IRLI IMMIGRATION REFORM LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202.232.5590 | 202.464.3590(fax)
www.irli.org

July 27, 2023

Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

VIA E-PORTAL (FOIA STAR):

Re: Freedom of Information Act (FOIA) Appeal from Executive Office of Immigration Review (EOIR) Request 2023-16792

Dear FOIA Officer:

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552, by the Immigration Reform Law Institute (IRLI), representing and on behalf of the Federation for American Immigration Reform (FAIR).

IRLI's request on behalf of FAIR to EOIR was submitted on January 10, 2023, and assigned identification number 2023-16792. On July 21, 2023, IRLI received a "final response" to our request in a letter signed by EOIR Associate General Counsel Jeniffer Perez Santiago.

On behalf of FAIR, IRLI appeals the denial of this request. This appeal is timely filed within 90 calendar days of EOIR's adverse decision. *See* 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 28 C.F.R. § 16.8(a).

On behalf of FAIR, IRLI originally requested:

1. All email correspondence to and from EOIR staff that mentions or pertains to the "Immigration Reform Law Institute," from and including January 1, 2021 up to and including January 10, 2023.
2. All email correspondence to and from EOIR staff that pertains to its policy of amicus brief invitations, from and including January 1, 2021 up to and including January 10, 2023.

On March 17, 2023, IRLI agreed to limit the scope of this request to only search the following custodians:
1. David Neal, EOIR's director
2. Lauren Alder, Assistant Director for the Office of Policy

EOIR's "production" in response to this request is, to be blunt, tantamount to a non-response: the agency provided over seven hundred pages of records, which it admits were responsive to the request, but only a handful of which were not 100% redacted.

EOIR asserts that the overwhelming bulk of these records are exempt from disclosure under FOIA Exemption 5, the exemption for "inter-agency or intra-agency memorandums or letters that 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). EOIR cites the deliberative process privilege, attorney-client privilege and work-product doctrine as examples of privileges that can be asserted under the ambit of Exemption 5, though it never specifies which if any of these privileges might apply to these records or portions of records.

To the extent that EOIR could be relying on the deliberative process privilege, the agency bears the burden to show that the records are both "predecisional and deliberative." *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 512 (D.C. Cir. 2011) (quoting *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing *Wolfe v. Dep't of Health & Human Services*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc))). Predecisional records are those "prepared in order to assist an agency decisionmaker in arriving at his decision," *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975), while a record is only deliberative when it "makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Purely factual material "that does not reveal the deliberative process is not protected by this exemption." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (internal quotation marks omitted)). Moreover, "even if [a] document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dep't. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). EOIR has made no such showing nor even alleged any of this.

To the extent that EOIR could be relying on attorney-client privilege, it must demonstrate that the material it withheld both "involves 'confidential communications between an attorney and his client'" and "relates to 'a legal matter for which the client has sought professional advice.'" *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F.Supp.2d 252, 267 (D.D.C. 2004) (quoting *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)). EOIR has made no such showing nor even alleged any of this.

To the extent that EOIR could be relying on the work product privilege, the records must have been prepared by attorneys "in anticipation of litigation." *Maine v. Dep't of Interior*, 298 F.3d 60, 66 (1st Cir. 2002) (quoting Fed. R. Civ. P. 26 (b)(3)(A)). This means the agency bears the burden of proving the records were actually "created because of" specific lawsuits, and not merely "prepared in the ordinary course of business or … [documents that] would have been created in essentially similar form irrespective of the litigation." *Id.* at 70 (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (internal quotation marks omitted)). EOIR has made no such showing nor even alleged any of this.

Additionally, insofar as any of these privileges under Exemption 5 might apply to any of the records EOIR has withheld, to imply that FOIA allows the withholding of entire documents merely because a portion may be exempt from disclosure would be to entirely ignore the "segregable portions" clause of the Act, which provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt …" 5 U.S.C. § 552(b). That this requirement applies to records purportedly exempt under Exemption 5 is well-settled, *see e.g. ,Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977), "unless redacting the portions of the documents that reveal deliberations is impossible," *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 309 (D.D.C. 2009) (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)), which there is no reason to believe is the case with respect to these records.

EOIR has not identified which of these privileges, if any, it is asserting to claim Exemption 5 covers any portion of any of the records it has withheld, let alone attempted to explain how each applies. EOIR has obviously not even attempted to segregate any purportedly exempt from non-exempt portions of records in its response. That every portion of every record in over seven hundred pages that EOIR has claimed is covered by Exemption 5 actually is so covered defies belief.

Still further, in its response, EOIR makes a blanket statement that "we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions." To imagine that EOIR has actually done so on an individualized basis with every portion of every conceivable responsive record and yet even still in the face of that standard produced several hundred pages that are entirely redacted strains credulity to say the least.

