



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

April 15, 2022

Re: FOIA Request NLRB-2022-000150

Dear Mr. Maxford Nelsen (Freedom Foundation):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on November 5, 2021, in which you requested:

1. Any written communication from NLRB members David Prouty and/or Gwynne Wilcox to the Designated Agency Ethics Official (DAEO) seeking guidance regarding the necessity of recusal from any case or rulemaking process.
2. Any recommendations or guidance the DAEO has provided to members Prouty and/or Wilcox regarding recusal from any case or rulemaking process.
3. Any written notice or communication prepared by members Prouty and/or Wilcox and stating their intent to participate in/not recuse themselves from any case or rulemaking.

You assumed financial responsibility in the amount of \$50.00 to process your request but asked that fees be waived.

We acknowledged your request on November 5, 2021.

Pursuant to the FOIA, a search inquiry for responsive records was directed to the DAEO. In addition, an inquiry was directed to the Solicitor to have Members Prouty and Wilcox conduct a search of their files for responsive records. Staff in those offices conducted the searches, which yielded the attached 43 pages of responsive, releasable records.

After a review, I have determined that portions of the records are exempt from disclosure under FOIA Exemptions 5 and 7A. (5 U.S.C. § 552(b)(5) and (b)(7)(A)). Specifically, redactions are made pursuant to Exemption 5, which protects certain inter- and intra-agency communications protected by the

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deliberative process and/or attorney work product privileges; and Exemption 7A, which pertains to records included in an open investigatory file where disclosure could reasonably be expected to interfere with enforcement proceedings.

Regarding the withheld records, these fifteen pages, consisting of internal notes and memoranda discussing recusal guidance from the Ethics Office to the Board Members on NLRB case matters, are exempt from disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Exemption 5 allows agencies to withhold “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,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by

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an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses, and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.*

Here, the withheld records meet the requirements for Exemption 5 protection under the deliberative process and attorney work product privileges. They are internal and predecisional. They contain the written notes of an Ethics Office attorney as well as recusal analysis and guidance provided a Board member with respect to two cases pending before the Board. As such, these internal records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and/or opinions of the Ethics staff and was created to assist Board Members in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i). Given your fee category placement, your request for a fee waiver is moot. Accordingly, there are no fees assessed for your request.

You may contact Stephanie Ostrowski, the Attorney-Advisor who processed your request, at (202) 501-8648 or by email at stephanie.ostrowski@nrlb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss

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any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

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Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (43 pages)