

of its decision-making process.” *Id.* (emphasis added). Moreover, the courts have held that if withheld materials are exempt only based on the deliberative process privilege, the agency is required to describe the factual content of the materials and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the materials. *Id.*

Attorney Work-Product Privilege

HHS also asserts the attorney work-product privilege as a basis for withholding 133 pages of responsive material.^{FN41} This privilege “protects disclosure of materials prepared by attorneys, or non-attorneys supervised by attorneys, in contemplation of litigation, that reveal information about an attorney’s preparation and strategy relating to a client’s case.” *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F.Supp.2d 252, 268 (D.D.C.2004) (citing *Coastal States*, 617 F.2d at 866); *Wilderness Society v. U.S. Dep’t of Interior*, 344 F.Supp.2d 1, 17 (D.D.C.2004) (citing *Judicial Watch, supra*). The purpose of the attorney work product privilege is to provide “a working attorney with a ‘zone of privacy’ within which to think, plan weigh facts and evidence, candidly evaluate a clients case, and prepare legal theories.” *Coastal States*, 617 F.2d at 864. Moreover, factual information in attorney work-product will also be protected unless the requesting party can demonstrate a substantial need for the material and an inability to obtain it without suffering undue hardship. *Judicial Watch*, 297 F.Supp.2d at 268 (citing *Fed.R.Civ.P.* 26(b)(3); *Putnam v. U.S. Dep’t of Justice*, 873 F.Supp. 705, 711 n. 4 (D.D.C.1995)). “The work-product privilege can be waived, however, if the work product is disclosed to a third party who does not share a ‘common interest in developing legal theories and analyses of documents’ with the primary party.” *Id.* (quoting *In re Sealed Case*, 676 F.2d 793, 817 (D.C.Cir.1981)) (other citations omitted).

^{FN41} The attorney work-product privilege is asserted for the following Bate-stamp page numbers: 490-91, 492-93, 497-98, 499, 500-06, 512, 517, 518-19, 526-28, 529, 530, 533, 542, 584-86, 831, 832, 839, 84-85, 86,

87-88, 89-90, 91, 92-93, 94-95, 96, 97, 101-02, 104-05, 115-17, 205-08, 209-11, 212-15, 217-18, 221-22, 223-24, 233-35, 241, 242, 243, 245, 246-47, 248, 249-50, 251, 254-55, 256-57, 258-59, 260-61, 262-64, 265, 266-67, 268, 269, 270-71, 272-73, 274-76, 277-79, 280-84, 285-86, 289-91, 292, 465, and 470-82.

*23 The cornerstone of this privilege is that the documents were prepared *in anticipation of litigation*. *Id.* (citing *Jordan*, 591 F.2d at 775) (emphasis added). Therefore, the attorney work product privilege may only be invoked to exempt those documents prepared in anticipation of litigation, and not “ ‘every written document generated by an attorney.’ ” *Judicial Watch*, 297 F.Supp.2d at 268 (quoting *Senate of the Commw. of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 586 (D.C.Cir.1987)). The agency’s burden of proving application of the attorney work-product privilege is two-fold: The agency must (1) show that the “documents must at least have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind,” *Coastal States*, 617 F.2d at 865, and (2) “provide some indication whether the documents have been shared with third parties, which would amount to a waiver of the privilege” ^{FN42}, *Wilderness Society*, 344 F.Supp.2d at 17 (citing *Judicial Watch*, 297 F.Supp.2d at 268). As to the first requirement, there must be some “indication in the *Vaughn* index or affidavits that there was even the dimmest expectation of litigation when the [] documents were drafted.” *Coastal States*, 617 F.2d at 865 (emphasis added).

^{FN42} The district court in *Judicial Watch* explained that in a normal, adversarial proceeding in which the parties are presumed to have equal access to the facts, on a waiver of privilege claim, the party asserting waiver would have the burden of proving that the privilege had been waived. However, in a FOIA case, where the agency possesses almost exclusive access to the facts, the court has required the agency to prove that it has not waived the privilege because the requester is not in a position to disprove it. 297 F.Supp.2d at 269 (citing *King v. U.S.*

Dep't of Justice, 830 F.2d 210, 218
(D.C.Cir.1987)).

In *Judicial Watch*, *Wilderness Society*, and *King*, the courts refused to allow the agencies to withhold documents pursuant to the attorney work product privilege because in all three cases, the agencies failed to provide the courts with sufficient facts, in either their affidavits or *Vaughn* indices, to allow the courts to conclude that specific claims had arisen and were likely to be pursued to the point of litigation by the agency.

Similarly, in the case at bar, HHS fails to provide both the court and the Commonwealth with sufficient facts in either its declarations or *Vaughn* indices to determine whether the work product privilege applies to each of the claimed 133 pages. Indeed, the *Vaughn* indices for the 133 pages withheld pursuant to the attorney work product privilege state merely that the "withheld material is an intra-agency memorandum containing predecisional analysis and opinions concerning the audit of Pennsylvania's Title IV-E program ... [and] contains confidential ... attorney work-product, prepared in reasonable anticipation of litigation or administrative proceedings between HHS and Pennsylvania." This explanation is stated for each of the 133 pages claimed as exempt under the attorney work product privilege. In addition, the declarations of Michael Leonard and Richard Stern fail to provide the necessary detail for the court to determine that these pages were drafted in anticipation of litigation. As to establishing this requirement, both declarations are utterly devoid of detail, stating only that "[t]he documents at issue were either obtained or prepared in contemplation of litigation with the Commonwealth of Pennsylvania concerning an audit of Pennsylvania's Title IV-E program." Stern Decl. at ¶ 52; Leonard Decl. at ¶ 16. Stern goes on to state that "[i]ndeed, a large majority of the documents reflect [his]own legal opinions and mental processes prepared in anticipation of the very litigation that Pennsylvania has initiated in [*Commw. of PA Dep't of Public Welfare v. United States, U.S. Dep't of Health & Human Serv.*, C.A. No. 05-1345 (W.D.Pa.)]. Stern Decl. at ¶ 52. However, what Mr. Stern and HHS have failed to realize is that they have provided no factual basis for the Court to make the giant leap they

suggest between the dates the documents were created (many of which occurred in 2000), and the litigation filed in 2005 as to how those documents could have been prepared in anticipation of litigation when the litigation was not filed, in many instances, until 5 years later.

*24 There is no indication at the time the particular document was drafted what claims or litigation were anticipated, especially since there may have been numerous audits of Pennsylvania's Title IV-E programs since 1997, and it is not clear whether every audit resulted in some sort of claim, administrative proceeding, or federal court case. For each document or page claimed as exempt under the attorney work-product privilege, HHS must identify the particular audit (by date or some other basis) which it anticipated would result in litigation (including an administrative proceeding), and specifically identify the administrative proceeding and/or federal court case which resulted, if any. In addition, HHS provides no indication of whether the documents have been shared with third parties and, therefore, whether the privilege has been waived. For example, if agency attorneys prepared any of these documents in response to litigation, and had filed substantially similar material with a court or other administrative body such that they were publicly available, HHS would have waived the privilege.

For these reasons, HHS has failed to satisfy its burden of proving that the 133 pages are exempt from disclosure pursuant to the attorney work-product privilege. Therefore, unless HHS demonstrates that these documents fall within Exemption (b)(5) under the deliberative process privilege, the Court will not be able to find that HHS is entitled to summary judgment in its favor on the withheld documents.

Deliberative Process Privilege

HHS has invoked the deliberative process privilege of Exemption (b)(5) as the basis for withholding all of the pages challenged by the Commonwealth. This privilege "protects from disclosure 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'"

' Wilderness Society, 344 F.Supp.2d at 10 (quoting Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (other citation omitted)). "The purpose of the deliberative process privilege is to ensure open communication between subordinates and superiors, prevent premature disclosure of policies before final adoption, and to avoid public confusion if grounds for policies that were not part of the final adopted agency policy happened to be exposed to the public." *Id.* (citing Defenders of Wildlife v. U.S. Dep't of Agric., 311 F.Supp.2d 44, 57 (D.D.C.2004)); see also Coastal States, 617 F.2d at 866 (citing Jordan, 591 F.2d at 772-74). The critical question, therefore, in determining whether an agency has met its burden of proof as to the deliberative process privilege, is whether " 'disclosure of [the] 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.' " Wilderness Society, 344 F.Supp.2d at 10 (quoting Formaldehyde Inst. v. Dep't of Health & Human Serv., 889 F.2d 1118, 1122 (D.C.Cir.1989)) (other citation omitted).

*25 In order to withhold documents under the deliberative process privilege, an agency must demonstrate that its decision is both (1) predecisional and (2) deliberative. Coastal States, 617 F.2d at 866; Wilderness Society, 344 F.Supp.2d at 10 (citing Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C.Cir.2002); Judicial Watch, 297 F.Supp.2d at 259 (citations omitted)). "A document is predecisional if it was 'prepared in order to assist an agency decision-maker in arriving at his decision,' rather than to support a decision already made." Wilderness Society, 344 F.Supp.2d at 10 (quoting Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1434 (D.C.Cir.1992) (other citation omitted)). In other words, a predecisional document is one that is " 'antecedent to the adoption of agency policy.' " Judicial Watch, 297 F.Supp.2d at 259 (quoting Jordan, 591 F.2d at 774). An agency will satisfy its burden as to the predecisional requirement if it "pinpoints[s] an agency decision or policy to which the document contributed," Senate of Puerto Rico, 823 F.2d at 585,

or "identif [ies] a decision-making process to which a document contributed", Judicial Watch, 297 F.Supp.2d at 259 (citation omitted).

As to the second requirement, that the document be deliberative, the agency must show that the document is " 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.' " Wilderness Society, 344 F.Supp.2d at 11 (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C.Cir.1975)) ("Vaughn II"); Judicial Watch, 297 F.Supp.2d at 259 (citing same). The deliberative document "must reflect the 'give-and-take of the consultative process.' " Wilderness Society, 344 F.Supp.2d at 11 (quoting Senate of Puerto Rico, 823 F.2d at 585). "In determining whether the deliberative process privilege should apply to a particular document, courts often look at "the nature of the decision making authority vested in the officer or person issuing the disputed document,' and the relative position in the agency's 'chain of command' occupied by the document's author and recipient.'" *Id.* (quoting Animal Legal Defense Fund, Inc. v. Dep't of Air Force, 44 F.Supp.2d 295, 301 (D.D.C.1999)). In this regard, generally employee to supervisor correspondence is more likely than other intra-agency communications to be exempt under the deliberative process privilege. Judicial Watch, 297 F.Supp.2d at 264 (citing Access Reports v. Dep't of Justice, 926 F.2d 1192, 1195 (D.C.Cir.1991)) ("A document from a junior to a senior is likely to reflect his or her own subjective opinions By contrast, one moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give and take.") (citing Senate of Puerto Rico, 823 F.2d at 586; Coastal States, 617 F.2d at 868)). Also, simply because a document has been designated as a "draft" does not automatically entitle the agency to withhold it based on the deliberative process privilege. Wilderness Society, 344 F.Supp.2d at 14 (citing Arthur Andersen & Co. v. I.R.S., 679 F.2d 254, 257 (D.C.Cir.1982)). For each document designated as a "draft," the agency must indicate whether the "draft" was " '(1) 'adopted formally or informally, as the agency position on an issue;' or (2) 'used by the agency in its dealings with the public.'" *Id.* (quoting

Judicial Watch, 297 F.Supp.2d at 261).

*26 Generally, factual information contained in a document which is withheld pursuant to the deliberative process privilege must be disclosed. Judicial Watch, 297 F.Supp.2d at 261 (citing Petroleum Info. Corp., 976 F.2d at 1434; Mead Data Central, 566 F.2d at 256). However, where the factual material may expose the policy judgments or reasoning of the author, and therefore the deliberative process of the agency, the factual information will also be exempt. Id. at 262 (citing Mead Data Central, 566 F.2d at 256; Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C.Cir.1993); Petroleum Info. Corp., 976 F.2d at 1437-38); Wilderness Society, 344 F.Supp.2d at 14. In the latter instance, the agency must provide the required justification for not releasing segregable factual information as outlined in Part 2 above.

In addition, the Court of Appeals for the District of Columbia has repeatedly emphasized that an agency will not satisfy its burden of establishing its right to withhold records with a conclusory assertion of privilege. Id. (citing Senate of Puerto Rico, 823 F.2d at 585 (quoting Coastal States, 617 F.2d at 861)). Rather, “[t]he agency must identify the role of a contested document in a specific deliberative process, Coastal States, 617 F.2d at 868, in order to ‘show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.’” Judicial Watch, 297 F.Supp.2d at 259 (quoting Mead Data Central, 566 F.2d at 258) (other citations omitted). Moreover, “[s]ince the applicability of the deliberative process privilege depends on the content of each document and the role it plays in the decision-making process, an agency’s affidavit must correlate facts in or about each withheld document with the elements of the privilege.” Id. at 259-60 (citing Senate of Puerto Rico, 823 F.2d at 585; Coastal States, 617 F.2d at 866; Mead Data Central, 566 F.2d at 251); see also Wilderness Society, 344 F.Supp.2d at 14 (to qualify redacted and withheld documents as exempt under the deliberative process privilege, the agency must “identify the ‘function and significance ... in the agency’s decision making process’” of these documents (citing Arthur Andersen, 679 F.2d at 258)). “Without a sufficiently specific affidavit or Vaughn Index, a court cannot decide, one way or the

other, a deliberative process privilege claim.” Id. at 260 (citing Senate of Puerto Rico, 823 F.2d at 585) (other citation omitted).

In the case at bar, neither the Vaughn indices nor the declarations of Leonard and Stern provide sufficient detail to enable this Court to decide HHS’s claim of deliberative process privilege. Although the explanations for many of the withheld pages state that the documents make recommendations or express opinions regarding legal or policy matters, the Vaughn indices and declarations fail to provide any details regarding the give-and-take and/or supervisor/employee relationship between the author and recipient(s) in all but a few entries. Moreover, none of the explanations identify the specific agency decision or policy to which a particular document contributed, or state what role the document played in the deliberative process. For example, the entry for Bate-stamp page no. 520 identifies a specific review-Pennsylvania’s Title IV-E foster care program for federal fiscal years 1998, 1999 and 2000-but neglects to identify the agency decision to which the document contributes and/or the role the document played in the decision. As another example, most entries describe the subject matter of the documents as relating to either a Pennsylvania Title IV-E program, an audit of that program, or a proposed settlement agreement. Not only does this description fail to identify the particular audit or program under consideration, it fails to identify the specific agency decision and the date thereof to which the particular document contributed and the way it contributed. Certainly, more than one audit has been conducted or contemplated by HHS and/or OIG with regard to Pennsylvania since 1997, yet no distinction is made as to which audit a particular document is referring. At the very least, HHS must identify the specific audit and/or program discussed in each withheld document, the particular agency decision to which the document contributed, and how the document contributed to it.

*27 Nor does HHS correlate any facts about the withheld material with the elements of the privilege. Rather, the explanation merely reiterates the required elements of the deliberative process privilege. For many of the entries, the author and/or recipient(s) are unknown, so that a particular individual cannot be

linked to a document. In this situation, “ ‘it becomes difficult if not impossible, to perceive how the disclosure of such documents would result in a chilling effect upon the open and frank exchange of opinions within the agency.’ ” Wilderness Society, 344 F.Supp.2d at 15 (quoting Ethyl Corp. v. U.S. E.P.A., 25 F.3d 1241, 1250 (4th Cir.1994)). At the very least, HHS should provide information regarding the source of the documents' origination or the location where these documents were found, in order for the Court to assess what role, if any, a document played in the decision-making process.

In a few cases, where the document is described as a “draft,” (see e.g., Bate-stamp page nos. 513-16), HHS states that the documents do not represent the final agency decision. But the documents still do not fall within the deliberative process privilege because they fail to articulate with the required detail any particular agency decision or correlate the facts with the elements of the privilege.

In order for HHS to prove it is entitled to withhold 196 pages of materials under the deliberative process privilege, it must show that each document is both predecisional and deliberative. However, on the current record, the Court cannot make a determination whether any of the entries challenged by the Commonwealth satisfy this test.

Accordingly, because HHS's *Vaughn* indices and declarations fail to provide sufficient detail to show that either the attorney-client privilege, attorney work-product privilege, or the deliberative process privilege applies to the withheld materials, the Court recommends that Defendants' motion for summary judgment on this issue be denied.

