



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
DIVISION OF LEGAL COUNSEL
Washington, D.C. 20570

Via email

August 25, 2022

Re: FOIA Appeal No. NLRB-DLC-2022-001646

Dear Michael Chamberlain:

This letter responds to your appeal filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and received in this office on July 12, 2022, in which you challenge the FOIA Officer's final response to your FOIA request, identified as NLRB-2022-000248. On July 28, we acknowledged receipt of your FOIA appeal and docketed it as NLRB-DLC-2022-001646. As explained below, after consideration of arguments raised in support of your appeal, applicable legal precedent, as well as a complete, independent review of the records responsive to your request, I have determined that your appeal is granted in part and denied in part.

Your Request and The FOIA Officer's Response

On December 1, 2021, you submitted to the NLRB FOIA Branch a request seeking:

1. All records pertaining to the decision by Gwynne Wilcox and David Prouty to participate in any future lawsuits or challenges to the joint employer rule;
2. All records related to the drafting, correspondence concerning, and development of Chair Lauren McFerran's letter dated November 5, 2021 addressed to members of the U.S. Senate (specifically, Sen. Braun, Sen. Burr, Rep. Foxx, Rep. Allen);
3. All records referenced in Chair McFerran's letter that contributed to the NLRB Ethics office's analysis concerning Members Wilcox and Prouty and their participation in matters involving their former employers or clients. For instance, we seek all records that support the following statements made by Chair McFerran: "Specifically, the DAEO found that nothing in 18 U.S.C. § 208 (the financial conflict of interest statute), 5 C.F.R. § 502(a)(1) (covered relationships), or the Biden Ethics Pledge requires Member Wilcox or Member Prouty to recuse themselves from the Board's consideration of the lawsuit. Moreover, the DAEO assessed the relevant circumstances and relationships and recommended that neither Member Wilcox's nor Member

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Prouty's participation would raise appearance concerns under the catch-all provision in 5 C.F.R. § 502(a)(2). Finally, the DAEO concluded that their participation would not be prohibited by the relevant provisions 2 of the applicable legal ethics rules or as a matter of due process. Members Wilcox and Prouty then made their respective decisions to participate based on this expert advice, which was also shared with the other Board Members;"

4. All records, including text messages, calendar invites, virtual meeting invites, logs and chats, and any prepared memorandum, analysis, or related document that was used in support of the decision by the ethics office, Members Wilcox or Prouty, Chair McFerran, or the Inspector General's office to determine there would be no appearance concerns under the catch-all provision in 5 C.F.R. § 502(a)(2);
5. All communications between any combination of the following individuals: A) Chair McFerran, Member Wilcox, Member Prouty or any member of their staff, the Ethics office, or the General Counsel's office, and B) any employee of the Inspector General's office including David Berry, that pertains or relates to any aspect of the joint employer rule, lawsuits brought by any former client or employer of Member Wilcox or Prouty (including any local branch or related entity), from August 1, 2021 to the time this request is processed; and
6. All records between any combination of: A) Chair McFerran, her staff, the General Counsel's office, the Inspector General's office and, B) any representative of a former client or employer of Members Wilcox and Prouty, including all such entities that are considered local branches of those entities, from August 1, 2021 to the date this request is processed.

In a January 6, 2022 phone conversation with a member of my staff, you agreed to accept the records responsive to FOIA Request NLRB-2022-000150 to satisfy paragraphs 1-4 of your request. Our office routed paragraph 5 of your request to the Office of Inspector General (OIG) for further processing. The OIG issued a response in FOIA Request NLRB-OIG-2022-000259 on December 2, 2021.¹

On May 3, 2022, the FOIA Officer responded to your request, granting it in part, and denying it in part. In her response, she provided you with copies of the records released in NLRB-2022-000150, nine additional pages of responsive records, and a copy of the letter issued in NLRB-2022-000150, which described the rationale for the information that had been withheld.

¹ I note that you have not appealed OIG's response to your request. Accordingly, this appeal does not address any aspect of paragraph 5 of your original request.

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Your FOIA Appeal

In your July 12 appeal, you raise two arguments: first, you assert the FOIA Officer provided an insufficient basis to justify the application of Exemption 7(A); second, you argue that neither the deliberative process privilege nor the attorney work-product privilege is applicable to the October 13, 2021 memorandum because it is final guidance that was not implicated in litigation.

Appeal Determination

After a full review of the records released in response to your request, I find that the FOIA Officer correctly applied FOIA Exemptions 7(A) and 5 to the redactions made throughout the records released to you. However, I identified limited, additional portions of the October 13, 2021 memorandum that I find can be released without causing harm to the Agency. For the reasons and analysis set forth in her original response and as further explained below, your appeal is denied in part and granted in part.