The FOIA foreseeable harm standard is laid out in 5 U.S.C. § 552(a)(8)(A), which provides:

> An agency ***shall***—
> (i) withhold information under this section ***only if—***
> (I) the agency reasonably foresees that disclosure ***would*** harm an interest protected by an exemption described in subsection (b); or
> (II) disclosure is prohibited by law; ***and***
> (ii)
> (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; ***and***
> (II) take reasonable steps necessary to segregate and release nonexempt information
> [emphasis added]

In *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021), the United States Court of Appeals for the District of Columbia Circuit explained at length Congress's purpose in adding the foreseeable harm standard to FOIA in 2016, which is highly relevant to, and indeed potentially at least in part dispositive of, this appeal and the underlying request:

> Congress adopted the FOIA Improvement Act in part out of "concerns that some agencies [were] overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure." S.REP.NO. 4, 114th Cong., 1st Sess. 2 (2015); see also H.R.REP.NO. 391, 114th Cong., 2d Sess. 9 (2016) ("[T]here is concern that agencies are overusing these exemptions to protect records that should be releasable under the law."). ***Congress was particularly concerned with increasing agency overuse and abuse of Exemption 5 and the deliberative process privilege***. H.R.REP.NO.391, at 9–10 ("The deliberative process privilege is the most used privilege and the source of the most concern regarding overuse."); see also S.REP.NO.4, at 3. Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can "articulate ***both*** the nature of the harm [from release] ***and*** the link between the specified harm and specific information contained in the material withheld." H.R.REP.NO.391, at 9. Agencies cannot rely on "mere 'speculative or abstract fears,' or fear of embarrassment" to withhold information. S.REP.NO.4, at 8. [emphasis added]

The court further stressed:

> In the context of withholdings made under the deliberative process privilege, the foreseeability requirement means that ***agencies must concretely explain how disclosure "would"—not "could"—adversely impair internal deliberations.*** [...] A perfunctory statement that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information between senior leaders within and outside of the agency will not suffice. [...] Instead, what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward.

Id. at 369-370. [emphasis added]

The district courts both in the District of Columbia and elsewhere have also repeatedly required disclosure by agencies for failing to fully apply the foreseeable harm standard specifically to records they claim are covered by Exemption 5. *See e.g., Judicial Watch, Inc. v. Dep't of Commerce*, 375 F.Supp.3d 93 (D.D.C. 2019); *Rosenberg v. Dep't of Defense*, 342 F.Supp.3d 62 (D.D.C. 2018); *Ecological Rights Foundation v. FEMA*, No. 16-cv-05254-MEJ, 2017 WL 5972702 (N.D. Cal., Nov. 30, 2017).

Because IRLI, on behalf of FAIR, does not agree that the requested materials EOIR has withheld are exempt from disclosure, we ask that you reverse the agency's denial of this FOIA request.

We further request that if any portions of the requested documents are withheld, you describe the deleted material in as much detail as possible and specify the statutory basis for the denial as well as your reasons for believing, as to each individual portion of each record: 1) that the

alleged statutory justification applies; 2) which privilege, if any, under Exemption 5 applies; and 3) how that portion of that record meets the foreseeable harm standard.

It is well-established law that a plaintiff in a FOIA case is entitled to an index of the documents and/or portions of documents that have been withheld by the defendant agency. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Moreover, the description of the withheld material must be "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Of course, we are not in the litigation context yet, but to help avoid such an eventuality, it would certainly be helpful if you were to provide such an index if you decide to continue withholding of any portions of the requested documents.

Finally, on behalf of FAIR, IRLI would remind you of your own official guidance to employ a de novo standard of review in adjudicating this appeal:

> The administrative appeal process serves an important screening function by providing agencies with "an opportunity to exercise [their] discretion and expertise on the matter" and "to correct mistakes made at lower levels and thereby obviate[] unnecessary judicial review." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). … given that FOIA decisions are generally reviewed under the "de novo" standard in court, see 5 U.S.C. § 552(a)(4)(B),—meaning that for most matters the court will review the agency's actions afresh—it is beneficial for agencies to use this same standard of review at the administrative appeal level as well. Employing a "de novo" standard of review at the administrative appeal level helps ensure that the agency is making a fully considered decision on appeal.

OIP Guidance: Adjudicating Administrative Appeals Under the FOIA, available at https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20Under%20the%20FOIA (visited July 25, 2023)

It is hard to imagine materials falling more squarely within the goal of FOIA—the full illumination of governmental activities in areas directly affecting the public good—than an agency's policy for allowing input from interested parties in the form of amicus submissions regarding pending cases before it.

If this appeal is denied or a response is not forthcoming within twenty (20) working days, IRLI on behalf of FAIR reserves all rights under FOIA to seek judicial review, including the award of attorney's fees.

Thank you for your time and consideration. We await your prompt reply.

Sincerely,

David L. Jaroslav
*Investigations Counsel**

25 Massachusetts Ave., NW Suite 335 │ Washington, DC 20001
Office: 202-232-5590 │ Fax: 202-464-3590 │ www.irli.org │ djaroslav@irli.org
*Admitted in Florida, DC Bar Pending – Supervised by DC Bar Member