



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

January 19, 2009

(202) 692-5000

VIA HAND DELIVERY

Ilyse Wolens Schuman
Littler Mendelson, P.C.
Transportation Core Group
1150 17th Street, N.W.
Washington, DC 20036

Re: Freedom of Information Act Request
FOIA File No. F-1498

Dear Ms. Schuman:

This responds to your letter of December 23, 2009, in which you appeal the denial of your Freedom of Information Act (FOIA) request. Your initial request was filed on November 4, 2009 and requested information related to the National Mediation Board's (NMB) Notice of Proposed Rulemaking concerning representation election procedures, Docket No. C-6964. By letter dated December 4, 2009, the NMB extended its response deadline until December 11, 2009. By letter dated December 11, 2009, the NMB determined to extend its response time until December 18, 2009. On December 17, 2009, the NMB responded to your request granting it in part and denying it in part. As stated in the December 17, 2009 letter, the NMB withheld two documents in full as these documents are privileged from disclosure under the FOIA by Exemption 5 (deliberative process privilege).

In your appeal you allege that "the NMB's response granting in part and denying in part our FOIA request is insufficient as a matter of law because it does not comply with 29 C.F.R. Section 1208.2(b)(2)(i)." 29 C.F.R. §1208.2(b) states:

- (1) Within 20 working days (excepting Saturdays, Sundays, and working holidays) after a request for records is received, the Chief of Staff shall determine and inform the requester by letter whether or the extent to which the request will be complied with, unless an extension is taken under paragraph (b)(3) of this section.
- (2) Such a reply letter shall include:
 - (i) A reference to the specific exemption or exemptions under the Freedom of Information Act authorizing the withholding of the record, a brief explanation of how the exemption applies to the record withheld.

In the December 17, 2009 letter, the NMB withheld two documents as these documents are privileged from disclosure under the FOIA by Exemption 5. Exemption 5 allows a government agency to withhold from 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." 5 U.S.C. § 552(b)(5). "[D]eliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dept. of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). "Exemption 5 to the FOIA permits nondisclosure if the document in question is an inter- or intra-agency memorandum which is both predecisional and deliberative." *State of Mo. ex. rel. Shorr v. U.S. Army Corps. of Engineers*, 147 F.3d 708, 710 (8th Cir. 1998). A predecisional document is one prepared in order to assist an agency decision-maker in arriving at his decision and which contains recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is deliberative if the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and, thereby, undermine the agency's ability to perform its function. *State of Mo.*, at 710. Therefore, "[t]he key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Comm. Corp. v. Dept. of Air Force*, 815 F.2d 1565, 1568 (D.C.Cir. 1987).

Additionally, in your appeal, you state that "the NMB has a statutory duty to release all 'reasonably segregable' factual portions of a withheld document. 5 U.S.C. § 552(b)."

I have reviewed this matter carefully and the two documents withheld consist of two emails between the Board Members and the General Counsel. One email includes a two-page attachment. These emails are predecisional and reflect personal opinions of the writer rather than the policy of the NMB. Therefore, it is my decision that the two documents are privileged from disclosure under the FOIA by Exemption 5 (deliberative process privilege). Furthermore, the withheld materials do not contain any "reasonably segregable factual portions" which could be released.

In your appeal you also state that "the NMB's response does not disclose the 'name or names and positions of the person or persons, other than the Chief of Staff, responsible for the denial.' 29 C.F.R. Section 1208.2(b)(2)(ii). Accordingly, we are entitled to such information." All FOIA contact information can be found on the NMB website (www.nmb.gov) under the "FOIA" button on the main web site page and clicking on "FOIA Designations and Contacts." The NMB has designated General Counsel, Mary L. Johnson, as its Chief FOIA Officer with overall responsibility under Executive Order 13392 of December 14, 2005, on Improving Agency Disclosure of Information.

As the Chief FOIA Officer, Ms. Johnson is responsible for the NMB's compliance with the FOIA. Pursuant to Executive Order 13392, Mary L. Johnson reviews all FOIA requests and all FOIA responses are issued under her signature.

In your appeal, you state that "the NMB's response does not 'specify the number of pages' Ms. Johnson withheld or indicate whether Ms. Johnson made 'a reasonable effort to estimate the amount of withheld information,' in violation of the NMB's FOIA Reference Guide." The NMB's FOIA Reference Guide is designed to assist FOIA requesters in making FOIA requests. The Guide is not binding on the NMB. Although the NMB is not legally required to specify the number of pages withheld, in the instant case the NMB withheld a total of four pages.

Lastly, in your appeal, you state:

Moreover, after more than six weeks, we received a total of 19 letters or faxes and seven e-mails and were instructed to download 'relevant documents' from the NMB's website. Based on the types of documents and communications we seek in our FOIA request and the scant response the NMB provided, we believe that the NMB has not conducted a complete or even a reasonable search of and review for responsive documents.

The NMB nonetheless determined that two extensions of time were necessary to respond to our FOIA request. Both notices of extension cited the need to 'search for, collect, and examine the voluminous amount of records identified in your request.' Therefore, it was quite surprising that, from this 'voluminous amount of records,' a total of only 26 documents were disclosed and two were withheld.

The NMB conducted a thorough and reasonable search which included, inter alia: reviewing each Board Member's correspondence, including email, faxes, voice mails, and notes, pertaining to the above-referenced proposed rule change from January 1, 2009 until December 17, 2009, the date of the NMB's response to your FOIA request; reviewing each Board Member's calendar entries for the above-stated time frame; and all memoranda received by the Board Members in conjunction with the proposed rule. As the D.C. Circuit Court stated, "The actual results are less important than the search itself, and [a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Carter, Fullerton & Hayes, L.L.C. v. Fed. Trade Comm'n*, 637 F.Supp.2d 1, 4 (2009) (citations omitted).

Your request covered an eleven-month time period. The NMB receives emails, faxes, voicemails, and other correspondence on a variety of issues relating to our representation, arbitration, and mediation functions. In order to conduct an exhaustive

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search for the documents requested in your FOIA request, NMB staff culled through *all* documents received during the eleven-month time frame addressed in your request. This type of search takes time. The NMB conducted a thorough search for the requested records and provided all responsive and non-exempt materials.

You have been advised by the General Counsel's letter of December 17, 2009, that additional relevant documents are accessible from the NMB website (www.nmb.gov) under the "What's New" button on the main web site page. The full text of the Proposed Rulemaking and related documents, including submissions by speakers at the December 7, 2009 hearing and letters and comments submitted to the NMB, can be found by clicking on the "Proposed NMB Representation Rulemaking" link. The contents of this link are continually updated as additional submissions are received.

You may seek judicial review of this decision in accordance with 5 U.S.C. § 552 (a)(4).

Sincerely,



Elizabeth Dougherty
Chairman