1. Exemption 7(A) was appropriately claimed

FOIA Exemption 7(A) authorizes the withholding of material when (a) there is a pending or reasonably anticipated enforcement proceeding, and (b) release of the material is reasonably expected to cause some articulable harm to that proceeding. *Juarez v. DOJ*, 518 F.3d 54, 58-59 (D.C. Cir. 2008). Prospective civil or administrative proceedings have been repeatedly held by courts as qualifying enforcement proceedings for purposes of Exemption 7(A). *See, e.g., Manna v. DOJ*, 51 F.3d 1158, 1165 (3d Cir. 1995); *Gray v. U.S. Army Crim. Investigation Command*, 742 F. Supp. 2d 68, 73 (D.D.C. 2010); *Jud. Watch v. Rossotti*, 285 F. Supp. 2d 17, 29 (D.D.C. 2003); *Env't Prot. Servs. v. EPA*, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005). Moreover, Exemption 7(A) continues to apply to material even after the underlying enforcement proceeding is closed if there exists a "related" proceeding that is still pending. *Al-Turki v. DOJ*, 175 F. Supp. 3d 1153, 1192 (D. Colo. 2016).

In your appeal, you assert that the Agency provided "absolutely no analysis" for why Exemption 7(A) applied, although you offer no argument why Exemption 7(A) does not apply to the redacted material. Upon a full review of the records released and the redactions made therein, I find the application of Exemption 7(A) to be appropriate. The records concern active litigation in the District Court for the District of Columbia, *SEIU v. NLRB*, Case No. 21-2443. Moreover, the contents of the memorandum include legal analysis of the propriety of Board Members Wilcox and Prouty participating in the Agency's response to that lawsuit. Release of the material redacted pursuant to Exemption 7(A) could harm the Agency's ability to

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defend itself in this ongoing litigation. Therefore, I find the application of Exemption 7(A) to be appropriate. However, as noted, below, there are limited, additional portions of the October 13, 2021 memorandum that I find no harm to the Agency in their release.

2. Exemption 5 was appropriately claimed

FOIA 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). Two frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege and the attorney work-product privilege.

The general purpose of the deliberative process privilege is to “prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Courts have consistently found several bases for this privilege, including to encourage open, frank discussions on matters of policy and to protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency’s action. *Morley v. CIA*, 690 F. Supp. 2d 244, 255-56 (D.D.C. 2010); *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978). Courts have required that communications be both predecisional and deliberative for the deliberative process privilege to be invoked. *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

In your appeal, you assert that the FOIA Officer’s application of Exemption 5 was not warranted “to the extent that redacted information constitutes final ethics guidance.” To support that assertion, you state that “final agency ethics guidance” is not predecisional, so it cannot be redacted under the deliberative process privilege of Exemption 5. You further argue that the material cannot be redacted under the attorney work-product privilege of Exemption 5 because it is the sort of “final decisions that agencies routinely produce in response to FOIA requests.” You cite to the Department of the Interior, the Environmental Protection Agency, and the Department of Housing and Urban [Development] for examples of agencies that allegedly “routinely produce” this type of material but you provide no evidence of such productions.

Initially, I note that the National Labor Relations Board is not bound by disclosure determinations made by other agencies. *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (release of information by one agency does not constitute an official release by another agency; to be an official disclosure, the release must have been made by “the agency from which the information is being sought”). Moreover, you offered no evidence that the records released by these other agencies include the

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same type of material redacted by the FOIA Officer in her response to your request. For those reasons, I am not persuaded by this argument.

As to the merits of the FOIA Officer's application of Exemption 5, after reviewing the records, I find she correctly applied Exemption 5 throughout the records released to you. She relied on both the deliberative process privilege, as well as the attorney work-product privilege, to assert Exemption 5, and I find her reliance on those privileges to be appropriate. Portions of the records were appropriately redacted under the deliberative process privilege to the extent they were predecisional and deliberative. Information contained within the October 13, 2021 memorandum is predecisional because it advised Board Members of the ethics and legal analyses they should employ in determining whether or not they should recuse from certain matters. Elsewhere, redactions were made to information that consists of recommendations or opinions, which are types of information protected by the deliberative process privilege. As with the memorandum, the other information redacted throughout the records is part of the deliberative process for Board Members to make recusal decisions. These types of materials are essential for an agency to make reasonable, considered, and well-informed decisions and have been routinely protected from release by the courts. *See, e.g., Shapiro v. Dep't of Justice*, 293 F. Supp. 3d 99, 117 (D.D.C. 2018) (finding OIP correctly withheld impressions, analysis, and recommendation of staff in evaluation and adjudication of adequacy of FBI's FOIA searches); *Elec. Frontier Found. v. Dep't of Justice*, 892 F. Supp. 2d 95, 102 (D.D.C. 2012), *aff'd*, 739 F.3d 1 (D.C. Cir. 2014) (protecting material that "constitutes advice used by decision-makers at the FBI ... in the context of their efforts to ensure that any [FBI] information-gathering procedures fully comply with the law") (internal quotations omitted).