4. Policy Considerations

Finally, HHS argues that policy considerations also support granting summary judgment in its favor. In this regard, HHS accuses the Commonwealth of instituting the instant FOIA case with the sole purpose of conducting discovery in Civil Action No. 05-1345 (W.D.Pa.), thereby intentionally sidestepping the federal rules of discovery and this Court's instruction that discovery in Civil Action No. 05-1345 be stayed

until the dispositive motions were resolved. See Reply Mem. in Supp. of Defs.' Mot. for Summ. J. & Opp'n to Pl.'s Rule 56(f) Mot. at 13. Such a tactic, according to HHS, is squarely against the spirit and purpose of FOIA, as explained by numerous courts, including the Supreme Court and Court of Appeals for the Third Circuit.^{FN43} HHS argues that essentially, these cases hold that FOIA was not intended to be a private discovery tool or to replace or supplement the discovery of litigants, but rather, is a public disclosure statute, fundamentally designed to inform the public about agency action, and not to benefit private litigants. Despite the express purpose of FOIA, HHS submits that counsel for the Commonwealth “has converted FOIA into his own personal discovery tool in an effort to avoid and/or supplement the Federal Rules of Civil Procedure.” (*Id.* at 14.) HHS further argues that if every plaintiff in a civil action against the United States filed a corresponding FOIA case in order to sidestep the federal rules of discovery, the drain of resources on the government and the Court system would be immeasurable. HHS posits that the Commonwealth should not be permitted to continue misusing and abusing the FOIA.

^{FN43} NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry ... FOIA was *not* intended to be a private discovery tool”; Metex Corp. v. ACS Ind., Inc., 748 F.2d 150, 155 (3d Cir.1984) (rejecting requester's argument that information requested is necessary to resolve underlying civil litigation as FOIA is public disclosure statute and not intended to replace or supplement discovery of private litigants); Newry Ltd. v. U.S. Customs & Border Prot. Bureau, No. Civ. A. 04-02110 HHK, 2005 WL 3273975, at *4 (D.D.C. July 29, 2005) (FOIA requesters' position as an entity whose merchandise was seized and the subject of administrative forfeiture proceeding had no bearing on its “right” to documents in question); Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. Civ. A. 04-1919(ESH), 2005 WL 913268,

*7 (D.D.C. Apr. 20, 2005) (identity of FOIA requester and his reasons for request have no bearing on entitlement); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 144, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (FOIA is “fundamentally designed to inform public about agency action and not to benefit private litigants.”); Renegotiation Bd. v. Bannerkraft Clothing Co., Inc., 415 U.S. 124, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974) (“Discovery for litigation purposes is not an expressly indicated purpose of [FOIA]”); Johnson v. Dep’t of Justice, 785 F.Supp. 2, 4 (D.D.C.1991) (FOIA “is not a discovery statute”).

***28** The Commonwealth disputes this accusation, and submits that HHS’s own practice manual provides that litigants are permitted to use FOIA during the pendency of litigation against the agency. See *HHS Departmental Appeals Board Appellate Division-Practice Manual FAQ*, which is posted on the internet at [http://www.hhs.gov/dab/appellate/manual.html# 25](http://www.hhs.gov/dab/appellate/manual.html#25). Specifically, the Commonwealth points to the following frequently asked question and the agency’s response thereto:

What is the relationship between discovery processes at the DAB and requests under the Freedom of Information Act (FOIA)? An appellant has a right to seek information from the Department under FOIA which is unaffected by the existence or use of DAB processes. FOIA and DAB processes sometimes intersect, as when an appellant has a pending FOIA request which the appellant anticipates will produce information to be used in DAB proceedings. To avoid delay and misunderstanding about the rights and obligations of the parties under the two separate processes, appellants are urged to ask the DAB to convene a telephone conference when a FOIA request related to the case is involved.

Id. The Commonwealth further submits that this FOIA case was filed in contemplation of DAB litigation as permitted by the above policy, and indeed, the Court notes that DAB litigation is more likely now that the district court has dismissed the Commonwealth’s civil action filed at docket no. 05-1345, as

unripe. Moreover, the Commonwealth posits that resort to FOIA is necessary due to the DAB’s restrictive policies on discovery. *Id.* Therefore, the Commonwealth asserts that it routinely files FOIA litigation early into any audit that is likely to be contested due to the lag time between presenting the FOIA request and receiving responsive documents, and that such practice is expressly permitted by HHS as indicated in its DAB practice manual.

As to the cases cited by HHS for the proposition that FOIA was not intended to be a private discovery tool, the Commonwealth acknowledges that FOIA was not designed to supplement the rules of civil discovery. The Commonwealth argues, nonetheless, that it is well established that a requester’s rights are not diminished because of its status as a litigant, citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 n. 23, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (stating that a person’s rights under FOIA are neither diminished nor enhanced by his “litigation-generated need” for agency documents), and State of Maine v. U.S. Dep’t of the Interior, 298 F.3d 60, 66 (1st Cir.2002). The Commonwealth further submits that the reasons that a person makes a request under FOIA are “simply not relevant to the merits of a FOIA request”, Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 n. 6 (7th Cir.1998), and that a plaintiff’s rights in a FOIA case “do not depend on his or her identity”, North v. Walsh, 881 F.2d 1088, 1096 (D.C.Cir.1989). Thus, the Commonwealth contends it has a right to have its FOIA litigation decided independently of what happens in the case filed at docket no. 05-1345.

***29** The Court finds HHS’s policy argument unpersuasive. The Court does not read the cases cited by HHS as authority for preventing a party to an administrative proceeding or a lawsuit from submitting a FOIA request for information that relates to the subject matter of those proceedings, nor does this authority prevent the agency from processing and responding to such a FOIA request. Rather, the cases cited by HHS support the proposition that a FOIA requester does not have a *right* to receive and examine documents just because the information may have some special significance to the requester but not to the public at large. Moreover, this authority does not sug-

gest that a plaintiff may not use FOIA to request information needed for an underlying civil case, nor does it suggest in any way that what the Commonwealth is doing here is an abuse or misuse of FOIA. As the district court observed in *Inter Ocean Free Zone, Inc. v. U.S. Customs Serv.*, “[t]he identity of the FOIA requester and the requester’s reasons for making the request have no bearing upon its entitlement to the information.... what is given to one requester is what is available to all who make the same request.” 982 F.Supp. 867, 871 (S.D.Fla.1997) (citing *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). That is all the Commonwealth can and is asking for here. “[FOIA’s] sole concern is with what must be made public or not made public.” *Reporters Comm.*, 489 U.S. at 772 (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761, 765 (1966-67)) (other citation omitted). Thus, to the extent the Commonwealth’s FOIA request seeks information that must be made available to the public, the Commonwealth has not abused or misused FOIA. For HHS to argue otherwise is disingenuous, especially in light of its own policy in the DAB practice manual. Indeed, HHS actually released approximately 925 pages of materials relating to the Pennsylvania’s Title IV-E programs, some of which are at issue in Civil Action No. 05-1345, in response to the Commonwealth’s FOIA requests in this case, which suggests, at the very least, that such “tactics” are permissible and not abusive.

Of course, Congress has built a safeguard into FOIA to protect agencies from having to disclose information that would contravene national security, privacy interests, law enforcement investigations, the attorney-client or work-product privileges, and deliberative process privilege, by enacting exemptions to FOIA’s disclosure requirements. These exemptions ensure that FOIA requester, who also happens to be a private litigant, does not obtain information that is not discoverable in a lawsuit.

Therefore, it cannot be said that the Commonwealth is abusing or misusing FOIA to obtain non-discoverable documents since these documents would be exempt under either the attorney-client, attorney

work-product or deliberative process privileges, so long as sufficiently detailed affidavits and *Vaughn* indices have been provided by the agency to justify their non-disclosure. However, in this case, HHS has failed to meet its burden and would have this Court hold the Commonwealth responsible. That the Court will not do. Accordingly, the Court finds no merit to HHS’s argument that policy considerations also support the granting of its motion for summary judgment.

5. Appropriate Relief & Commonwealth’s Rule 56(f) Motion

*30 The Court has found that HHS’s *Vaughn* indices and declarations are so deficient with regard to its segregability analysis and proving its entitlement to withholding materials or portions of materials pursuant to Exemption (b)(5) that the Court is unable to make a *de novo* determination on these issues, and similarly, the Commonwealth is unable to articulate its challenges. In this instance, the Court has several options in fashioning the appropriate relief, including inspecting the withheld materials *in camera*, allowing the plaintiff to conduct discovery, and requesting further affidavits and/or an amended *Vaughn* index from the agency. See *Judicial Watch*, 297 F.Supp.2d at 270 (citing *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 997 (D.C.Cir.1998)). The Court will review each of these options in turn.

One option is to order an *in camera* review of the withheld materials, and in fact, HHS has indicated that it is not opposed to such review in the event that the Court concludes HHS is not entitled to summary judgment as to HHS’s claims of exemption.^{FN44} The Court has broad discretion in determining whether an *in camera* review should be conducted in a particular case. *Spirko*, 147 F.3d at 997. “The ultimate criterion is simply this: Whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption.” *Id.* at 996 (quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C.Cir.1978)). Two factors here counsel against *in camera* review. First, conducting an *in camera* review is generally disfavored and appropriate “only when the issue ... could not be otherwise resolved.” *NLRB v. Robbins*

Tire & Rubber Co., 437 U.S. at 224. As explained below, the Court believes the best way to resolve the deficiencies here is through limited discovery. The second factor is the relatively large number of pages at issue. For some of the withheld materials, HHS is in the best position to provide the necessary factual information to prove the claimed exemptions, especially where the required details may not appear in the documents themselves, such as facts demonstrating documents were prepared in anticipation of litigation, or identifying the agency decision to which a particular document contributed. Conducting an *in camera* review of close to 200 pages of unreleased materials to determine whether the withheld materials are exempt under one of the claimed privileges would place a substantial burden on judicial resources, and is especially not warranted here in light of HHS's failure to supply the Court and the Commonwealth with even the minimal information necessary to make a *de novo* review and challenge the bases for withholding the materials, respectively. Another factor militating against *in camera* review is the general disfavor of *in camera* review by the courts as the principal means for resolving segregability disputes, as it impedes the adversarial position of the requester and is inconsistent with FOIA.^{FN45} Accordingly, the Court declines to order an *in camera* review at this time.

FN44. See Reply Mem. in Supp. of Defs.' Mot. for Summ. J. & Opp'n to Pl.'s Rule 56(f) Motion (Doc. No. 17) at 2-3, 12.

FN45. Although *in camera* review has been required where the agency response is "vague; its claims too sweeping, or there is a reason to suspect bad faith," Mead Data Central, 566 F.2d at 262 (citing Weissman, 565 F.2d at 697-98)), these factors do not outweigh the more laudable factors of advancing the purposes of FOIA and conserving judicial resources under the particular facts of this case.

*31 The second option the Court may select is allowing the plaintiff to conduct discovery. In the instant matter, the Commonwealth has indeed filed a Rule 56(f) motion requesting discovery in response to the Defendants' motion for summary judgment.^{FN46}

Specifically, the Commonwealth requests that it be allowed to inquire as to (1) how HHS went about identifying segregable factual material, and (2) with regard to the claimed privileges, whether the withheld materials meet the requirements for withholding, including (i) the role of particular documents in the deliberative process, and (ii) whether attorney-client privilege documents have been kept confidential.^{FN47} In addition, although not raised directly in its Rule 56(f) motion, the Commonwealth challenges the assertion of the attorney work-product privilege on the basis that HHS has not met its burden of proof of establishing that the documents were prepared in anticipation of litigation, and therefore, by implication, suggests discovery is needed on this issue as well.

FN46. Fed.R.Civ.P. 56(f) provides: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

FN47. See Pl.'s Br. in Opp'n to HHS' Mot. for Summ. J. & in Supp. of its Rule 56(f) Mot. (Doc. No. 15) at 20. The Commonwealth also requested discovery with regard to the adequacy of the search and suggests that at the conclusion of discovery, the parties be allowed to file cross motions for summary judgment. Given the Court's ruling on the adequacy of the search, *supra*, the Court recommends that the Commonwealth's Rule 56(f) motion be denied as to that issue.

In support of its Rule 56(f) motion, the Commonwealth submits the declaration of Jason Manne, counsel for the Pennsylvania Department of Public Welfare dated June 2, 2006 ("Manne Decl."). (Doc. No. 14.) In his declaration, Manne states that based on his prior experience, which spans twenty-five years

of handling Federal-State grant litigation including 12 FOIA lawsuits, he has a reasonable belief that HHS may not have released all segregable factual information in exempt documents and may be claiming exemptions improperly, as the official making the determination has historically lacked the program-specific knowledge necessary to make that determination. Manne specifically points to Bate-stamp page no. 545 as evidence of HHS's failure to release all segregable factual information. (Manne Decl. at ¶¶ 1, 5-6.) Manne further states that without knowing precisely how the decision to withhold information was made, he cannot adequately respond to the issue of segregability in HHS's motion for summary judgment. (*Id.* at 5.) In addition, Manne asserts that he cannot adequately respond to HHS's claimed exemptions without additional information regarding each document and how the document relates to the claimed privilege, as more fully explained in the Commonwealth's brief. (*Id.* at 6.)

HHS opposes the Commonwealth's Rule 56(f) motion, and in support thereof, advances two arguments. First, HHS submits that where the court already has sufficient information, consisting of *Vaughn* indices and declarations, to conclude the agency has fully complied with FOIA, discovery is generally unavailable. This argument is flawed however, because HHS assumes, incorrectly, that Court will find its *Vaughn* indices and declarations to be sufficiently detailed. As explained above, that is not the present case. Nonetheless, HHS cites a number of cases in which courts have denied discovery requests in FOIA cases.^{FN48} However, the Court finds none of these cases dispositive here as the agencies in those cases submitted sufficiently detailed affidavits and/or there was no evidence of bad faith on the part of the agency, thereby making discovery unnecessary, unlike HHS in the case at bar.

^{FN48}. The cases cited by HHS include *Wheeler v. CIA*, 271 F.Supp.2d 132, 139 (D.D.C.2003) (no evidence of bad faith); *SaifeCard*, 926 F.2d at 1200-02 (affidavits sufficiently detailed and no evidence of bad faith); *Simmons v. U.S. Dep't of Justice*, 796 F.2d 709, 711-12 (4th Cir.1986) (affidavits sufficiently detailed); *Broadrick v. Execut-*

ive Office of President, 139 F.Supp.2d 55, 64 (D.D.C.2001) (affidavits sufficiently detailed and no evidence of bad faith).

*32 Second, HHS submits that there is no need here to conduct an *in camera* review, but if the Court is dissatisfied with the information supplied, it has the discretion to order a more specific index or order an *in camera* review. According to HHS, given the number and similarity of the documents at issue, an *in camera* inspection would (1) show that the documents were appropriately withheld, (2) would completely eliminate the need for discovery on the FOIA exemptions, and (3) allow the Court to make its own segregability determination. By so arguing, however, HHS attempts to improperly shift its burden of proof to this Court. As stated earlier, the Court finds an *in camera* review would substantially burden judicial resources.

Clearly, there is precedent for allowing limited discovery in FOIA cases where the affidavits and/or *Vaughn* index are deficient and national security is not involved. *See, e.g., Commw. of PA Dep't of Public Welfare v. United States, U.S. Dep't of Health & Human Serv.*, Civ. A. No. 99-175, 1999 U.S. Dist. LEXIS 17978, *7-8 (W.D.Pa. Oct. 12, 1999) (citing *Church of Scientology v. IRS*, 991 F.2d 560, 563 (9th Cir.1993), vacated in part on other grounds, 30 F.3d 101 (9th Cir.1994); *Benavides v. DEA*, 968 F.2d 1243, 1249-50 (D.C.Cir.), mod. on other grounds, 976 F.2d 751 (D.C.Cir.1992)); *see also Schiller v. I.N.S.*, 205 F.Supp.2d 648, 653 (W.D.Tex.2002) (noting numerous district court cases holding that discovery in FOIA cases is limited to determining whether withheld items are exempt from disclosure or whether a thorough search for documents has been made). Because a FOIA plaintiff "obviously cannot know the facts [it] does not know," without discovery, it is virtually impossible for a FOIA plaintiff to know whether the agency has complied with FOIA's mandate. *Id.* at *8 (quoting *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 129 (3d Cir.1993)). As the Court of Appeals for this Circuit observed in *Davin, supra*: "The review of FOIA cases is made difficult by the fact that the party seeking disclosure does not know the contents of the information sought and is, therefore, helpless to contradict the govern-

ment's description of the information or effectively assist the trial judge." *Id.* (quoting *Davin*, 60 F.3d at 1049). In *Commw. v. HHS* filed at Civil Action No. 99-175, Judge Smith found that the agency's affidavit on the adequacy of the search was scant and ordered limited discovery regarding the completeness of the material produced as well as the methodology used to compile it. *Id.* (citing *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C.Cir.1980)).

