



PROTECT the PUBLIC'S TRUST

July 12, 2022

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

RE: Appeal of Determination for FOIA Request NLRB-2022-000248

Dear Ms. Platt;

Consistent with 20 C.F.R. § 102.117(c)(2)(v), we are writing to appeal adverse determinations relating to FOIA Request NLRB-2022-000248. Specifically, citing Exemptions 5 and 7A, NLRB appears to be improperly withholding final ethics guidance. Accordingly, we request that the NLRB reexamine materials responsive to FOIA Request NLRB-2022-000248 and remove redactions relating to final ethics advice.

I. Background

On May 3, 2022, NLRB provided a determination letter in response to FOIA NLRB-2022-000248. NLRB-2022-000248 contained six parts. With respect to parts 1-4, NLRB represented that this was similar to a previous request, NLRB-2022-000150, and we agreed to accept the records responsive to NLRB-2022-000150 as satisfying parts 1-4 of our request.

Along with the May 3, 2022, letter, NLRB provided several responsive documents, as well as a copy of the determination letter for NLRB-2022-000150 dated April 15, 2022, which contained an explanation for redactions to responsive documents. The determination letter cited Exemptions 5 and 7A to justify redactions. With respect to Exemption 5, the letter claimed that material was exempt as deliberative process and/or attorney work product. The letter provides no analysis for its claim of Exemption 7A.

II. Argument

The purpose of the Freedom of Information Act is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Consistent with this purpose, “[a]t all times courts must bear in mind that FOIA mandates a ‘strong presumption in favor of disclosure’” *Nat’l Ass’n of Home Builders v. Norton*, 309 F. 3d 26, 32 (D.C. Cir. 2002) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). Accordingly, the burden is on the agency to demonstrate that



claims of exemption are justified. That burden cannot be met with respect to the claims of exemptions in the referenced NLRB determination letters.

First, NLRB claims redactions pursuant to exemption 7A, however, the determination letter provides absolutely no analysis for why this is so. The sum total of the determination letter's analysis of exemption 7A is a cursory restatement of the exemption: "Exemption 7A, which pertains to records included in an open investigatory file where disclosure could reasonably be expected to interfere with enforcement proceedings." There is no analysis or explanation of whether there is an open investigatory file or how disclosure of final ethics advice could reasonably be expected to interfere with open enforcement proceedings. All there is is a conclusory statement. This is plainly insufficient to sustain the agency's burden to justify any and all redactions.

Second, NLRB claims redactions pursuant to Exemption 5, asserting that materials are covered by the deliberative process privilege and/or protections for attorney work product. As both Congress and the Court of Appeals for the District of Columbia have emphasized, exemption 5 "is to be applied 'as narrowly as consistent with efficient Government operation.'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Exemption 5 is thus "narrow [in] scope" and should be applied consistent with "the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Id.* Moreover, "[a] strong theme of [the courts'] opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Id.* at 867.

To the extent that redacted information constitutes final ethics guidance (as it appears to, particularly in the case of the October 13, 2021 memorandum to Board Members Gwynne Wilcox and David Prouty, which begins "This memo provides ethics guidance . . ." and describes what the Ethics Office has "concluded"), these assertions of privilege under exemption 5 are unavailing.

As the determination letter in NLRB-2022-000150 notes, there are two elements to an assertion of the deliberative process privilege: (1) a record must be predecisional; and (2) a record must be deliberative. Both elements must be present to sustain an assertion of deliberative process.

Final agency ethics guidance is not predecisional. As unredacted portions of the October 13, 2021, memorandum state, this memorandum reflects what the Ethics Office "concluded." It (and, it appears, several other emails) reflect the culmination of the agency decision making process. The possibility that a Board Member may choose to disregard the Ethics Office's considered guidance does not change this conclusion. *See Tax Analysis v. IRS*, 117 F.3d 607, 617 (D.C. Cir 1997) ("The legal conclusions the Office of the Chief Counsel provides to field personnel constitute agency law, even if those conclusions are not formally binding. . . . Rather



than documents produced in the process of formulating policy, FSAs are themselves statements of an agency's legal position and, as such, cannot be viewed as predecisional.”).

Moreover, the analysis portion of the NLRB-2022-000150 determination letter provides no analysis to support such a conclusion. Instead, it merely asserts that withheld portions of the records “are internal and predecisional” and notes “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.” This is wholly inadequate to meet the agency's burden to establish a withholding pursuant to exemption 5. Nothing in this analysis addresses, let alone establishes, that the ethics guidance is not a statement of the agency's legal position, and thus not predecisional.

Since the NLRB has not (and cannot) establish that final agency ethics guidance is predecisional, it cannot assert the deliberative process privilege under exemption 5.

The agency's assertion of the attorney work product privilege is also unavailing. The attorney work product privilege “has been uniformly held to be limited to documents prepared in contemplation of litigation.” *Coastal States*, 617 F. 2d at 864.

Final agency ethics guidance is not protected by the attorney work product. Instead, they are the sort of final decisions that agencies routinely produce in response to FOIA requests. To wit, at least three federal agencies – the Department of the Interior, the Environmental Protection Agency, and the Department of Housing and Urban – have produced final ethics agreements.

The determination letter's allusions to potential litigation are insufficiently specific to sustain the agency's burden to justify its withholdings. As the D.C. Circuit has noted, “if an agency were entitled to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of FOIA would be largely defeated.” *Id.* at 865. The determination letter does not provide sufficient detail to sustain a claim that the documents were prepared in anticipation of specific litigation, and that all of the redacted portions involve the same litigation concerns. For example, the letter does not distinguish whether the potential litigation relates to the ethics advice itself or to substantive challenges to the underlying matter. If the concern is the latter, it is hard to see how the privilege would apply *to the ethics advice*, since that advice is not implicated in the litigation.

Instead, the determination letter merely notes that the content of the records “was created to assist Board Members in their decision-making process.” This same argument could apply “to any document prepared by any person in the Government with a law degree,” and is insufficient to meet the agency's burden.

III. Conclusion

The explanations in NLRB's determination letter are wholly insufficient to support the withholdings claimed under exemptions 7A and 5. There is absolutely no analysis supporting



PROTECT the PUBLIC'S TRUST

the agency's claim to an exemption under 7A. Many of the documents appear to be final agency ethics guidance, which is not predecisional. Accordingly, claims of the deliberative process privilege are unavailing. Finally, the agency has failed to properly justify its claim of the attorney work product privilege by demonstrating that the documents are sufficiently prepared in anticipation of litigation.

For the foregoing reasons, we appeal the agency's May 3, 2022, determination and request that NLRB provide unredacted records of all agency ethics guidance as soon as possible.

Respectfully submitted,

Michael Chamberlain
Director
Protect the Public's Trust