption he received under 18 U.S.C. § 208. Mr. Veatch had been a senior USPS procurement official at that time and the FOIA request concerned the integrity of Postal Service contracting.

By letter dated October 7, 2021, the Postal Service provided 17 pages of almost entirely redacted material. (Exhibit 2.) Nearly all substantive text was redacted, except for one line that put the agency and Mr. Veatch in a favorable light.

The Postal Service response stated that:

“bodies of certain emails were redacted pursuant to Exemption 5, as they are protected under the attorney-client privilege and the deliberative process privilege.”

(Exhibit 2, p. 1.) No other justification was given for the withholding of substantive text. As discussed below, neither Exemption 5 nor the attorney-client privilege justifies the redactions.

Argument

I. The Requested Documents May Not Be Withheld under FOIA Exemption 5, deliberative process privilege.

The requested records may not be properly withheld under FOIA Exemption 5, the deliberative process privilege. This privilege protects “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Buzzfeed, Inc. v. Dep’t of Just.*, 419 F. Supp. 3d 69, 75 (D.D.C. 2019) (quoting *Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015)). “The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

Records withheld under the deliberative process privilege must be both “predecisional and deliberative.” *Mapother v. Dep’t of Just.*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). “A document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made. Material is deliberative if it reflects the give-and-take of the consultative process.” *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citations and internal quotations marks omitted). Exemption 5 protects “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). To qualify for this exemption, a document’s “source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *CREW v.*

USPS, No. 20-cv-2927, 2021 WL 3662843 (D.D.C. Aug. 17, 2021), citing, S. Dist. Ct. Dep't of Interior & Bureau of Indian Affs. v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

Exemption 5 does not apply because there was no deliberative process. The Postal Service's ethical conduct, conflict of interest, and post-employment restriction rules were already in place and were not being reconsidered or reevaluated. Mr. Veatch's communications with the USPS Ethical Conduct Office presumably did not seek to establish or change any USPS policy. Similarly, the Ethical Conduct Officer's communications to him had nothing to do with establishing or changing USPS policy. On the same basis, a District Court recently held that the Postal Service was required to release Postmaster General's recusal memoranda. *CREW v. USPS, No. 20-cv-2927, 2021 WL 3662843 (D.D.C. Aug. 17, 2021)*. The Court held that accepting the Postal Service's more expansive view of the privilege would "effectively shield[] all agency action from review without accounting for any subsidiary agency decisions" and undermine the integrity of the FOIA process as a means of ensuring government accountability. *100Reporters LLC v. Dep't of Just.*, 248 F. Supp. 3d 115, 153 (D.D.C. 2017). The deliberative process privilege thus does not apply to any of these communications.

II. The Requested Documents May Not Be Withheld under Attorney-Client Privilege.

The Postal Service also invoked the attorney-client privilege. This privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The purpose of the privilege is "to promote open communication between attorneys and clients so that fully informed legal advice may be given." *Nat'l Council of La Raza v. Dep't of Just.*, 411 F.3d 350, 360 (2d Cir. 2005) (citation omitted).

The attorney-client privilege does not apply to the requested documents, because it only applies to covered attorney-client communications. "The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services," as well as "communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.'" *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Id.* Not every communication between an attorney and a client—government or otherwise—is privileged. As the D.C. Circuit has explained, "consultation with one admitted to the bar but not in that other person's role as a lawyer is not protected," and thus a government attorney's "advice on political, strategic, or policy issues, valuable as it may [be], would not be shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998).

Mr. Veatch's request for ethical conduct guidance, and the guidance given to him, was not covered by the attorney-client process. Mr. Veatch's presumed inquiries concerned USPS's conflict of interest and post-employment restriction rules. The Postal Service itself was not seeking or obtaining legal advice on these issues.

Moreover, the USPS employee manual states unequivocally that disclosures made to USPS ethics officials are not protected by the attorney-client privilege:

Employees who have questions about the application of the ethics regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating these regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee has made full disclosure of all relevant circumstances in seeking such advice. **Disclosures made by an employee to an agency ethics official are not protected by the attorney-client privilege.** An agency ethics official is required by 28 U.S.C. 535 to report any information he or she receives relating to a violation of the criminal code (Title 18 U.S.C.).