The decision whether to allow discovery lies within the discretion of this Court. *Schiller*, 205 F.Supp.2d at 653 (citing *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 544 (6th Cir.2001)) (other citations omitted). The courts have uniformly held that discovery in a FOIA case is permitted "when factual issues arise about the 'adequacy or completeness of the government search and index' and this issue can arise 'only after the government files its affidavits and supporting memorandum of law' ". *Id.* (quoting *Murphy v. F.B.I.*, 490 F.Supp. 1134, 1137 (D.D.C.1980)). Therefore, given that the discovery the Commonwealth seeks to conduct is limited to the issue of the completeness of HHS's *Vaughn* indices and declarations as to segregability of non-exempt factual information and the claimed exemptions for withholding materials, and that HHS has already filed its *Vaughn* indices and supporting declarations, the Court finds that limited discovery is appropriate here.

*33 In lieu of discovery and an *in camera* review, the Court may order the agency to provide supplemental declarations or an amended *Vaughn* index to correct the deficiencies. In light of the fact that HHS has already had two opportunities to provide sufficiently detailed affidavits and has failed both times, the Court finds the better approach is to allow the Commonwealth to conduct limited discovery as outlined above.

Accordingly, the Court recommends that the Commonwealth's Rule 56(f) motion be granted and limited discovery allowed with regard to the completeness of the *Vaughn* indices and declarations on the segregability of non-exempt factual information and the claimed exemptions for the withheld materials. At the conclusion of discovery, if HHS still wishes to withhold materials or portions of materials, it will be

allowed to renew its motion for summary judgment, and the Commonwealth will be permitted to file a cross-motion for summary judgment.

III. CONCLUSION

While the claimed privileges for a number of the documents appear plausible on the surface, HHS has failed to provide sufficiently detailed declarations and *Vaughn* indices to show that it has met *all* of the criteria for the respective privileges. Ultimately, the Court may well find that the withheld materials are exempt under either the attorney-client privilege, attorney work-product privilege, or the deliberative process privilege. However, on the current record, the Court cannot determine whether any of the claimed privileges apply as the declarations and *Vaughn* indices fail to provide the required detail.

Therefore, for this reason and the reasons set forth above, it is recommended that Defendants' Motion for Summary Judgment (Doc. No. 8) be granted with regard to the issue of the adequacy of the search, and denied without prejudice in all other respects. It is further recommended that Plaintiff's Rule 56(f) Motion (Doc. No. 13) be denied with prejudice on the issue of the adequacy of the search, and granted on the remaining issues.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

W.D.Pa., 2006.
Pennsylvania Dept. of Public Welfare v. U.S.
Slip Copy, 2006 WL 3792628 (W.D.Pa.)

END OF DOCUMENT



Caution

As of: Apr 05, 2007

LOUISE SAWYER, Plaintiff, v. SOUTHWEST AIRLINES, Defendant. GRACE FULLER, Plaintiff, v. SOUTHWEST AIRLINES, Defendant.

CIVIL ACTION No. 01-2385-KHV, CIVIL ACTION No. 01-2386-KHV

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2002 U.S. Dist. LEXIS 25111

December 23, 2002, Decided

DISPOSITION: [*1] Plaintiffs' Motion to Compel Production of Documents denied in part.

compel except as to six documents, which the Court will inspect *in camera* to determine whether they are protected by work product [*2] immunity.

COUNSEL: For LOUISE SAWYER, plaintiff: Scott A. Wissel, Lewis, Rice & Fingersh, L.C., Kansas City, MO.

I. Factual Background

For SOUTHWEST AIRLINES, defendant: John W. Cowden, Mary C. O'Connell, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO. Todd W. Amrein, Phoenix, AZ.

In these two consolidated cases, Plaintiffs assert civil rights claims pursuant to 42 U.S.C. § 1981. In addition, Plaintiff Fuller alleges claims for intentional and negligent infliction of emotional distress, while Plaintiff Sawyer alleges only a claim for intentional infliction of emotional distress.

JUDGES: David J. Waxse, United States Magistrate Judge.

Global Aerospace ("Global") is Southwest's insurer and has a duty to defend Southwest with respect to the claims asserted in these consolidated cases. n1 At issue in this motion to compel are documents that were exchanged between Southwest and Global in connection with this action.

OPINION BY: David J. Waxse

n1 Ida Loubier Aff, Ex. 1 attached to doc. 73.

OPINION:

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' Motion to Compel Production of Documents (doc. 72). Plaintiffs ask the Court to overrule Defendant Southwest Airlines' ("Southwest") objections to Plaintiff Grace Fuller's First Request for Production of Documents that are based on the assertion of attorney-client privilege and work product protection and to compel production of the alleged privileged and protected documents. For the reasons set forth below, the Court will deny the motion to

In its August 17, 2002 responses to the requests for production, Southwest objected to producing any documents that were protected by the attorney-client privilege and work product doctrine. Southwest also objected to producing certain documents that it contended were protected from disclosure by the insurer/insured

privilege. [*3] Southwest did not provide a privilege log until September 23, 2002. On October 4, 2002 Southwest served a consolidated privilege log, and Plaintiffs filed the instant motion to compel on October 17, 2002. Southwest responded to the motion to compel and provided an amended version of the privilege log ("Amended Privilege Log") on October 28, 2002.

In its response to the motion to compel, Southwest states that it has abandoned its assertion of the insurer/insured privilege and has provided to Plaintiffs the documents it withheld based on that privilege. Thus, those objections and documents are no longer at issue. The objections at issue are only those based upon the attorney-client privilege and work product doctrine.

II. Analysis

A. Did Southwest Waive the Right to Assert Attorney-Client Privilege and Work Product Protection by Failing to Timely Serve a Privilege Log?

Plaintiffs first argue that the motion to compel should be granted because Southwest waited more than two months after it served its initial responses to the requests for production to provide a meaningful privilege log. The Court will decline to find waiver. The Court will therefore proceed to analyze [*4] the merits of Southwest's privilege and work product objections and determine whether the Amended Privilege Log is sufficient to satisfy Southwest's obligations.

B. Attorney-Client Privilege

1. Applicable law

Whether the court applies federal or Kansas law generally makes no difference in determining whether the attorney-client privilege applies. n2 This is because the essential elements of the attorney-client privilege are nearly identical under both Kansas and federal law. n3 Moreover, "the Kansas statute concerning the attorney-client privilege and its exceptions is typical of the laws of other jurisdictions." n4

n2 *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, (D. Kan. 2000) (citations omitted).

n3 *Marten v. Yellow Freight Sys., Inc.*, 1998 U.S. Dist. LEXIS 268, No. 96-2013- GTV, 1998 WL 13244, at *7 (D. Kan. Jan. 6 1998).

n4 *In re A.H. Robins Co.*, 107 F.R.D. 2, 8 (D. Kan. 1985) (citation omitted).

Under Kansas law, the essential elements of the privilege are: [*5]

(1) Where legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) the communications made in the course of that relationship (4) made in confidence (5) by the client (6) are permanently protected (7) from disclosures by the client, the legal advisor, or any other witness (8) unless the privilege is waived. n5

n5 *State v. Maxwell*, 10 Kan. App. 2d 62, 63, 691 P.2d 1316 (1984) (citation omitted).

Similarly, the essential elements of the privilege under federal common law are:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. n6

n6 *Great Plains Mut. Ins. Co.*, 150 F.R.D. 193, 196 n.4 (D. Kan. 1993).

[*6]

Under both Kansas and federal law, the attorney-client privilege protects confidential communications made by a client to an attorney in order to obtain legal assistance from the attorney in his or her capacity as a legal advisor. n7 Under both laws, the term "communications" includes advice given by the attorney in the course of representing the client. n8 It also includes disclosures by the client to the attorney's representative or employee incidental to the professional relationship. n9

n7 *Simmons Foods*, 191 F.R.D. at 632; *Marten*, 1998 U.S. Dist. LEXIS 268, 1998 WL 13244, at *6.

n8 *Simmons Foods*, 191 F.R.D. at 632; *Marten*, 1998 U.S. Dist. LEXIS 268, 1998 WL 13244, at *6. See also *K.S.A. 60-426(c)(2)*.

n9 *Simmons Foods*, 191 F.R.D. at 632; *Marten*, 1998 U.S. Dist. LEXIS 268, 1998 WL 13244, at *6. See also *K.S.A. 60-426(c)(2)*.

2. *Is the attorney-client privilege applicable here and has it been waived?*

Plaintiffs assert that Southwest has waived any attorney-client privilege existing [*7] between Southwest and its attorney John Cowden by disclosing the documents to Global. Southwest responds that Global is also a client of Southwest's attorney John Cowden, and, thus, an attorney-client relationship also exists between Global and Cowden. Southwest further asserts that a claims attorney for Global requested legal advice and consultation from Cowden and that he provided that legal advice and consultation through written communications that are the subject of the motion to compel. In reply, Plaintiffs argue that the mere fact that Global is also a client of Cowden's does not save the privilege or protection. They argue that regardless of the attorney-client relationship between Global and Cowden, Global is still a third-party to any communications between Southwest and Cowden, and thus, when the communications between Cowden and Southwest were disclosed to Global, the privilege was waived. Plaintiffs claim that the proper objection in such a situation would have been for Southwest to assert objections based on either the joint defense doctrine or the common interest doctrine. Plaintiffs argue that because Southwest has never asserted either of these objections, any privilege [*8] existing under those doctrines has been waived.

The Court disagrees, and, for the reasons discussed below, finds the common interest doctrine to be applicable here. Although Southwest has not expressly asserted the doctrine by name, Southwest has established all of the necessary elements of the doctrine.

3. *The common interest doctrine*

Generally, when a communication between a client

and an attorney occurs in the presence of third parties, the attorney-client privilege is waived. n10 The common interest doctrine, however, affords two parties with a common legal interest a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information. n11 The common interest doctrine can only exist where there is an applicable underlying privilege, such as the attorney-client privilege or the work-product doctrine. n12

n10 *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 620 (D. Kan. 2001).

n11 *Johnson Matthey, Inc. v. Research Corp.*, 2002 U.S. Dist. LEXIS 13560, No. 01 CIV.8115MBMFM, 2002 WL 1728566, at *6 (S.D. N.Y. July 24, 2002)

[*9]

n12 *Cavallaro v. U.S.*, 284 F.3d 236, 240 (1st Cir. 2002); *In re Megan-Racine*, 189 Bankr. 562, 571.

Admittedly, there is no Kansas statute or case that recognizes the common interest doctrine as a distinct privilege. n13 The Court, however, does not find that to be fatal to the assertion of the doctrine. Most commentators and courts view it not as a separate privilege, but as an exception to waiver of the attorney-client privilege. n14 The common interest doctrine thus acts as an exception to the general waiver rule by facilitating cooperative efforts among parties who share common interests. n15

n13 *In State v. Maxwell*, 10 Kan.App.2d 62, 691 P.2d 1316 (1984), the Kansas Court of Appeals addressed a similar doctrine relating to an attorney's joint defense of two or more clients. The Court finds that doctrine inapplicable here, however, as Global is not a co-defendant of Southwest in this litigation.

n14 See, e.g., *U.S. Info. Sys., Inc. v. Int'l Broth. of Elec. Workers Local Union No. 3*, 2002 U.S. Dist. LEXIS 19363, No. 00 CIV.4763RMBJCF, 2002 WL 31296430, at *3

(S.D. N.Y., Oct. 11, 2002) ("the joint defense privilege or common interest rule is not really a separate privilege. Rather, it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship.") (citation omitted); *Johnson Matthey, Inc. v. Research Corp.*, 2002 U.S. Dist. LEXIS 13560, No. 01 CIV.8115MBMFM, 2002 WL 1728566, at *6 (S.D. N.Y. July 24, 2002) ("The common interest exception is not an independent privilege, but an extension of the attorney-client privilege which serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."); *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1256 (C.D. Cal. 2000) (California law recognizes a "joint client" or "common interest" exception to the attorney-client privilege); *Roberts Aircraft Co. v. Kern*, No. 96- N-1214, 1997 WL 524894, at 3 (D. Colo. March 20, 1997) ("The 'common interest' doctrine is an exception to an otherwise applicable attorney-client privilege.").

[*10]

n15 *In re Megan-Racine Assoc., Inc.*, 189 Bankr. 562, 571 (N.D. N.Y. 1995).

For the common interest doctrine to attach, "most courts . . . insist that the two parties have in common an interest in securing legal advice related to the same matter -- and that the communications be made to advance their shared interest in securing legal advice on that common matter." n16 "The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." n17

n16 *First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 581 (N.D. Cal. 1995) (citations omitted); *accord Strougo v. BEA Assoc.*, 199 F.R.D. 515, 525 (S.D. N.Y. 2001) (to invoke the "common interest" exception, a party must show that the communications were made in

the course of a joint defense effort or that the clients share a common legal interest, and that the statements were designed to further the common effort); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999) (parties must have a common legal, as opposed to commercial, interest and show that the communications are made in the course of formulating a common legal strategy).

[*11]

n17 *Johnson Matthey*, 2002 U.S. Dist. LEXIS 13560, 2002 WL 1728566, at *6 (citations omitted).

The Court finds that these elements have been satisfied here. Southwest has established that Southwest and Global, who has a duty to defend Southwest in this case, have an interest in common and that the interest of a legal and not commercial nature. Southwest has provided the affidavit of Ida Loubier, n18 a claims attorney for Global. Her affidavit establishes that, pursuant to Global's duty to defend Southwest, she retained Cowden as the attorney to defend Southwest in these consolidated cases and to provide legal advice in connection with all matters relating to the lawsuits. Her affidavit also establishes that, as a representative of Global, she requested and obtained legal advice from Cowden in connection with matters relating to the cases.

n18 See Ex. 1, attached to doc. 73.

In light of the above, the Court holds that Southwest has [*12] established sufficient evidence to warrant application of the common interest exception to the waiver of any attorney-client privilege. Although Southwest did not use the term "common interest" doctrine or exception in asserting that the documents were privileged, it has shown that the necessary elements exist with respect to the claimed privileged documents. To fault Southwest for not using the correct terminology, when all of the elements have been satisfied, would elevate form over substance and would contravene the important policies underlying the attorney-client privilege. As the Kansas Supreme Court has emphasized, "the attorney-client privilege is important to the

administration of justice and should not be set aside lightly." n19

n19 *Wallace Saunders, Austin, Brown & Enochs, Chartered v. Louisburg Grain Co., Inc.*, 250 Kan. 54, 62, 824 P.2d. 933 (1992).

In sum, the Court holds that the common interest doctrine applies here and the documents exchanged between Southwest and Global retain [*13] their attorney-client privileged status. Plaintiffs' motion to compel will therefore be denied with respect to the documents that Southwest has asserted are attorney-client privileged.

B. Work Product Protection

The Court will now proceed to determine whether Southwest has properly asserted work product protection. Of the hundreds of documents listed in the Amended Privilege Log, only sixteen are identified solely as work product. n20 This analysis thus pertains to only those sixteen documents.

n20 Most of the documents identified in the Amended Privilege Log as work product are also identified as attorney-client privileged communications. Because the Court has upheld the assertion of the attorney-client privilege, the Court need not determine whether those documents are also protected by work product immunity.

1. *Are the documents protected by work product immunity?*

"Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard [*14] embodied in *Fed.R.Civ.P. 26(b)(3)*." n21 Thus, the Court will apply federal law to determine whether Southwest's assertion of work product protection should be upheld.

n21 *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 702 (10th Cir. 1998) (citation omitted).

As the party asserting work product protection, Southwest has the burden of establishing that the work product doctrine applies. n22 To carry that burden, Southwest must make a "clear showing" that the asserted objection applies. n23 Southwest must show that "(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party." n24

n22 *Disidore v. Mail Contractors of America, Inc.*, 196 F.R.D. 410, 413 (D. Kan. 2000) (citations omitted).

n23 *Id.* (citations omitted).

[*15]

n24 *Johnson v. Gmeinder*, 191 F.R.D. 638, 643 (D. Kan. 2000) (citations omitted).

Applying these standards here, the Court finds that Southwest has established that all but the following documents are protected by work product immunity: PRIV 157, 158, 219, 245, 246, and 328. Southwest has failed to show that these six documents were prepared in anticipation of litigation or for trial. Southwest shall provide copies of those documents to the Court for an *in camera* inspection so that the Court may determine whether they are in fact protected by work product immunity. Southwest shall submit these documents to the Court within **seven (7) days** of the date of this Memorandum and Order.

