



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

December 20, 2022

Mr. Michael Ding
Via email – foia@aflegal.org

Re: Appeal of FOIA Initial Request SBA-2022-006641 (Appeal SBA-2022-007613)

Dear Mr. Ding:

This determination constitutes the appellate response of the U.S. Small Business Administration (SBA) to your Freedom of Information Act (FOIA) request dated June 6, 2022. An administrative appeal to the SBA FOIA Office (“Office”) was received timely on August 31, 2022.

I. Background

On June 6, 2022, Michael Ding (“Appellant”) submitted a request for information under the Freedom of Information Act pursuant to 5 U.S.C. §552. That request sought records of:

“The Agency’s “strategic plan,” that was required by Section 3(b) of Executive Order 14019 (March 7, 2021) on “Promoting Access to Voting,” to be submitted to the Assistant to the President for Domestic Policy by September 23, 2021.”

In a letter to the Appellant, dated June 24, 2022, the Office of the General Counsel (OGC) issued a no records determination. In a letter dated August 31, 2022, the Appellant submitted an administrative appeal of their adverse determination to this Office.

II. Discussion & Analysis

An informed citizenry is a crucial element of a functioning democracy. The FOIA is intended to ensure such a citizenry, which is “needed to check against corruption and to hold the governors accountable to the governed.”¹ When an agency denies a FOIA request, it is the agency’s burden to justify its decision, showing that: (1) the requested records are not agency records; (2)

¹ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)

responsive agency records were not withheld; or (3) responsive agency records were withheld properly.¹

This Office has found that the Agency's search was inadequate, however the records are exempt from disclosure pursuant to Exemption 5 as will be explained below.

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure "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."² The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context."³ In addition, the courts have identified three traditional privileges, among others, that fall under Exemption 5: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" privilege.⁴ Under the deliberative process privilege, agencies are permitted to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated.⁵

The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions.⁶ The ultimate purpose of the Exemption 5 deliberative process privilege is to protect the quality of agency decisions.⁷ In order to be shielded by the privilege, a record must be pre-decisional, generated before the adoption of agency policy, and deliberative, reflecting the give-and-take of the consultative process,⁸ however, it can lose that status if it is adopted, formally or informally, as the agency position on an issue.⁹ The deliberative process privilege does not exempt purely factual information from disclosure.¹⁰ However, "[t]o the extent that pre-decisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5."¹¹ The deliberative process privilege routinely

¹ *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 232 (D.D.C. 2010) (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980))

² 5 U.S.C. § 552(b)(5).

³ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

⁴ *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

⁵ *Sears*, 421 U.S. at 151.

⁶ *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958)).

⁷ *Sears*, 421 U.S. at 151.

⁸ *Coastal States*, 617 F.2d at 866.

⁹ *Id.*

¹⁰ *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992).

¹¹ *Id.*

protects certain types of information, including “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”¹

Additionally, The Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.² The D.C. Circuit Court has found that the communications exchanged with the Office of the President are exempt from disclosure under the Presidential Communications Privilege, even though the President and his immediate advisors are not themselves an “agency” under the FOIA.³

The records in question consisted of draft documents that were solicited and reviewed by president and his advisors, prepared for the purpose of advising the president regarding the implementation of an Executive Order, and reflected presidential decision-making and thus the Presidential Communications Privilege applies.⁴

III. Decision on Appeal

After careful consideration of all the relevant facts, this Office **DENIES** the Appellants administrative appeal in part and **GRANTS** it in part. Our office has determined that the information requested is exempt from mandatory disclosure under Exception 5.

IV. Exhaustion of Administrative Remedies

Please be advised that with this appeal, you have now exhausted your administrative remedies for this FOIA request. You may pursue this matter in the United States District Court for the district in which you reside or have your principal place of business, or where the records are located, or in the District of Columbia.

In accordance with 13 C.F.R. § 102.8, fees are not assessed for the processing of this appeal.

In addition, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created 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 as follows:

¹ Coastal States, 617 F.2d at 866.

² Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (stating that exemption 5 “incorporates . . . generally recognized civil discovery protections”); see also Ass’n for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977) (“The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.”) (non-FOIA case)

³ 9 See Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1110 n.1 (D.C. Cir. 2004) (noting that Office of the President is not an “agency,” but “embrac[ing] the definitional analysis set forth” in In re Sealed Case, 121 F.3d 729, 749-50, 752 (D.C. Cir. 1997), to protect documents covered by the Presidential Communications Privilege without any further discussion of threshold)

⁴ 5 Judicial Watch, 365 F.3d at 1114 (quoting In re Sealed Case, 121 F.3d at 752); see Judicial Watch, Inc. v. DOD, 913 F.3d 1106, 1113-4 (D.C. Cir. 2019) (finding that five memoranda were solicited and reviewed by president and his national security advisors, prepared for purpose of advising president regarding raid on terrorist’s compound, and reflected presidential decision-making and thus that presidential communications privilege applies);

The U.S. National Archives and Records Administration

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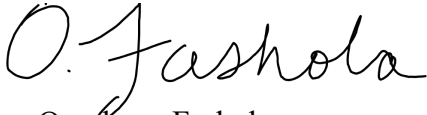
Telephone: 202-741-5770

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Respectfully,

A handwritten signature in black ink, appearing to read "O. Fashola". The signature is fluid and cursive, with the first letter "O" being large and prominent.

Oreoluwa Fashola

Chief, Freedom of Information/Privacy Acts Office

CC: OGC
OFO