In your appeal you cite to *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607 (D.C. Cir. 1997), to support your argument that final agency ethics guidance is a final agency decision, even where a Board Member has the discretion to make his or her own determination, irrespective of the Ethics Office's considered guidance. However, I find your reliance on this case to be misplaced. In *Tax Analysts*, the document at issue was a Field Service Advice Memoranda ("FSA") that was prepared by the Office of the Chief Counsel for the IRS upon request by field personnel seeking legal guidance, usually with reference to the situation of a specific taxpayer. *Id.* at 608-09. The purpose of an FSA is to ensure that field personnel apply the law correctly and uniformly, and, while not binding, FSAs are given great deference and generally followed. *Id.* at 609. The court in *Tax Analysts*, relying on *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980), found that FSAs represented a body of secret law because they contained the answers to legal questions submitted by the field, and the main function of an FSA is "the promotion of uniformity" throughout the country on significant questions of tax law. Thus, the FSAs were used by that agency's

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personnel, who were responsible for making decisions about how the tax code applies to taxpayers. Here, however, the information redacted under Exemption 5 does not interpret the National Labor Relations Act as it applies or might apply to the public. As such – and distinct from the *Tax Analysts* case -- the memorandum does not contain any discussion of a body of law used by the National Labor Relations Board in the discharge of its regulatory duties or in its dealings with the public. As described above, the withheld information consists of advice to two Board Members from the Designated Agency Ethics Official (“DAEO”) concerning the ethics and legal analyses they should employ in determining whether they should recuse from a particular matter, including redactions of recommendations or opinions. For these reasons, your reliance on the *Tax Analysts* case is unavailing.

Additionally, I note that certain information was redacted properly under the work-product privilege because the Agency’s Ethics Office prepared material that included opinions and analysis, in anticipation of ongoing and future litigation. *See Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947); *Maine v. U.S. Dep’t of the Interior*, 298 F.3d 60, 67 (1st Cir. 2002). Thus, the material provided advice that was used to ensure appropriate ethical and legal handling of Agency litigation and to ensure recusal decisions that may be subject to future challenges would be defensible. That there may be challenges to recusal decisions in connection with the joint employer rule litigation is evidenced by multiple pending administrative unfair labor practice cases in which recusal issues for Board Members Wilcox and Prouty have been raised. *See, e.g.*, 06/02/2022 Answer filed in *Starbucks Corp.*, Case No. 03-CA-285671 et al. (available at <https://www.nlr.gov/case/03-CA-285671>); 05/17/2022 Answer filed in *Starbucks Corp.*, Case No. 18-CA-292306 (available at <https://www.nlr.gov/case/18-CA-292306>); 07/14/2022 Notice to Show Cause, *District Hosp. Partners, L.P. d/b/a The George Washington University Hosp.*, Case Nos. 05-CA-216482 et al. at 4-7 (Member Prouty denying motion requesting recusal) (available at <https://www.nlr.gov/case/05-CA-216482>).

Applying a harm analysis, I concur with the FOIA Officer that that release of this material would harm the Agency’s decision-making process by exposing the legal opinions, advice, and/or recommendations made by the Agency’s Ethics Office. The Board Members rely on the Ethics Office for recommendations to make sound legal determinations, and the release of the legal analysis would have a chilling effect on frank discussions during the deliberative process and inhibit drafters from freely exchanging ideas. Additionally, release of this information would reveal the mental impressions, assessments, and thought processes of the DAEO, contrary to the purposes of the attorney work-product doctrine. *See Leopold v. Dep’t of Justice*, 487 F. Supp 3d 1, 10 (D.D.C. 2020).

Finally, I find that the FOIA Officer complied with her duty to segregate non-exempt material from exempt material. However, upon my review, I have identified

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additional, limited portions of the October 13, 2021 memorandum that I find can be released without causing harm to the Agency's interests. A new set of records reflecting the additional release of information is being provided to you.

Conclusion

For the reasons explained above, I find that the FOIA Officer appropriately applied Exemptions 7(A) and 5 to the redactions throughout the records released to you in response to your FOIA request, except for a limited portion of information I am releasing to you in the attached records. Based on the foregoing reasons, your appeal is denied in part, and granted in part.

The undersigned, at the direction of and pursuant to the policies established by the General Counsel, Jennifer Abruzzo, is responsible for this determination under the FOIA.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Toll free: 1-877-684-6448
Facsimile: 202-741-5769

Judicial review of FOIA determinations may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides,

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or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. § 552(a)(4)(A)(vii) and (a)(4)(B).

Sincerely,

JENNIFER A. ABRUZZO
General Counsel

By: *Nancy E. Kessler Platt*
NANCY E. KESSLER PLATT
Associate General Counsel
Division of Legal Counsel
National Labor Relations Board

cc: Freedom of Information Act Officer

Attachment: (14 pages)