2. *Are Plaintiffs entitled to review the work product documents regardless of their protected status?*

Plaintiffs assert that even if the Court finds that the documents are protected work product, Plaintiffs have a substantial need for these documents and that they should therefore be produced pursuant to *Fed.R.Civ.P. 26(b)(3)*. Under that rule, a party may discover work product "upon [*16] a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." n25

n25 *Fed.R.Civ.P 26(b)(3)*.

Plaintiffs have made no showing of "substantial need." The Court will therefore deny the motion to compel as it pertains to the documents that the Court has determined are protected by work product immunity.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Compel Production of Documents (doc. 72) is denied in all respects except with respect to the six documents identified as PRIV 157, 158, 219, 245, 246, and 328 in Southwest's Amended Privilege Log. Within **seven (7) days** of the date of this Memorandum and

Order, Southwest shall provide copies of those documents to the Court for the Court's *in camera* inspection. The Court will defer ruling on the Motion to Compel as it pertains to those six documents until the Court has [*17] reviewed said documents.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 23rd day of December 2002.

David J. Waxse

United States Magistrate Judge

1 of 100 DOCUMENTS



Analysis

As of: Apr 05, 2007

**SALLY BROESSEL, On Behalf of Herself and All Others Similarly Situated,
PLAINTIFF vs. TRIAD GUARANTY INSURANCE CORPORATION,
DEFENDANT**

CIVIL ACTION NO. 1:04CV-00004-JHM

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
KENTUCKY, BOWLING GREEN DIVISION**

238 F.R.D. 215; 2006 U.S. Dist. LEXIS 93726

August 2, 2006, Decided

PRIOR HISTORY: *Broessel v. Triad Guar. Ins. Corp., 2006 U.S. Dist. LEXIS 94192 (W.D. Ky., Aug. 1, 2006)*

COUNSEL: **[**1]** For Sally Broessel, On Behalf of Herself and All Others Similarly Situated, Plaintiff: Dana E. Deering, LEAD ATTORNEY, Parry, Deering, Futscher & Sparks PSC, Covington, KY; Douglas Bowdoin, LEAD ATTORNEY, Douglas Bowdoin, PA, Orlando, FL; Tamra C. Givens, Terry A. Smiljanich, W. Christian Hoyer, LEAD ATTORNEYS, James, Hoyer, Newcomer & Smiljanich, PA, Tampa, FL.

For Triad Guaranty Insurance Corp., Defendant: Jennifer R. Vala, Lisa Wolgast, Nolan C. Leake, LEAD ATTORNEYS, King & Spalding, LLP, Atlanta, GA; Ronald G. Sheffer, LEAD ATTORNEY, Sheffer Law Firm, PLLC, Louisville, KY.

JUDGES: E. Robert Goebel, United States Magistrate Judge.

OPINION BY: E. Robert Goebel

OPINION:

[*217] ORDER

Before the Court are Plaintiff's Motion to Compel (DN 103), Plaintiff's supplement (DN 116), Defendant's response (DN 120), Plaintiff's reply (DN 129), and Defendant's sur-reply (DN 142). At issue are documents that Defendant has withheld from production on claim of work-product protection, the attorney-client privilege, and/or the joint defense/common interest privilege. Pursuant to an earlier order (DN 132), Defendant submitted directly to the undersigned for *in camera* inspection all documents that it **[**2]** has withheld from production on claim of privilege or work-product protection. For the reasons set forth below, Plaintiff's motion is granted in part and denied in part. **[*218]**

A

Pursuant to *Rule 26(b)(1)*, discovery must be "relevant to the claim or defense of any party." *Fed.R.Civ.P. 26(b)(1)(2000 Amendment)*, Advisory Committee's Note, 2000 amendments; see *Phalp v. City of Overland Park, Kansas*, 2002 U.S. Dist. LEXIS 9684, 2002 WL 1162449, *3 *fn.3 (D.Kan. 2002)*. The undersigned notes that four of the documents withheld by Defendant are joint defense agreements. See 007382-007392, 00751-007581, 008962-008966, 008967-008976. The parties have argued vigorously on the question of whether these documents are privileged. However, both seemed to have overlooked a precedent

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issue. Specifically, are these documents relevant within the meaning of *Rule 26(b)(1)*? While these documents may be helpful to the Court in addressing this discovery dispute, they are not "relevant to the claim or defense of any party." *Fed.R.Civ.P. 26(b)(1)*. For this reason, the undersigned concludes the joint defense agreements are not discoverable. [**3]

Defendant appears to concede that the remainder of the withheld documents are relevant (DN 120). For this reason the undersigned will turn to Defendant's claim or claims of privilege as to each document withheld from production. The parties agree that federal common law on privilege applies to this discovery dispute.

Rule 26(b)(1) of the Federal Rules of Civil Procedure mandates that privileged matters are afforded an absolute protection from discovery. This is distinguishable from the qualified protection from discovery that is afforded work-product. n1 *Fed.R.Civ.P. 26(b)(3)*; *In re Perrigo Company*, 128 F.3d 430, 437 (6th Cir. 1997) (citations omitted); *Toledo Edison Co.*, 847 F.2d 335, 338-341 (6th Cir. 1988).

n1 The protection afforded work-product is not a privilege as the term is used in the Rules of Civil Procedure or the Law of Evidence. *Hickman v. Taylor*, 329 U.S. 495, 509-510, 67 S. Ct. 385, 91 L. Ed. 451 & n. 9 (1947). If an adverse party demonstrates substantial need and an inability to obtain the equivalent without undue hardship then the Court may order such work-product be produced, provided it does not reveal an attorney's mental impressions and opinions. *In re Perrigo Company*, 128 F.3d 430, 437 (6th Cir. 1997) (citations omitted); *Toledo Edison Co.*, 847 F.2d 335, 338-341 (6th Cir. 1988).

[**4]

B

Defendant has asserted only the attorney-client privilege as to documents 007283-07286, 007564, 007650-007651, 007654, 007662, 007665, 007671-007672, 007685, 007688-007689, 007690-007692, 007693, 007698-007699, 007759-007760, 007761, and 007806.

Case law often articulates the elements of the

attorney-client privilege as follows:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."

Reed v. Baxter, 134 F.3d 351, 355-356 (6th Cir. 1998) (citations omitted). However, these elements apply to only a portion of the confidential communications that courts have deemed subject to the attorney-client privilege. For example, the privilege applies to confidential communications from counsel to client that set forth legal advice or reveal the substance of the client confidence. *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990) (citations omitted); *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 441-442 (S.D.N.Y. 1995) [**5] (citations omitted). The attorney-client privilege also extends to communications made by noncontrol group employees (1) at the direction of their superiors, (2) in order to secure legal advice for the corporation, (3) about matters within the scope of the employee's corporate duties; and (4) while the employees were aware that they were being questioned in order that the corporation could obtain legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 394, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). Additionally, confidential communications disclosed to or made in the presence of certain agents of the attorney (e.g., accountants, engineers, or experts) to further the rendition of legal advice or in connection with the legal representation are subject to the attorney-client [*219] privilege. See e.g., *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). Further, the privilege extends to communications among corporate employees that reflect legal advice rendered by counsel to the corporation. *In re Grand Jury 90-1,758 F.Supp. 1411, 1413 (D.Colo. 1991)* (President of the corporation conveyed in a letter to the Board of Directors legal advice he received from outside counsel); [**6] *SCM Corp. V. Xerox Corp.*, -70 F.R.D. 508, 518 (D. Conn.) appeal dismissed, 534 F.2d 1031, 1032 (2d Cir. 1976) ("A privileged communication should not lose its protection if an executive relays legal advice to

another who shares responsibility for the subject matter underlying the consultation.").

The burden of establishing the existence of the attorney-client privilege rests with Defendant because it is asserting the privilege in response to Plaintiff's discovery requests. *U.S. v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999) (citing *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir.1983)); see also *Ross v. City of Memphis*, 423 F.3d 596, 606 (6th Cir. 2005).

After considering the arguments of the parties and conducting a review of documents 007283-07286, 007564, 007650-007651, 007654, 007662, 007665, 007671-007672, 007685, 007688-007689, 007690-007692, 007693, 007698-007699, 007759-007760, 007761, and 007806, the undersigned concludes that Defendant has satisfied its burden of demonstrating that each communication or note summarizing a communication is subject to the attorney-client [**7] privilege.

C

Defendant has asserted the joint defense/common interest privilege as to the remainder of the documents it has withheld from production. n2

n2 In a few instances Defendant has also asserted the attorney-client privilege. See documents 007380-007381, 007559, 007560, 007652-007653, 007660-007661, 007663-007664, 007666-007667, 007673-007674, 007675-007676, 007679-007680, 007681-007682, 007683-007684, 007686-007687, 007694-007695, 007696-007697, 007700-007701, 007709-007714, and 007820. For the reasons set forth in this section, the assertion of both privileges is redundant.

"The common interest privilege is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, American Bar Association Section of Litigation at 196 (4th ed. 2001). For this reason, it "assumes the existence of a valid underlying

[**8] privilege." *Id.* Additionally, it assumes "there is a valid basis for exchanging information with a third party without undermining the requirement of confidentiality for the attorney-client privilege to apply." *Id.* "In effect, it states that privileged communications shared among and within some group of people will be deemed to have been made in confidence." *Id.*

Essentially, there are three situations where this exception is deemed to apply. *Id.* at 200-206. The first being a single attorney representing multiple clients in the same matter. *Id.* at 200-201. The first situation does not apply to the circumstances herein.

Another situation where the common interest is deemed sufficient to preclude waiver is when parties share a common defense. *Id.* at 201. This joint defense concept developed in the "criminal context when multiple defendants, each having separate counsel, share information to effect a united defense." *Id.* More and more, to protect the joint defense privilege, parties enter into written joint defense agreements in an effort to assure that information shared among the attorneys for each of the defendants will remain privileged despite the sharing. [**9] *Id.* Here, Defendant and the other six members of the mortgage insurance industry in the United States did just that in May 2003. All seven signatories to this agreement appreciated the need to pool their resources in preparing a common or united defense to the claims asserted in an alleged class action suit filed against one of its members, Mortgage Guaranty Insurance Corporation ("MGIC") (DN 120, Exhibit 1, Affidavit of Earl Wall; 007382-007392). Essentially, all seven members [*220] recognized they may become co-defendants in that action or become defendants in an alleged class action raising the same claims (DN 120, Exhibit 1, Affidavit of Earl Wall; 007382-007392). While the seven members of the mortgage insurance industry did not become co-defendants in the same civil action, all but one are presently defending against the same claims asserted in six alleged class action lawsuits prosecuted by the same law firm.

The third and final situation where the common interest is deemed sufficient to preclude waiver is "when two or more clients share a common legal or commercial interest and, therefore, share legal advice with respect to that common interest." *Id.* at 203. "The common [**10] interest doctrine encourages parties working with a common purpose to benefit from the guidance of counsel,

and thus avoid pitfalls that otherwise might impair their progress toward their shared objective." *Id.* The doctrine has evolved from *Duplan Corp. v. Deering Milliken*, 397 F.Supp. 1146 (D.S.C. 1974), "which was limited to a common shared legal, rather than a common shared financial or commercial, interest." Epstein, *supra*, at 203. Notably, "[u]nlike the joint defense privilege, the common interest does not require or imply that an actual suit is or ever will be pending." *Id.*

After considering the arguments of the parties as well as the affidavits of Earl F. Wall, General Counsel of Defendant, and Suzanne C. Hutchinson, Executive Vice-President of the Mortgage Insurance Companies of America ("MICA"), the undersigned concludes the third situation applies to the circumstances herein. True, the seven members of the mortgage insurance industry did enter into a joint defense agreement in May of 2003. However, as evidenced by many of the documents withheld and indicated in Mr. Wall's affidavit, these seven companies and the trade organization they created, [**11] MICA, have clearly shared a "common legal interest" n3 that extends beyond pooling their resources to prepare a common or united defense to the claims asserted in an alleged class action suit. Defendant has satisfied its burden of demonstrating a "common legal interest" with the other six members in the industry and MICA that extends to legislative and regulatory matters, as well as in matters in litigation or which could lead to litigation. For this reason, the undersigned finds Defendant's assertion of the common interest privilege well-taken, including the communications made years before the filing of this action and made after Radian Guaranty, Inc. ("Radian") withdrew as a member of MICA in July of 2003. n4

n3 There are two lines of cases that reflect differing views regarding the common interest arrangement. *Id.*; *Libbey Glass, Inc. v. Oneida, LTD.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999). The undersigned has applied the more restrictive standard which is expressed in *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995). Epstein, *supra*, at 203-204, 206; *Libbey Glass, Inc.*, 197 F.R.D. at 348. In *Bank Brussels Lambert* the Court concluded:

"The common interest doctrine, then, has both a theoretical and a

practical component. In theory, the parties among whom privileged matter is shared must have a common legal, as opposed to commercial, interest. In practice, they must have demonstrated cooperation in formulating a common legal strategy."

160 F.R.D. at 447. Notably, the common interest doctrine, "does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation." *Id.*

[**12]

n4 The undersigned concludes that Radian's business dispute with MICA on an unrelated matter does not prevent it from continuing to share this "common legal interest" with Defendant, the other five members of the industry and MICA.

Defendant recently produced the Property Casualty Insurers Association of America ("PCIAA") documents discussed in Plaintiff's motion to compel. n5 Thus, the Court need not address Plaintiff's arguments regarding those documents.

n5 Defendant provided this information in the cover letter that accompanied the withheld documents it submitted to the undersigned for an *in camera* review.

The undersigned has considered Plaintiff's argument regarding document 007566-007568 (DN 129 at page 2 and footnote 3) and concludes the common interest privilege does apply because on March 6, 1998, Amerin was a mortgage insurance company that [*221] shared a common legal interest with Defendant, the other members in [**13] the industry and MICA. According to Defendant, Amerin subsequently merged with another mortgage insurance company to form Radian in 1999 (DN 142 at 3).

The undersigned has also considered Plaintiff's

argument regarding 007431-007433, 007434-007436, 007887-007889. An *in camera* review of these documents reveals that each document sets forth a series of emails, the earlier of which were copied to Pete Mills with Countrywide, a lender. Certainly, the common interest privilege does not apply to the emails that were copied to Mr. Mills. However, the common interest privilege does apply to the subsequent emails. In sum, Defendant may redact from each document the emails that were not copied to Pete Mills before it produces the three documents.

Next, the undersigned concludes that no privilege applies to the following documents 007438-007441, 007443-007458, 007461-007496, 007584-007620, 007704-007706, 007765-007771, 007773-007779, 008168-008234. These non-privileged documents are attachments to communications that are subject to privilege. The undersigned has considered whether these attachments are protected from discovery under the work-product doctrine. n6 While each of these documents [**14] were prepared or obtained before or during this litigation, the undersigned concludes only 007584-007620 was obtained or prepared because of litigation and not for some other purpose. *Toledo Edison Co.*, 847 F.2d 335, 339, 341 (6th Cir. 1988); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, American Bar Association Section of Litigation at 506 (4th Ed. 2001). Reading the material at 007584-007620 could very well reveal the mental impressions, opinions, and trial strategy of Defendant's counsel. Since case law and *Rule 26(b)(3)* imply a near absolute protection is to be accorded to such work-product, the undersigned concludes it should not be produced to Plaintiff. *Hickman v. Taylor*, 329 U.S. 495, 510-513, 67 S. Ct. 385, 91 L. Ed. 451 (1947); see also *Upjohn Co. V. United States*, 449 U.S. 383, 400-402, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981); *In re Perrigo Company*, 128 F.3d 430, 437 (6th Cir. 1997) (citations omitted); *Toledo Edison Co.*, 847 F.2d at 338-341. Notably, "only disclosures that are 'inconsistent with the adversary system' are deemed to waive work-product

protection." Epstein, *supra*, at 610. Since the material has [**15] not been disclosed to an adversary the undersigned concludes a waiver has not occurred. In sum, Defendant shall produce 007438-007441, 007443-007458, 007461-007496, 007704-007706, 007765-007771, 007773-007779, and 008168-008234 because they are not subject to privilege.

n6 If the document can be said to have been obtained or prepared in anticipation of litigation then it is entitled to a qualified protection from discovery. See *In re Perrigo Company*, 128 F.3d 430, 437 (6th Cir. 1997); *Toledo Edison Co.*, 847 F.2d 335, 338-341 (6th Cir. 1988); see also *Arkwright Mutual Insurance Co. v. National Union Fire Insurance Co.*, 1994 U.S. App. LEXIS 3828, 1994 WL 5899, * 3 (6th Cir. 1994) (unpublished opinion).

IT IS HEREBY ORDERED that Plaintiff's motion to compel is GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that on or before August 28, 2006, Defendant shall produce to Plaintiff redacted versions of 007431-007433, 007434-007436, 007887-007889. Specifically, Defendant [**16] may redact from each document the emails that were not copied to Pete Mills.