Postal Service Employee Labor and Relations Manual § 662.11, September 2021, <https://bit.ly/2NrUYPM> (emphasis in original). Furthermore, the regulations of the OGE, which oversees the ethics requirements for executive branch agency officials, provide that “[a] current or former employee who discloses information to an agency ethics official, to a Government attorney, or to an employee of the Office of Government Ethics does not personally enjoy an attorney-client privilege with respect to such communications.” 5 C.F.R. § 2641.105(e). The plain text of these provisions makes clear that the attorney-client privilege does not apply to communications between Veatch and USPS ethics counsel. *CREW v. USPS*, No. 20-cv-2927, 2021 WL 3662843 (D.D.C. Aug. 17, 2021). Veatch could thus have not relied on an expectation of attorney-client privilege in his communications with the USPS Ethics Office.

Even when an attorney-client relationship does exist, the privilege could not shield the withheld documents “simply because they are the product of an attorney-client relationship.” *Mead Data*, 566 F.2d at 253. Rather, the party invoking the privilege must also establish that the information itself is confidential and was not shared with a third party. *Id.* In addition, as the Postal Service has noted in other FOIA proceedings, the privilege protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege. *See Fisher v. United States*, 425 U.S. 391, 403 (1976)).

Moreover, the Postal Service did not establish the necessary predicate for claiming attorney-client privilege. USPS fails to identify the purported attorneys and clients involved in the communication, or their relationship to one another. It likewise fails to claim, even in conclusory terms, that the withheld communications were “made for the purpose of securing legal advice or services” or “rest on confidential information obtained from the client.” *Tax Analysts*, 117 F.3d at 618.

III. The Postal Service's Redactions Were Over-Broad and Improperly Selective.

The Postal Service's FOIA response also failed to disclose "reasonably segregable material" that can be released from a broader record as to which a FOIA exemption has been asserted. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007); see also 5 U.S.C. § 552(b).

The Postal Service essentially redacted all substantive text, save for one sentence which tended to reflect positively on the agency and former official. These redactions were over-broad and selective and thus improper under FOIA. As discussed above, the claimed exemptions do not apply, but even if they did apply, they do not justify wholesale redactions of all substantive text. Only the specific portion of the text that falls within the claimed deliberative process or attorney-client privilege may be redacted.

The redactions were also improperly selective, because it left unredacted text that could just as easily have come within the asserted exemptions as the redacted text. The Postal Service redacted all substantive text except for one sentence in Mr. Veatch's June 10, 2021 email to Ethics Help, which stated, "Again, I apologize for the granularity of the questions, but I want to be compliant." (Exhibit 2, p. 18 of 19.) Under the Postal Service's reasoning, this statement should also have been withheld because it reveals the subject matter of Mr. Veatch's communications. But it was released, most likely because it puts the agency and the former official in a good light.

In addition, the selective release shows that segregable material does indeed exist, though USPS has released only one sentence of it. Given that there are only 17 pages of materials provided, the Postal Service could have easily reviewed them and attempted to separate truly exempt material from non-exempt material. See *Mead Data*, 566 F.2d at 261 n.55.

IV. The USPS Failed to Conduct an Adequate Search

Request No. 3 sought "all ethical guidance, ethics agreements, records of recusals, and screening arrangements pertaining to Mr. Veatch from January 1, 2021 to the present." It does not appear the Postal Service searched for this material. Mr. Veatch apparently continued in his official duties while serving in his procurement function, so there should have been recusals and screening arrangements in place during this period. Alternatively, the Postal Service can satisfy its search obligations by representing that no such recusals or screening arrangements exist.

Request No. 4 sought "[a]ny determination granting an exemption to any requirement or subsection under 18 U.S.C. § 208 for Douglas Veatch." This statute allows an agency to grant an exemption to financial disclosure requirements. A request for a copy of any such determination granting an exemption must be provided under 18 U.S.C. § 208(d). The Postal Service's FOIA response did not address this request.



Thomas Marshall, Esq.
December 16, 2021
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Conclusion

For the above reasons, we request release of the identified documents and an adequate search for further responsive documents.

Sincerely,

CULHANE MEADOWS PLLC

A handwritten signature in black ink that reads "David P. Henkel".

DAVID P. HENDEL

Exhibits 1 -2