IT IS FURTHER ORDERED that on or before August 28, 2006, Defendant shall produce copies of 007438-007441, 007443-007458, 007461-007496, 007704-007706, 007765-007771, 007773-007779, 008168-008234.

August 2, 2006

E. Robert Goebel

United States Magistrate Judge

LEXSEE 421 U.S. 168, AT 184

Warning

As of: Apr 05, 2007

**RENEGOTIATION BOARD v. GRUMMAN AIRCRAFT ENGINEERING
CORP.**

No. 73-1316

SUPREME COURT OF THE UNITED STATES

*421 U.S. 168; 95 S. Ct. 1491; 44 L. Ed. 2d 57; 1975 U.S. LEXIS 119; 1 Media L.
Rep. 2487; 20 Cont. Cas. Fed. (CCH) P83,865*

**Argued January 14, 1975
April 28, 1975**

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

SUMMARY:

An action instituted by a government defense contractor under the Freedom of Information Act (5 USCS 552) in the United States District Court for the District of Columbia raised the issue whether the Act required public disclosure of various documents generated by the Renegotiation Board and its Regional Boards in determining whether government defense contractors were liable to the government for excessive profits realized on government contracts subject to the Renegotiation Act of 1951 (50 USCS App 1211 et seq.)--the specific documents involved having been issued with regard to renegotiation proceedings with certain contractors during a period ending in 1965. The plaintiff sought disclosure of (1) those Regional Board Reports which had been submitted to the Renegotiation Board, and which recommended that "clearances" be

issued to the contractor on the basis of findings that no excessive profits had been realized, the Board having subsequently approved the "clearances," and (2) Division Reports which had been submitted to the Renegotiation Board by a "division" of the Board (usually consisting of three of its five members) assigned to determine the amount of excessive profits after the contractor was unable to agree with a Regional Board as to such amount, and which included recommendations for final disposition of the cases, along with any additional or contrary views of division members. The District Court held that the reports were "final opinions," within the Freedom of Information Act's disclosure provisions (5 USCS 552(a)(2)(A)), and were not within the Act's fifth exemption (5 USCS 552(b)(5)) from disclosure for "inter-agency or intra-agency memorandums" (325 F Supp 1146, 20 ALR Fed 370). The United States Court of Appeals for the District of Columbia Circuit affirmed (157 App DC 121, 482 F2d 710, 20 ALR Fed 383).

On certiorari, the United States Supreme Court reversed. In an opinion by White, J., expressing the views of seven members of the court, it was held that (1) the reports involved were not "final opinions" subject to disclosure under the Freedom of Information Act, but

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instead fell within the Act's fifth exemption for "inter-agency or intra-agency" memoranda, since (a) only the full Renegotiation Board had the power by law to decide whether excessive profits existed, neither the Regional Boards nor the divisions of the Renegotiation Board having any decisional authority, (b) both types of reports were prepared for use by the Renegotiation Board in its deliberations, thus constituting the kind of predecisional recommendations contemplated by the Act's fifth exemption, and (c) there was no showing that the reasoning in the reports was adopted by the Board as its reasoning, even when it agreed with the conclusion of the report; and (2) it was unnecessary to determine whether the Regional Boards were "agencies" for the purposes of the Act, since if they were separate agencies, their final recommendation would be "inter-agency" memoranda under the Act's fifth exemption, and if they were not separate agencies, their recommendations would be "intra-agency" memoranda under the exemption.

Douglas, J., dissented.

Powell, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §64

WAR §15.3

Freedom of Information Act -- Renegotiation Board --
disclosure of Regional Board Reports --

Headnote:[1A][1B][1C]

Certain Regional Board Reports submitted to the Renegotiation Board and recommending that "clearances" be issued to government defense contractors on the basis of findings that no excessive profits had been realized by the contractors under contracts subject to the Renegotiation Act of 1951 (*50 USCS App 1211 et seq.*)--the Renegotiation Board having subsequently approved the "clearances"--are not "final opinions" made in the adjudication of cases within the meaning of the Freedom of Information Act provision making such final opinions available for public inspection (*5 USCS 552(a)(2)(A)*), but instead fall within the Act's fifth exemption from disclosure for "inter-agency or intra-agency memorandums" (*5 USCS 552(b)(5)*), where (1) only the Renegotiation Board has the power by law to decide whether excessive profits existed, the Regional Boards having no decisional authority whatever, (2) the

Regional Board Reports were prepared prior to the Renegotiation Board's decision and were used by the Board in its deliberations, thus constituting the kind of predecisional deliberative advice and recommendations contemplated by the Act's fifth exemption, and (3) there was no showing that the reasoning in the reports was adopted by the Renegotiation Board; it is unnecessary to determine whether the Regional Boards are themselves "agencies" for the purposes of the Freedom of Information Act, since if they are separate agencies, their final recommendations are "inter-agency" memoranda under the Act's fifth exemption, and if they are not agencies separate from the Renegotiation Board, their recommendations are "intra-agency" memoranda under the exemption.

[***LEdHN2]

LAW §64

WAR §15.3

Freedom of Information Act -- Renegotiation Board --
disclosure of Division Reports --

Headnote:[2A][2B]

Division Reports, which were submitted to the Renegotiation Board by a "division" of the Board (usually consisting of three of its five members) assigned to determine the amount of excessive profits realized by a government defense contractor after the contractor was unable to agree with a Regional Board as to the amount of excessive profits recoverable by the government under the Renegotiation Act of 1951 (*50 USCS App 1211 et seq.*), and which included a recommendation for final disposition of the matter, along with any additional or contrary views of division members, are not "final opinions, including concurring and dissenting opinions," made in the adjudication of cases within the meaning of the Freedom of Information Act provision making such "final opinions" available for public inspection (*5 USCS 552(a)(2)(A)*), but instead fall within the Act's fifth exemption from disclosure for "inter-agency or intra-agency memorandums" (*5 USCS 552(b)(5)*), where (1) only the full Renegotiation Board has the power by law to decide whether excessive profits existed, a division of the Board having no legal decisional authority but merely analyzing and recommending; (2) the Division Reports were prepared prior to the Board's decision for use in the deliberations by the full Board, including the members of the division who might change their minds and who might have included thoughts or arguments in the report with which they were not in

421 U.S. 168, *, 95 S. Ct. 1491, **;
44 L. Ed. 2d 57, ***LEdHN2; 1975 U.S. LEXIS 119

agreement or which were not tentative; and (3) there was no showing that the reasoning in the reports was adopted by the Board as its reasoning, even when it agreed with the conclusion of a report.

[***LEdHN3]

LAW §64

Freedom of Information Act -- exemption of intra-government memoranda --

Headnote:[3A][3B]

Subsection (b)(5) of the Freedom of Information Act (5 USCS 552(b)(5)) which exempts from public disclosure inter-agency or intra-agency memoranda that would not be available by law to a party other than an agency in litigation with the agency, does not include documents which are "final opinions" made in the adjudication of cases, subject to disclosure under the Act (5 USCS 552(a)(2)(A)).

[***LEdHN4]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- exemption of intra-government memoranda --

Headnote:[4]

Subsection (b)(5) of the Freedom of Information Act (5 USCS 552(b)(5))--which exempts from public disclosure inter-agency or intra-agency memoranda that would not be available by law to a party other than an agency in litigation with the agency--incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context; and both the Freedom of Information Act's provision and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not.

[***LEdHN5]

LAW §64

Freedom of Information Act -- exemption of "inter-agency" memoranda --

Headnote:[5]

Since the exemption of certain memoranda from public disclosure contained in subsection (b)(5) of the Freedom

of Information Act (5 USCS 552(b)(5)) includes "inter-agency" memoranda as well as "intra-agency" memoranda, the exemption is intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency.

[***LEdHN6]

LAW §64

WAR §15.3

Freedom of Information Act -- applicability to Renegotiation Board --

Headnote:[6A][6B]

Congress intended the Renegotiation Board to be subject to the provisions of the Freedom of Information Act (5 USCS 552).

[***LEdHN7]

LAW §64

WAR §15.3

Renegotiation Board -- necessity of written opinions --

Headnote:[7]

Since the Renegotiation Act of 1951 (50 USCS App 1221) exempts the Renegotiation Board from all provisions of the Administrative Procedure Act (5 USCS 551 et seq.) except for the Public Information Section (Freedom of Information Act, 5 USCS 552), the opinion writing section of the Administrative Procedure Act (5 USCS 557) is inapplicable to Board decisions; and the Board has no affirmative obligation under the Freedom of Information Act to write opinions.

[***LEdHN8]

LAW §64

Freedom of Information Act -- agency opinions --

Headnote:[8]

The Freedom of Information Act (5 USCS 552) imposes no independent obligation on agencies to write opinions; it simply requires them to disclose the opinions which they do write.

[***LEdHN9]

COURTS §151

Renegotiation Board documents -- public disclosure -- matter for Congress --

Headnote:[9]

It is not for the United States Supreme Court, under the purported authority of the Freedom of Information Act (5 USCS 552), to require disclosure of documents of the Renegotiation Board and its Regional Boards which are not final opinions, which do not accurately set forth the reasons for the Board's decisions, and the disclosure of which would impinge upon the Board's pre-decisional processes; if the public interest suffers by reason of the Board's failure to explain some of its decisions, the remedy is for Congress to require it to do so.

SYLLABUS:

Pursuant to the Government contract renegotiation process in effect under the Renegotiation Act of 1951 for so-called Class A cases (those in which the contractor reported profits of more than \$ 800,000 on the relevant contracts) during the period involved in this case, if the Regional Board made a recommendation as to the amount of excessive profits in the year in issue rather than recommending a clearance, i. e., a unilateral determination that a contractor realized no excessive profits during the year in issue, the case, if the contractor declined to enter into an agreement, would be reassigned to the Renegotiation Board (Board). The case file, including the Regional Board Report, was then transmitted to the Board and assigned to a division of the Board, usually consisting of three of its five members, which in due course would make its own decision and submit to the full Board a Division Report, including a recommendation for final disposition of the case. If the Regional Board concluded that no excessive profits had been realized and that a clearance should therefore issue, a "final recommendation" that a clearance be issued was sent to the Board, which considered the case on the basis of the Regional Board Report. Respondent brought an action pursuant to the Freedom of Information Act (FOIA), 5 U. S. C. § 552, seeking disclosure of certain Regional Board Reports resulting in a recommendation of clearance and Board approval, and of Division Reports in other cases, all related to and issued during renegotiation proceedings involving 14 other companies during the period 1962-1965. The District Court ultimately granted relief on the grounds that both the Regional Board and Division Reports were "final opinions" within the meaning of § 552(a)(2)(A), which requires a Government agency to make available to the public "final opinions, including concurring and dissenting opinions, as well as

orders, made in the adjudication of cases," and were not exempt from disclosure under § 552(b)(5) (Exemption 5) as "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." The Court of Appeals affirmed, further holding that even if the Regional Board Reports were not "final opinions" of the Board, they were disclosable as final opinions of the Regional Board, which was to be considered an "agency" for purposes of the FOIA. Held: Neither the Regional Board nor Division Reports are final opinions and they do fall within Exemption 5, since (1) only the full Board has the power by law to make the decision whether excessive profits exist; (2) both types of reports are prepared prior to that decision and are used by the Board in its deliberations; and (3) the evidence fails to support the conclusion that the reasoning in the reports is adopted by the Board as its reasoning, even when it agrees with a report's conclusion. Pp. 183-190.

(a) The Regional Board Reports, being prepared long before the Board reached its decision and being used by it as a basis for discussion, are precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. Regardless of whether the Regional Boards are agencies for Class A purposes so that their final recommendations are inter-agency memoranda, or are not agencies separate from the Board so that their recommendations are intra-agency memoranda, the Regional Boards' total lack of decisional authority brings their reports within Exemption 5 and prevents them from being "final opinions." Pp. 185-188.

(b) Since the Division Reports were prepared before the Board reached its decision and to assist it in its deliberations, and were used by the full Board as a basis for discussion, the Board should not be deprived of such a thoroughly uninhibited version of this valuable deliberative tool by making such reports public on the unsupported assumption that they always disclose the final views of at least some Board members. Pp. 189-190. *157 U. S. App. D.C. 121, 482 F.2d 710, reversed.*

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., dissented. POWELL, J., took no

421 U.S. 168, *; 95 S. Ct. 1491, **;
44 L. Ed. 2d 57, ***LEdHN9; 1975 U.S. LEXIS 119

part in the consideration or decision of the case.

COUNSEL:

Allan Abbot Tuttle argued the cause for petitioner. With him on the brief were Solicitor General Bork, Assistant Attorney General Hills, Leonard Schaitman, and David M. Cohen.

Tom M. Schaumberg argued the cause for respondent. With him on the brief was Frederick B. Abramson. *

* Melvin L. Wulf, Carol A. Cowgill, and Marvin M. Karpatkin filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance.

JUDGES:

Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Rehnquist; Powell took no part in the consideration or decision of the case.

OPINION BY:

WHITE

OPINION:

[*170] [***62] [**1493] MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether certain documents - documents generated [***63] by the Renegotiation Board (Board) and by its Regional Boards in performing their task of deciding whether certain Government contractors have earned, and must refund, "excessive profits" on their Government contracts - are "final opinions" explaining the reasons for agency decisions already made, and thus expressly subject to disclosure pursuant to the Freedom of Information Act (Act), 5 U.S.C. § 552(a)(2)(A), or are instead predecisional consultative memoranda exempted from disclosure by § 552(b)(5). See *NLRB v. Sears, Roebuck & Co.*, ante, p. 132.

I

Essential to the consideration of whether the documents at issue in this case must be disclosed pursuant to the relevant provisions of the Act is an understanding of the renegotiation process, a process that itself serves to define the documents in issue and hereinafter described. n1 [*171] Under the Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U.S.C. App. § 1211 et seq., the Government is entitled to recoup from those who hold contracts or subcontracts with certain departments of the Government [**1494] any "excessive profits" received by such persons on such contracts. The amount of the profits which will be considered "excessive" in connection with a particular contract depends upon the statutory factors which are set forth in the margin. n2 As the Board's name suggests, it [*172] endeavors to, and in fact does, conclude the vast majority of its cases by agreement. 50 U.S.C. App. § 1215(a) [***64] (1970 ed., Supp. I). Absent an agreement, however, the Board must decide either to issue a "clearance," i.e., a unilateral determination that the contractor realized no excessive profits during the year in issue, or to issue a unilateral order fixing excessive profits at a specified amount and directing the contractor to refund them. The unilateral order is final unless a de novo determination regarding excessive profits is sought within 90 days before the Court of Claims. n3 It is in those cases not terminated by agreement that the documents at issue in this case were generated. n4 With this in mind, we turn to the details of the renegotiation process as it existed during the period relevant to the decision in this case. n5

n1 See generally S. Rep. No. 93-927, pp. 1-2 (1974); Staff Review of Recommendations Made on the Renegotiation Process: A Preliminary Report 3-5 (1974) (prepared for the use of the House Committee on Ways and Means and the Senate Committee on Finance by the staff of the Joint Committee on Internal Revenue Taxation (hereinafter Staff Review)).

n2 Title 50 U.S.C. App. § 1213 (e) reads as follows:

"(e) The term 'excessive profits' means the portion of the profits derived from contracts with

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the Departments and subcontracts which is determined in accordance with this title [§§ 1211 to 1224 of this Appendix] to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

"(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

"(2) The net worth, with particular regard to the amount and source of public and private capital employed;

"(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

"(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

These statutory "factors" were developed by the War Contracts Price Adjustment Board during World War II, were incorporated by Congress into the original Renegotiation and Revenue Acts of that era, were continued in the Renegotiation Act of 1951, and have undergone little change since their initial development. Staff Review, *supra*, n. 1, at 23 and nn. 34-36.

n3 Prior to July 1971, de novo review was by the Tax Court. See 85 Stat. 98.

n4 Through June 30, 1970, 3,524 out of 4,006 cases not resulting in clearances terminated by agreement. Of the remaining 482 cases, the Board's unilateral orders were challenged in court in 203 cases.

n5 The description of the renegotiation process is of the process existing between 1962 through 1965 - the period in which the documents relevant to this case were generated within the Board - notwithstanding changes made since. Unless otherwise indicated, all citations to the Code of Federal Regulations throughout this opinion are to the Renegotiation Board's regulations in effect during this period (i.e., the Code as revised January 1, 1967).

Persons holding contracts or subcontracts with certain departments of the Government were required to file financial statements as prescribed by the Board, 50 *U.S.C. App. § 1215(e)(1)* (1964 ed.); 32 CFR Part 1470, if their receipts from those contracts met the requisite jurisdictional amount, 50 *U.S.C. App. § 1215(f)*. These statements [*173] were reviewed by the staff of the Board, and, if that initial review indicated the possibility that the contractor realized "excessive" profits, the "case" was referred to one of two Regional Boards for further action. n6 At the time of this assignment, [**1495] each case was designated as a Class A case or a Class B case: the former if the contractor had reported profits of more than \$ 800,000 on the relevant contracts covered in his financial statement, and the latter in all other cases. n7 The principal difference between Class A cases and Class B cases was that the Regional Boards had some final decisional authority in the latter and none in the former. 32 CFR §§ 1471.2(b), 1473.2(a), 1474.3(a), and 1475.3(a). Since the documents sought by respondent in this case were all generated in Class A cases, only the procedure applicable to those cases will be discussed.

n6 The reference is normally made on the basis of geographical considerations, 32 CFR § 1471.2(a). These Regional Boards were established in 1952 by regulation, 32 CFR § 1451.32, pursuant to statutory authorization, 50 *U.S.C. App. § 1217(d)*. Unlike members of the

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Board, who are appointed to the Board by the President, Regional Board members are civil servants.

n7 Under certain circumstances, cases may be redesignated after their initial designation. 32 CFR § 1471.2(f).

After reference to a Regional Board, a case was usually assigned to a staff team consisting of an accountant and a renegotiator. n8 This [***65] team, after determining what further information from the contractor was required, secured such information and received any submissions [*174] the contractor might have wanted to make with regard to his case, including his position concerning the statutory factors that largely determined whether he had received "excessive profits," 50 U.S.C. App. § 1213 (e). A document entitled "Report of Renegotiation" was then prepared by the team. Part IA of that report, the accountant's section, contained pertinent financial and accounting data and was furnished to the contractor upon request. n9 Part II of the Report of Renegotiation, prepared by the renegotiator, and not furnished to the contractor, generally contained "an analysis and evaluation of the case; and a recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." 32 CFR § 1472.3 (d). According to testimony given in this case, a Part II in outline form would be as follows: S

"A. Sources of Information

"B. Application of Statutory Factors:

"1. Character of Business

"2. Capital Employed

"3. Extent of Risk Assumed

"4. Contribution to the Defense Effort

"5. Efficiency

"6. Reasonableness of Costs and Profits

"(a) Costs

"(b) Pricing

"(c) Profits

"C. Special Matters

"D. Conclusion and Recommendation."I

n8 During the years 1962-1965, a renegotiator might be a staff member employed by the Regional Board or a member of the Regional Board itself. Under the Board's current regulations, a member of the Regional Board who acts as a renegotiator in a specific case is thereafter barred from participation in the case as a member of the Regional Board. 32 CFR § 1472.3 (d) (1974). There was no comparable regulation in effect during the period relevant to this case.

n9 32 CFR § 1472.3 (d). Under 1972 amendments to the regulations, the Report of Renegotiation was discontinued and was replaced by other reports not relevant to this case. See generally 32 CFR §§ 1472.3 (e)-(g), and (i) (1974).

After a Report of Renegotiation was prepared, but [*175] prior to its submission to the Regional Board, the team assigned to the case endeavored to meet with the contractor to resolve "any issues or disputed matters of fact, law or accounting." 32 CFR § 1472.3 (b). The report was then submitted to the Regional Board.

After reviewing the Report of Renegotiation and the case file, the Regional Board would make a "tentative recommendation [**1496] with respect to the amount of excessive profits realized in the fiscal year under review." 32 CFR § 1472.3 (e). n10 This "tentative recommendation" could "be in an amount greater than, equal to, or less than the amount recommended in the Report of Renegotiation." Ibid. After a "tentative recommendation" was made, the contractor, unless he declined, attended a meeting with the renegotiation team at which he was informed of the tentative recommendation of the Regional Board, as well as the Regional Board's reasons therefor, and was afforded the opportunity to [***66] respond. The Regional Board would then enter a "final recommendation" either that a clearance be issued or that excessive profits be found in an amount greater than, equal to, or less than the tentative

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recommendation reached previously. If this final recommendation of the Regional Board corresponded to that of the staff team or panel, the report would be signed by the chairman of the Regional Board, signifying the approval of the staff or panel recommendation; if the Regional Board's final recommendation differed from the prior recommendation, an addendum would be attached to the report. The Report of Renegotiation with addenda, if any, will hereafter be referred to for convenience as the Regional Board Report.

n10 Under current regulations, the Regional Board no longer makes this "tentative recommendation" in Class A cases, 32 CFR §§ 1472.3 (k) and (l) (1974).

[*176] (i)

Assuming the Regional Board did not recommend a clearance, it notified the contractor of its final recommendation in an effort to obtain an agreement. Toward this end, the contractor, upon request, would be furnished a "summary of the facts and reasons" (Summary) upon which the recommendation was based. 32 CFR § 1472.3 (i). n11 If a contractor did not request such a document, there is no indication that one was ever prepared in his case.

n11 This document was made available to the general public by regulation on February 24, 1971. 32 *Fed Reg.* 3808, 32 CFR § 1480.5 (a) (1972). When the Board first made the summaries of facts and reasons available to the public by regulation, it specifically stated that its action was taken "[w]ithout regard to the provisions of 5 U.S.C. [§] 552 (a)(2)...." *Ibid.* Subsequent to the effective date of that regulation, the District Court in this case, notwithstanding the fact that the controversy over respondent's access to the summaries of facts and reasons sought in this action had apparently been mooted, held that these documents must be made available under the ACT as "final opinions" of either the Board or the Regional Board, except in certain circumstances. 325 *F. Supp.* 1146, 1151-1152 (DC 1971). The Board has since amended its regulations, indicating that its own interpretation of the Act as to these documents is now consistent

with that of the District Court. 32 CFR § 1480.5 (a) (1974). Under current Board regulations, the contractor automatically receives a document entitled "Proposed Opinion," if he has not indicated a willingness to enter into an agreement with the Board. 32 CFR § 1477.3 (a) (1974).

If the contractor declined to enter into an agreement, the case was then reassigned to the Board, to which the case file including the Regional Board Report was transmitted. The case was then assigned to a "division" of the Board, usually consisting of three of its five members, which would undertake a study of the case. Staff personnel would go over both Part IA and Part II of the Regional Board Report and indicate, in memoranda, their [*177] agreement or disagreement with the recommendation made by the Regional Board. At an appropriate juncture, the contractor would be afforded an opportunity to meet with the division members to discuss his case and submit additional relevant material. The division, in due course, would reach its own decision as to what recommendation should be made to the Board, "not... bound or limited in any manner [**1497] by any evaluation, recommendation or determination of the Regional Board." 32 CFR § 1472.4 (b). The division would then submit to the full Board a report of the case, prepared by one of the members (Division Report), and including a recommendation for final disposition along with additional or contrary views, if [***67] any, of the other division members. The Division Report is one of the categories of documents sought by respondent under the Act.

The Board would then meet, each member having had the opportunity to study the case file and the report submitted on behalf of the division, discuss the case, and vote on a final disposition. Neither the Board nor any of its members were bound by any prior recommendations. The Board was free, after discussion, to reject the proposed conclusion reached in the Division Report, or to accept it for reasons other than those set forth in the report. 32 CFR § 1472.4 (d). Assuming the Board did not decide that a clearance should issue, the contractor was then notified of the Board's conclusion and would be given, at his request, a Summary to enable him to decide whether to enter into an agreement with the Board. If an agreement was not reached, the Board would then enter a unilateral order within a specified time, 32 CFR Part 1475, and would issue, pursuant to statute, at the request

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of the contractor, a "statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination." 50 U.S.C. App. [*178] § 1215 (a) (Statement). n12 Absent a contractor's request for a Statement, there is no indication that one was ever prepared in his case. For this type of case, the renegotiation process thus came to an end. n13

n12 The "Summaries" and "Statements" were similar in both format and content. App. 35-41; 32 CFR § 1477.4. Under current Board regulations, the Regional Board now issues to the contractor a "Proposed Opinion," in lieu of the "summary of facts and reasons" discussed above, and furnishes to the contractor a "Regional Board Opinion" when the Regional Board's recommendation is forwarded to the Board. 32 CFR §§ 1477.3 (a) and (c) (1974). The Board also issues a "Final Opinion" in place of the Statement at the same time as it enters a unilateral order. 32 CFR § 1477.3 (b) (1974). All of these documents are available to the public. 32 CFR § 1480.5 (a) (1974).

n13 A dissatisfied contractor had the right at this point to bring an action in the Tax Court, which had jurisdiction to determine de novo whether excessive profits had been realized (see n. 3, supra); jurisdiction of these cases has subsequently been transferred to the Court of Claims. See *Renegotiation Board v. Bannercrest Clothing Co.*, 415 U.S. 1, 15 and n. 14 (1974).

(ii)

If the Regional Board concluded that no excessive profits had been realized by a particular contractor and that a clearance should therefore issue - or if the contractor agreed with the Regional Board as to an amount of excessive profits before the case was reassigned to the Board - then a Division Report was never created in that case. Instead, a "final recommendation" that a clearance be issued or that the agreement be consummated was sent to the Board, and the Board considered the case on the basis of the Regional Board Report, together with comments made by the Board's accounting and review divisions. After meeting and discussing the case on the basis of these documents, the Board decided whether to approve the

Regional Board's conclusion. If it did, appropriate closing documents were prepared by the [*179] Regional Board. No explanation of the Board's reasons for agreeing with the Regional Board's recommendation was prepared or sent to the contractor; and it is not possible to know whether the Board agreed with the reasoning [***68] of the Regional Board Report or just its conclusion. If the conclusion of the Regional Board was not approved, [**1498] the case was either returned to the Regional Board for further factfinding, or assigned to a division of the Board as though no recommendation agreeable to the contractor had ever been made. The Regional Board Reports in the category of cases in which clearances were recommended and approved by the Board - and therefore in which no Division Report was created - is the other type of document in issue in this case.

II

Against the foregoing backdrop, respondent filed a complaint, pursuant to the Act, in the District Court on June 27, 1968, seeking disclosure of "certain final opinions, orders and identifiable records" related to or issued during renegotiation proceedings involving 14 other companies during the period 1962-1965. n14 Respondent additionally sought certain documents related to its then-pending renegotiation proceedings before the Board for 1965, but later agreed that it was not seeking access to "[i]ntra-agency memoranda and communications consisting of advisory [*180] opinions, conclusions recommendations, and analyses prepared by personnel and members of the Board" in its own case. 138 U.S. App. D.C. 147, 150, 425 F. 2d 578, 581 (1970). The District Court denied relief. On appeal, the Court of Appeals appears to have assumed that the "opinions" sought by respondent were limited to Statements and Summaries as defined in 32 CFR § 1480.8. n15 138 U.S. App. D.C., at 148, and n. 2, 425 F. 2d, at 579, and n. 2. On this basis, the Court of Appeals reversed, rejecting the claim of the Renegotiation Board that the documents sought were "completely immune" from disclosure under 5 U.S.C. § 552(b)(4), the provision of the Act exempting certain privileged or confidential information submitted to the Government by any person. n16 The court, stating that the Board was required to make available "final opinions, including concurring and dissenting [***69] opinions," n17 remanded the case to the District Court for further proceedings in which the requested documents were to be made available after "suitable deletions." 138 U.S. App. D.C., at 150, 425 F. 2d, at 581.

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n14 By reference in its complaint to correspondence between it and the Board of April 26, 1968, respondent requested access to "final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases" and "written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached." Nothing in the complaint or the letter suggests that, at that time, respondent sought the Regional Board Report, or the Division Report, in any of these renegotiation cases.

n15 Title 32 CFR § 1480.8 read in pertinent part:

"Except as authorized... opinions and orders will not be published or made available to the public... inasmuch as they are regarded as confidential... by reason of the confidential data furnished by contractors.... For the purposes of this paragraph, the term 'opinion' includes a statement furnished pursuant to [32 CFR Part 1477] and the term 'order' includes an agreement to eliminate excessive profits, as well as a unilateral determination. Opinions and orders are not cited as precedents in any renegotiation proceedings." Part 1477, as written during the period 1962-1967, included only Statements and Summaries.

n16 Title 5 U.S.C. § 552(b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential matters."

n17 *138 U.S. App. D.C., at 149, 425 F. 2d, at 580*, quoting from 5 U.S.C. § 552(a)(2)(A).

n18 A more detailed description of the documents sought is set out in the opinion written by the District Court after the initial remand from the Court of Appeals, *325 F. Supp., at 1151*.

[*181] Subsequent to the remand of the case by the Court of Appeals, the Board turned over to respondent certain documents, including Statements and Summaries,

in attempted compliance with the mandate of that court. Respondent, not satisfied with the documents so disclosed, moved in the District Court for the disclosure, inter alia, of (1) Division Reports in all cases in which neither "Statements" nor "Summaries" were created; (2) Regional Board Reports resulting [**1499] in a clearance; and (3) any document concurring in or dissenting from (1) and (2) above. n18

On the question whether these documents were "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), the District Court permitted respondent to take the deposition of the then Chairman of the Board. That deposition of the Chairman constitutes almost the only evidence of record in this case bearing on this question other than the pertinent statutes and regulations. Although conceding, as it had to on the basis of the Chairman's deposition, that only the Board had final decisional authority, and that it studies and considers, but does not adopt Regional Board or Division Reports, the District Court held that these reports were "final opinions" for purposes of the Act and rejected the Board's contention that the documents were specifically exempted from disclosure under subsection (b)(5) of the Act, 5 U.S.C. § 552(b)(5) (Exemption 5), which encompasses: S

"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." I [*182] As to the Regional Board Reports in clearance cases, the court characterized the clearance as the "decision" of the Regional Board "unless the Board is not in accord"; and held that "[i]n order for the public to be fully informed, the reasons behind the clearance... must be made available and in this type of case such... reasons are found in the Regional Board's report." As to the Division Reports, the court said that, although the Board may disagree with the reasoning of the report, "[i]t is in fact the last document which explains reasons for the Board's decision," it should "at the very least... reflect the analysis of one member," and thus it must be disclosed at least as a "concurring [or] dissenting opinion." 5 U.S.C. § 552(a)(2)(A). On appeal, the Court of Appeals affirmed the "findings of fact" and "conclusions" reached by the District Court and found two additional grounds supportive of the lower court's judgment as to the Regional Board Reports. The court held that, even if the [***70] Regional Board Reports recommending a

clearance subsequently approved by the Board n19 were not "final opinions" of the Board, they were disclosable as final opinions of the Regional Board: the Regional Board itself was to be considered an "agency" for purposes of the Act, and the reports were certainly its "final opinions" and, as such, they were disclosable under the express provisions of 5 U.S.C. § 552(a)(2)(A) and therefore outside the scope of Exemption 5. In concluding that the Regional Boards are agencies, the court relied in part on the power of the Regional Boards finally to dispose of certain Class B [*183] cases. n20 In concluding that its decisions were "final," notwithstanding inevitable Board review, it analogized the power of the Regional Board in Class A cases to the power of a United States district court: the former's decisions being reviewable by the Board and the latter's by a United States court of appeals. The fact that the Regional Board's decisions were subject to review did not obviate the [*1500] fact, any more than it does in the case of a United States district court, that its decisions are "final," 157 U.S. App. D.C. 121, 128, 482 F. 2d 710, 717 (1973), and that its report leading to a clearance was performe a "final opinion" of an "agency" subject to disclosure under the Act. The Court of Appeals additionally held that the Regional Board Reports were, in any event, "identifiable records," 5 U.S.C. § 552(a)(3), which are disclosable, unless exempt, and that these reports were not within the purview of Exemption 5 of the Act, because they "are not solely part of the consultative and deliberative process, but rather reflect actual decisions communicated outside the agency." 157 U.S. App. D.C., at 129, 482 F. 2d, at 718. See NLRB v. Sears, Roebuck & Co., ante, p. 132.

n19 The District Court had held the reports of Regional Boards to be disclosable only in instances where a regional Board made a final recommendation for a clearance and the Board concurred in the recommendation. *Id.*, at 1154. The Court of Appeals did not purport to extend the holding of the District Court to Regional Board Reports in other contexts.

n20 157 U.S. App. D.C. 121, 126-127, and nn. 20 and 23, 482 F. 2d 710, 715-716, and nn. 20 and 23 (1973).

The Board brought the case to this Court and we granted certiorari, 417 U.S. 907 (1974), setting the case for argument with NLRB v. Sears, Roebuck & Co., ante, p. 132, in order to resolve the important questions presented particularly with respect to the proper construction and interpretation of Exemption 5 of the Act. For reasons set forth hereafter, we reverse the judgment of the Court of Appeals.

III

[**LEdHR1A] [1A] [**LEdHR2A] [2A] [**LEdHR3A] [3A] [**LEdHR4] [4] Strictly speaking, the issue in this case is whether the Division Reports and the Regional Board Reports fall [*184] within Exemption 5, pertaining to "inter-agency or intra-agency memorandums... which would not be available by law to a party other than an agency in litigation with the agency." [**71] 5 U.S.C. § 552(b)(5). n21 As we hold today in the companion case of NLRB v. Sears, Roebuck & Co., ante, at 149, Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context; and both Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not. Because only the full Board has the power by law to make the decision whether excessive profits exist; because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that the reasoning in the reports is adopted by the Board as its reasoning, even when it agrees with the conclusion of a report, we conclude [*185] that the reports are not final opinions and do fall within Exemption 5.

[**LEdHR3B] [3B]

n21 Grumman claims that the documents are "final opinions" expressly made disclosable, pursuant to 5 U.S.C. § 552(a)(2)(A). However, as we noted in the companion case of NLRB v. Sears, Roebuck & Co., ante, at 147-148, a conclusion that the documents are within

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Exemption 5 would be dispositive in the Government's favor, since the Act "does not apply" to such documents; and a contrary conclusion would be dispositive against the Government, since it concedes that the documents are "identifiable records" otherwise disclosable pursuant to 5 U.S.C. § 552(a)(3). Thus, strictly speaking, the question whether the documents are "final opinions" is relevant only in deciding whether Exemption 5 applies to them and is important only because we have construed Exemption 5 in *NLRB v. Sears, Roebuck & Co.*, ante, at 153-154, not to include "final opinions" within the meaning of 5 U.S.C. § 552(a)(2)(A).

A. Regional Board Reports

It is undisputed that the Regional Boards had no legal authority to decide whether a contractor had received "excessive profits" in Class A cases. n22 [**1501] In such cases, the Regional Boards could investigate and recommend, but only the Board could decide. 32 CFR §§ 1472.3-1472.4. The reports were prepared long before the Board reached its decision. The Board used the Regional Board Report as a basis for discussion and, even when it agreed with the Regional Board's conclusion, it often did so as a result of an analysis of the flexible statutory factors completely different from that contained in the Regional Board Report. Chairman Hartwig testified: I

"[W]hen the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or [***72] adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. [*186]

And there is no Board-adopted document which you could call an opinion." App. 79.1

n22 We decline to consider whether this case would be different if the Regional Boards had de facto decisional authority - i.e., if, instead of making up its own mind in each case, the Board "reviewed" the Regional Board's recommendation under a clearly erroneous or some other deferential standard; or if the Board failed even to

review the vast bulk of the reports, absent special circumstances. There is no evidence in the record indicating that the Regional Boards had such de facto authority. Indeed, the evidence is to the contrary. In a recent review by the Comptroller General of 209 cases, the Board concurred in the Regional Board's recommendation only 85 times. Comptroller General, Report to the Congress: The Operations and Activities of the Renegotiation Board 33-34 (B-163520 - May 1973).

[***LEdHR1B] [1B]The Regional Board Reports are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. Moreover, absent indication that its reasoning has been adopted, there is little public interest in disclosure of a report. "The public is only marginally concerned with reasons supporting a [decision] which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a [decision] which was actually adopted on a different ground." *NLRB v. Sears, Roebuck & Co.*, ante, at 152. Indeed, release of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading. *Sterling Drug, Inc. v. FTC*, 146 U.S. App. D.C. 237, 246-247, 450 F. 2d 698, 707-708 (1971); *International Paper Co. v. FPC*, 438 F. 2d 1349, 1358 (CA2), cert. denied, 404 U.S. 827 (1971). Accordingly, these reports are not "final opinions," they do fall within the protection of Exemption 5, and they are not subject to compulsory disclosure pursuant to the Act.

The Court of Appeals' attempt to impute decisional authority to Regional Boards by analogizing their final recommendations to the final decisions of United States district courts must fail. The decision of a United States district court, like the decision of the General Counsel of the NLRB discussed in *NLRB v. Sears Roebuck & Co.*, ante, at 158-159, n. 25, has real operative effect independent of "review" by a court of appeals: absent appeal by one of the parties, the decision has the force of law; and, even if an appeal is filed, the court [*187] of appeals will be bound, within limits, by certain of the

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district court's conclusions. n23 The recommendation of a Regional Board, by contrast, has no operative effect independent of the review: consideration of the case by the Board is not dependent on the decision by a party to "appeal" - such consideration is an inevitable event without which there is no agency decision; and the recommendation of the Regional Board carries no legal weight whatever before the Board - review by the latter is, as the Court of Appeals conceded, [**1502] de novo. Indeed, "review" is an entirely inappropriate word to describe the process by which the Board decides whether to issue a clearance following a recommendation to that effect by the Regional Board. The latter's recommendation is functionally indistinguishable from the recommendation of any agency staff member whose judgment has earned the respect of a decisionmaker. There is simply no sense in which Regional Boards have the power to make "final dispositions" and thus no sense in which the explanations of [***73] their recommendations can be characterized as "final opinions." n24 See *NLRB v. Sears, Roebuck & Co.*, ante, at 158-159.

n23 Fact determinations, for example, are reviewable under a "clearly erroneous" standard and certain legal judgments only for abuse of discretion.

n24 The distinction, between "recommendations" and "final opinions" subject to review, for Exemption 5 purposes is compelling. In order that a decisionmaker consider all the arguments in support of all the options, those who recommend should be encouraged to make arguments which they would not make in public and with which they may even disagree. However, if their recommendations were to have operative effect and thus qualify as decisions - even though subject to review - they should be discouraged from basing their decisions on arguments which they would not make publicly and with which they disagree.

[***LEdHR1C] [1C] [***LEdHR5] [5] In concluding that the Regional Board Reports are within the scope of Exemption 5, it is unnecessary to [*188] decide whether, as respondent strenuously argues and the Court

of Appeals concluded, the Regional Boards are themselves "agencies" for the purposes of the Act. Respondent and the court below proceed on the premise that the final written product of an "agency's" deliberations may never fall within Exemption 5, and reason that since the Regional Board Report is the final product of the Regional Board, it must therefore be disclosable if the Regional Board is a separate agency. n25 The premise is faulty, however, overlooking as it does the fact that Exemption 5 does not distinguish between inter- agency and intra- agency memoranda. By including inter- agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency. Thus, if the Regional Boards are agencies for Class A purposes, their final recommendations are inter- agency memoranda; and, if they are not agencies separate from the Board, their recommendations are intra- agency memoranda. In either event, the Regional Boards' total lack of decisional authority brings their reports within Exemption 5 and prevents them from being "final opinions."

n25 We note in passing that, while the conclusion of the court below that the Regional Board's status as an agency stemmed from its power to issue "orders" in Class B cases finds support in the cases, *International Paper Co. v. FPC*, 438 F.2d 1349, 1359-1359 (CA2), cert. denied, 404 U.S. 827 (1971); *Washington Research Project, Inc. v. Department of HEW*, 164 U.S. App. D.C. 169, 504 F. 2d 238 (1974), cert. pending, No. 74-736, the Court of Appeals never considered the possibility that the Regional Board might be an agency for Class B purposes and not for Class A purposes.

[*189] B. Division Reports

[***LEdHR2B] [2B] It is equally clear that a division of the Board has no legal authority to decide. Once again, it may analyze and recommend, but the power to decide remains with the full Board. The evidence is uncontradicted that the Division Reports were prepared before the Board reached its decision, were used by the

full Board as a basis for discussion, and, as the Chairman testified, were "prepared for and designed to assist the members of the Board in their deliberations"; nor is the discussion limited to the material and analysis contained in the Division Report. Following the discussion, any Board member may disagree with the report's conclusion or agree with it for reasons other than those contained [***74] in the report. Indeed, as Chairman Hartwig testified, it is [**1503] likely that this will occur because of the highly judgmental nature of the Board's decisions given the number and generality of the statutory criteria. In any event, the reasoning of the Division Report is never adopted - though its conclusion may be - and no effort is made to reach agreement on anything but the result.

[***LEdHR6A] [6A] It is true that those who participate in the writing of the Division Report are among those who participate in the Board's decision, and that, human nature being what it is, they may not change their minds after discussion by the full Board. This creates a greater likelihood that the Board's decision will be in accordance with the Division Report than is the case with respect to a Regional Board Report and that, where the Board's decision is different, the Division Report will reflect the final views of at least one of the Board's members. See *NLRB v. Sears, Roebuck & Co.*, ante, at 158-159, n. 25. However, this is not necessarily so. The Board obviously considers its discussion following the creation of the Division Report to be of crucial importance to its decision for, notwithstanding [*190] the fact that a division is made up of a majority of the Board, it has been delegated no decisional authority. The member of the Board who wrote the report may change his mind as a result of the discussion or, consistent with the philosophy of Exemption 5, he may have included thoughts in the report with which he was not in agreement at the time he wrote it. The point is that the report is created for the purpose of discussion, and we are unwilling to deprive the Board of a thoroughly uninhibited version of this valuable deliberative tool by making Division Reports public on the unsupported assumption that they always disclose the final views of at least some members of the Board. n26

[***LEdHR6B] [6B]

n26 Since all of the members of the division are free to change their minds after deliberation

and are free to place thoughts or arguments in the Division Reports which were only tentative in the first place, we need not reach the question whether a concurring or dissenting opinion must be disclosed even where no opinion expressing the view of the agency is written.

Respondent argues that Division Reports, as well as concurrences or dissents thereto, constitute "final opinions" of the Board or individual members of the Board, relying on a specific reference, assertedly made to such documents, in the House Report which accompanied the Act, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). That report, in speaking to the Committee's understanding of what is now codified as 5 U.S.C. § 552(a)(2)(A), stated:

"[Subsection (A)] requires concurring and dissenting opinions to be made available for public inspection. The present law, requiring most final opinions and orders to be made public, implies that dissents and concurrences need not be disclosed. As a result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies - including... the Renegotiation Board - do not make public the minority views of their members." H.R. Rep. No. 1497, supra, at 8.

This statement from the legislative history of the Act supports the proposition that Congress intended the Board to be subject to the Act's provisions, *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S., at 16, and at first blush lends support to respondent's contention that Congress assumed, in passing the Act, that the Board was issuing "final opinions" in cases, that the Board was withholding concurrences and dissents to those final opinions, and that § 552(a)(2)(A) was designed to put an end to this practice. Our research convinces us, however, that this language from the House Report is not to be so read. The "survey" referred to in the report was conducted in 1963 by the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations of the

421 U.S. 168, *190; 95 S. Ct. 1491, **1503;
44 L. Ed. 2d 57, ***LEdHR6B; 1975 U.S. LEXIS 119

House. The unpublished data gathered during that survey indicate that, in response to three questions submitted by the subcommittee to the Board, concerning its practices with respect to opinion writing and publication, the Board stated:

"Except as authorized in Renegotiation Board Regulations 1480.4 (a) (attached), opinions and orders of the Renegotiation Board are not published or made available to the public (see RBR [32 C.F.R. §] 1480.8)...."

As our prior discussion of 32 CFR § 1480.8, n. 15, supra, makes clear, the "opinions" to which the Board referred were Statements and Summaries. Thus, the reference to concurring and dissenting opinions in the House Report, with respect to the Renegotiation Board, was not to Division Reports but was to nonexistent concurrences to and dissents from Statements and Summaries which were already being made public.

[*191]

[***LEdHR7] [7] [***LEdHR8] [8] [***LEdHR9] [9]The [***75] [**1504] effect of this decision is that, in those cases in which Statements and Summaries were not issued, the public will be largely uninformed as to the basis for decisions by the Renegotiation Board. Indeed, the decisions of both courts below - conceding as they both did the absence of decisional authority in either the Regional Boards or divisions of the statutory board - appear to have rested in the final analysis on the notion that the Renegotiation Board has an affirmative obligation under the Act to make public the reasons for its decisions; and that it must disclose its opinion or the nearest thing to an opinion in every case. However, Congress explicitly exempted the Renegotiation Board from all provisions of [*192] the Administrative Procedure Act except for the Public Information Section. 50 U.S.C. App. § 1221. Thus the opinion-writing section of the APA, 5 U.S.C. § 557 - which itself applies only to "adjudication required by statute to be determined on the record after opportunity for an agency hearing" and even then only if the agency decision is not subject to de novo court review, 5 U.S.C. § 554 - is inapplicable to Board decisions. The Freedom of Information Act imposes no independent obligation on agencies to write opinions. It

simply requires them to disclose the opinions which they do write. NLRB v. Sears, Roebuck & Co., ante, p. 132. If the public interest suffers by reason of the failure of the Board to explain some of its decisions, the remedy is for Congress to require it to do so. It is not for us to require disclosure of documents, under the purported authority of the Act, which are not final opinions, which do not accurately set forth the reasons for the Board's decisions, and the disclosure of which would impinge on the Board's predecisional processes.

The judgment of the Court of Appeals is

Reversed.

Mr. JUSTICE DOUGLAS dissents.

Mr. JUSTICE POWELL took no part in the consideration or decision of this case.

REFERENCES: Return To Full Text Opinion

65 Am Jur 2d, Public Works and Contracts 141; 66 Am Jur 2d, Records and Recording Laws 32-46

24 Am Jur Pl & Pr Forms (Rev ed), War, Form 4

2 Am Jur Trials 409, Locating Public Records; 14 Am Jur - Trials 437, Representing the Government Contractor

5 USCS 552

US L Ed Digest, Administrative Law 64; War 15.3

ALR Digests, Administrative Law 53; United States 5

L Ed Index to Annos, Freedom of Information Act; United States

ALR Quick Index, Freedom of Information Acts; Public Works and Contracts; Renegotiation

Federal Quick Index, Freedom of Information Acts; Public Works and Contracts; Renegotiation Act

Annotation References:

Construction and application of Federal Administrative Procedure Act. 94 L Ed 631, 95 L Ed 473, 97 L Ed 884.

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421 U.S. 168, *192; 95 S. Ct. 1491, **1504;
44 L. Ed. 2d 57, ***75; 1975 U.S. LEXIS 119

Governmental privilege against disclosure of official information. 95 L Ed 425, 97 L Ed 735.

What constitutes "final opinion" or "order" of federal administrative agency required to be made available for public inspection within meaning of Freedom of Information Act (5 USCS 552(a)(2)(A)). 20 ALR Fed 400.

Scope of judicial review under Freedom of

Information Act (5 USCS 552(a)(3)), of administrative agency's withholding of records. 7 ALR Fed 876.

What are inter-agency or intra-agency memorandums or letters exempt from disclosure under the Freedom of Information Act (5 USCS 552(b)(5)). 7 ALR Fed 855.

Renegotiation of war contracts. 153 ALR 1455, 158 ALR 1490.

2 of 17 DOCUMENTS



Analysis

As of: Apr 05, 2007

**SHERMCO INDUSTRIES, INC. and Peter A. Sherman, Plaintiffs-Appellees, v.
SECRETARY OF the AIR FORCE, Defendant-Appellant.**

No. 78-2499

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

613 F.2d 1314; 1980 U.S. App. LEXIS 19498; 27 Cont. Cas. Fed. (CCH) P80,280

March 19, 1980

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Northern District of Texas.

COUNSEL:

Alice Mattice, Leonard Schaitman, Dept. of Justice, Appellate Section, Washington, D. C., for defendant-appellant.

Wesner & Wyler, C. Thomas Wesner, Jr., Dallas, Tex., for plaintiffs-appellees.

JUDGES:

Before BROWN, TJOFLAT and GARZA, Circuit Judges.

OPINION BY:

BROWN

OPINION:

[*1315]

After its bid for a contract to overhaul airborne generators was rejected by the Air Force, Appellee Shermco Industries, Inc. (Shermco) filed a protest with

the General Accounting Office (GAO) and requested from the Air Force the production of several documents in connection with this protest. [*1316] The Air Force produced all but seven of these documents and Shermco sued for their disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1977) (FOIA). The District Court ordered the production of the documents, holding that the exemptions of 5 U.S.C. §§ 552(b)(4) and (5) were inapplicable. n1 We reverse.

n1. *Shermco Industries, Inc. v. Secretary of the Air Force*, 452 F. Supp. 306 (N.D.Tex.1978).

I. Factual [2] Background**

In 1976, Shermco had a five-year contract with the Air Force to overhaul airborne generators at McClellan Air Force Base near Sacramento, California. The Air Force terminated the contract in its third year, citing "quality problems," and solicited offers from a number of contractors, including Shermco, to continue the work. On October 14, 1976, Shermco was informed that Tayko Industries, Inc. (Tayko) was the lowest acceptable bidder and that Shermco's bid was rejected. On October 22, 1976, Shermco filed a protest with the GAO pursuant to 4 CFR Part 20 (1979). Shermco and its president made several requests to the Air Force for information

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concerning Tayko's bid to help Shermco implement its protest. These requests included ones made under FOIA and the Privacy Act. n2 The Air Force produced twenty-four of the requested items but withheld seven others three legal memoranda which had been attached to the Air Force's response to the protest, the contracting officer's recommendation prepared in connection with the protest, n3 and three documents containing Tayko's basic pricing information, including "items, quantities and unit prices." On November 10, 1977, Shermco filed suit [**3] against the Secretary of the Air Force to obtain these documents, pursuant to FOIA and the Privacy Act.

n2. 5 U.S.C. § 552a (1977).

n3. Since the Air Force has decided to release the contracting officer's recommendation, the disclosure of this document is not at issue on this appeal.

The District Court held that FOIA required the disclosure of all seven documents requested. The Secretary appeals this holding and we reverse. n4

n4. At oral argument, this Court learned that in December, 1978, the GAO denied Shermco's protest. At first glance it seems that this would give the Air Force the right to make a final award of the contract to Tayko and moot the central issue of this appeal, whether or not the Air Force's decision is final. However, Shermco can request reconsideration of the decision by the GAO. 4 CFR § 20.9 (1979). Moreover, Congress has amended the Small Business Administration Act to give the SBA the power to determine the competency of a small business to perform a government procurement contract. This Certificate of Competency, once awarded, is deemed conclusive proof of the small business' abilities, and the contract must be awarded to it. Pub.L. 95-89, Title V, § 501, Aug. 4, 1977, 91 Stat. 561; 15 U.S.C. § 637(b)(7) (West Supp.1979). See House Conference Report 95-535, 1977 U.S.Code Cong. & Admin.News vol. 2 at 821, 851-52. The current status of the proceedings in this case is that the Air Force has not yet awarded the contract to Tayko but is doing the work internally. Thus, there has not yet been a

final decision, and since the Appellee still has remedies it can seek from the GAO and the SBA, this appeal is not moot.

[**4]

II. The Cost Proposals And Exemption 4

The Air Force's basis for the withholding of Tayko's cost proposals was Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4), which provides that the Government is not required to disclose

trade secrets and commercial or financial information obtained from a person and privileged or confidential

The Air Force argued that because there had not been a final award of the contract, this information should remain confidential until a final award was made. To disclose this information before a final decision was made would make it more difficult for the Air Force to make its final decision and would be prejudicial to the low bidder, undermining his competitive advantage.

[*1317] The District Court conceded that the decision was not yet technically final (452 F. Supp. at 322) and that, if there were no final award, Exemption 4 would apply (*Id.* at 324). However, the Court found that, for purposes of FOIA, the decision was final (*Id.* at 322), and that "(a)ny need for secrecy (was) no longer present because the award (would) be made either to the successful bidder or the protester" *Id.* at 324. Therefore, the Court concluded, the [**5] cost proposals were no longer confidential nor exempt.

The purpose of Exemption 4 is twofold to protect the interests of individuals who disclose confidential information to government agencies and to protect the *Government as well. National Parks and Conservation Association v. Morton*, 162 U.S.App.D.C. 223, 228, 498 F.2d 765, 770 (D.C. Cir. 1974). n5 This information concerning Tayko's cost proposals, in the hands of a competitor prior to the time of a final award, would jeopardize the Air Force's ability to discern clearly which bidder could do the best job for the lowest price. Moreover, the nondisclosure of this information is in keeping with the Armed Services Procurement Regulations (ASPR) policy prohibiting bidding with knowledge of competing bids. n6 Nondisclosure prior to final award also encourages competing bidders to enter

bids which accurately reflect their capabilities and their costs; this secrecy protects the bargaining power of each competitor's bid. Absent the assurance of this confidentiality, bidders might be reluctant to disclose such information to the procuring government agency.

n5. In *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 355-360 99 S. Ct. 2800, 2810-2812, 61 L. Ed. 2d 587, 601-03 (1979), the need for nondisclosure of information received by an agency concerning the award of a contract, prior to the award of that contract, is acknowledged and discussed in the context of Exemption 5, the exemption for certain intra- and inter-agency memoranda (discussed *Infra* at 1318-1319. Further discussion of the *Merrill* opinion is at note 11, *Infra*. We believe the need for secrecy of commercial information prior to the award of a contract is equally, if not more important in the context of Exemption 4, where the information is derived from a private party, rather than a government agency.

[**6]

n6. ASPR 3-805.3(b) & (c); 32 CFR 3.805.3(b) & (c) (1976):

3-805.3 Discussions With Offerors.

(b) Discussions shall not disclose the strengths or weaknesses of competing offerors, or disclose any information from an offeror's proposal which would enable another offeror to improve his proposal as a result thereof.

(c) Auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to another offeror. On the other hand, it is permissible to inform an offeror that his price is considered by the Government to be too high.

On appeal, the Air Force reasserts the same argument that their selection of Tayko as the lowest acceptable bidder did not amount to a final award. To support this

contention it cites GAO briefing papers stating that the effect of a GAO ruling in favor of a protestor in a pre-award protest is not necessarily that he will be awarded the contract. It may mean the contract bidding will be reopened to choose the next lowest responsible bidder. [**7] Therefore, the reasons for withholding the cost proposals pursuant to Exemption 4 still exist.

We feel that the District Court misunderstood the bid protest procedure when it characterized the award as a final decision. The October 14th notice to Shermco was of a proposed award to Tayko; it was not a final decision. The District Court's statement that there was no need for secrecy because the award would be made either to Tayko or to Shermco is contrary to GAO protest procedure. It is amply clear from the record and from oral argument that there is a possibility that if the protest were to succeed either before the GAO, the SBA or some other forum, the bidding could be reopened. Thus, the Tayko pricing information [*1318] is covered by Exemption 4 and should not have been disclosed. n7

n7. Recently, in *Audio Technical Services, Ltd. v. Department of Army*, C.A. 487 F. Supp. 779 (1979), the Federal District Court of the District of Columbia specifically rejected the position of the Northern District of Texas in *Shermco* and held that bid proposals of a successful bidder for a government contract, sought by an unsuccessful bidder in conjunction with a GAO protest, fell within Exemption 4. Interestingly, the District of Columbia Court so held, even though it characterized the award of the contract as final. Instead, the Court relied solely on the policy considerations, holding *Sub silentio* that the need for secrecy remains even after a final award.

[**8]

III. The Legal Memoranda And Exemption 5

The refusal of the Air Force to disclose three legal memoranda attached to its response to Shermco's protest was based on Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5):

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 . . .)

The District Court found the Air Force memoranda to be "legal opinions prepared to assist the contracting officer in making his decision awarding the overhauling contract," which would not normally have been releasable because of this exemption. 452 F. Supp. at 322. However, since, according to the District Court, the Air Force award of the contract to Tayko was a final decision, these intra-agency memoranda in defense of the bid protest became part of that decision and were releasable under *NLRB v. Sears-Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). Moreover, it was the District Court's opinion that by sending these memoranda to the GAO, the Air Force had waived its rights to assert the confidentiality of these otherwise internal staff opinions. 452 F. Supp. at 322. These memoranda [**9] had become part of the Air Force's "official position" against the protest by Shermco. For both reasons, these documents were deemed releasable.

A. The Executive Privilege For Communications Relating To Governmental Deliberations

Exemption 5 incorporates at least two n8 types of privileges traditionally available to the Government in civil litigation (i) the attorney-client and attorney work-product privileges n9 and (ii) the executive privilege for information relating to governmental deliberations. *NLRB v. Sears Roebuck & Co.*, supra, 421 U.S. at 149-54; 95 S. Ct. at 1515-1518, 44 L. Ed. 2d at 46-49.

n8. A very recent Supreme Court decision, *Federal Open Market Committee v. Merrill*, supra, holds that Exemption 5 also incorporates a qualified privilege for confidential commercial information, modeled along the lines of *F.R.Civ.P. 26(c)(7)*. This exemption is discussed in more detail Infra at note 11.

n9. Because we hold that the Air Force's legal memoranda come under the executive privilege of Exemption 5, we need not consider Appellants' alternative argument that these memoranda are also exempt as attorney work-products.

[**10]

The executive privilege grew out of a need to protect the governmental decision-making process by assuring those persons, both inside and outside the decision-making agency, who offer information and opinions to the Government that their communications will be kept in confidence. *NLRB v. Sears*, supra, 421 U.S. at 151-52, 95 S. Ct. 1516-1517, 44 L. Ed. 2d 47-48. See *Mead Data Central, Inc. v. United States Department of Air Force*, 184 U.S. App. D.C. 350, 225-226, n. 28, 566 F.2d 242, 254-55, n. 28 (D.C. Cir. 1977). For this reason, the Supreme Court has distinguished between pre-decisional communications which are exempt from disclosure and post-decisional communications which are not. *NLRB v. Sears*, 421 U.S. at 152-53, 95 S. Ct. at 1517, 44 L. Ed. 2d at 48-49; *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184, 95 S. Ct. 1491, 1500; 44 L. Ed. 2d 57, 71 (1975). See *Audio Technical Service v. Army*, supra. Disclosure of pre-decisional communications presents more [*1319] danger that governmental sources of information and advice will be inhibited. Besides, there is less public concern for this information, whereas the public is vitally interested in learning [**11] an agency's reasons for a final decision which has the effect of law. *NLRB v. Sears*, supra, 421 U.S. at 151-52, 95 S. Ct. at 1516-1517, 44 L. Ed. 2d at 47-48.

In *Sears*, the Supreme Court emphasized that this distinction is supported by FOIA itself 5 U.S.C. § 552(a)(2)(A) n10 which requires the disclosure of all final agency opinions. 421 U.S. at 153, 95 S. Ct. at 1517, 44 L. Ed. 2d at 49. Thus, the Supreme Court concluded that if an advisory opinion of an agency staff member is expressly incorporated into a final agency decision, the policy considerations supporting the nondisclosure of this type of pre-decisional communication are no longer operable. Once the agency adopts its employee's advice as its own, the agency will defend its employee and he need no longer be concerned with adverse consequences if his communication becomes a matter of public record. Moreover, his advice, as part of a final agency opinion, has now become a matter of more profound public interest. 421 U.S. at 161, 95 U.S. at 1521, 44 L. Ed. 2d at 53. Thus, in effect, what was once a pre-decisional communication becomes post-decisional and is no longer exempt from disclosure under Exemption 5.

n10. S 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

[**12]

Grumman, supra, 421 U.S. at 184, 95 S. Ct. at 1500, 44 L. Ed. 2d at 71, lists the criteria for identifying a post-decisional communication: (i) The decision must, of course, be final. (ii) The agency of which the information is demanded must possess the power to make the final decision into which the pre-decisional information is incorporated. (iii) Finally, the information must be adopted as part of the agency's reasoning for its decision. Because the Grumman decision relied on Sears, its companion case, we believe these criteria also should apply to the Sears hybrid, the pre-decisional communication turned post-decisional. With respect to the third criterion, Sears goes even further than Grumman and holds that the hybrid, to become a post-decisional communication, must be "expressly adopt(ed) or incorporate(d) by reference" into the final opinion. 421 U.S. at 161, 95 S. Ct. at 1521-1522, 44 L. Ed. 2d at 53.

In holding that the three legal memoranda submitted to the GAO by the Air Force did not fall within Exemption 5, the District Court followed Sears but then held that these once pre-decisional memoranda, by being submitted to the GAO in connection with the Shermco protest, were [**13] incorporated into the Air Force's final decision to award the contract to Tayko, and therefore had become post-decisional.

In the leap from Sears to this case we find this conclusion unacceptable for two reasons. First, as we stated earlier in this opinion, the proposed award of the contract to Tayko was not the final opinion of the Air Force. n11 Because the decision was not yet final, all the considerations [**1320] which support the nondisclosure of pre-decisional communications were still in effect, as was Exemption 5. Second, even if it were a final decision, these memoranda were not expressly incorporated by reference into the opinion. They had been used by the Air Force internally in reaching their

initial conclusion that Tayko was the lowest bidder, and they were produced to the GAO in aid of their defense against Shermco's protest, but they were never attached to any formal written decision by the Air Force.

n11. Shermco cites *Federal Open Market Committee v. Merrill, supra*, "for the proposition that as soon as the Government awards a contract, any protection under Exemption 5 for any information generated in the process leading up to the award of the contract expires."

The specific holding of the Supreme Court in Merrill was "that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract." 443 U.S. at 360, 99 S. Ct. at 2812, 61 L. Ed. 2d at 603. This newly created but qualified exception is in addition to the two traditional Exemption 5 privileges for attorney work-products and executive deliberations. We do not believe this new category of Exemption 5 information includes legal memoranda prepared by an agency to aid in its deliberations at issue in this case. We find two passages in Merrill to support this conclusion.

First, the Supreme Court found support for the creation of this privilege in *F.R.Civ.P. 26(c)(7)*. This procedural rule permits a District Court to issue a protective order so "that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way." The analogous privilege under Exemption 5 was created by the Supreme Court only for confidential commercial information, and did not mention confidential research, a category in which we believe legal memoranda more readily fall. We decline to read "Exemption 5 confidential commercial information" so broadly as to include every type of information which could be protected under Rule 26(c)(7) because the Merrill opinion expressly states "that Exemption 5 was (not) intended to incorporate every privilege known to civil discovery." 443 U.S. at 360, 99 S. Ct. at 2809, 61 L. Ed. 2d at 599.

613 F.2d 1314, *1320; 1980 U.S. App. LEXIS 19498, **13;
27 Cont. Cas. Fed. (CCH) P80,280

Second, the Supreme Court distinguishes between pre-decisional deliberations (and we have already held that the legal memoranda in the case before us are pre-decisional) and confidential commercial information which there is no need to protect after a contract is awarded. *443 U.S. at 360, 99 S. Ct. at 2812, 61 L. Ed. 2d at 603*. To us this is another indication that pre-decisional deliberations and confidential commercial information are not the same thing.

The language in the Merrill opinion on which Shermco relies in support of its proposition that the right to invoke Exemption 5 disappears as soon as a contract is awarded is as follows:

The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

443 U.S. at 360, 99 S. Ct. at 2812, 61 L. Ed. 2d at 603.

Not only are the legal memoranda at issue in this case not confidential commercial information, but we do not believe the Supreme Court, when it made the above statement, was necessarily creating a rule which applies to all communications exempt under § 552(b)(5). Moreover, we do not believe the Supreme Court was attempting to define a final decision as equivalent to the award of a contract or pinpoint when the final award of a contract technically is made. The finality of an agency decision was not even at issue in Merrill. For all of the reasons we state above, we do not think the Merrill case is applicable here.

[**14]

B. Waiver Of Exemption 5 Through Disclosure To

GAO

The District Court also held that, by disclosing these

memoranda to the GAO, the Air Force waived its rights to claim Exemption 5. We will begin by stating that the mere fact that one federal agency releases intra-agency communications to another federal agency cannot by itself imply the waiver of Exemption 5, which explicitly applies to inter-agency, as well as intra-agency, memoranda.

Waiver occurs when an agency makes its information more broadcast than is allowed by its own regulations, *Cooper v. Department of Navy, 594 F.2d 484 (5th Cir. 1979)*, but it does not occur when an agency whose action is being reviewed forwards to the reviewing agency legal memoranda in support of its position:

By including Inter-Agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency.

Grumman, supra, 421 U.S. at 188, 95 S. Ct. at 1502, 44 L. Ed. 2d at 73. In reviewing [**15] the Air Force's preliminary decision to award this contract to Tayko, the GAO needed and [*1321] was entitled to the legal and technical advice of both parties. The Air Force should be allowed to supply this information without running the risk of waiving Exemption 5. The forwarding of these memoranda to the GAO was not a broadcast disclosure by the Air Force. It was no more than the submission of the agency's legal opinion in defense of a bid protest. There was thus no waiver of Exemption 5.

In sum, we hold that the Air Force's notice to Shermco was a proposed, and not a final, award of the contract to Tayko. There is a possibility that, if the GAO or its successor under the new law, the SBA, upholds the protest, that bidding will be reopened. All the policy reasons for exempting from disclosure both the Tayko cost proposals and the legal memoranda of the Air Force still operate to make this information immune from disclosure within the language of Exemptions 4 and 5. n12 Accordingly, we reverse the judgment of the District Court and remand this cause with orders to enter judgment in favor of the Appellant Air Force.

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613 F.2d 1314, *1321; 1980 U.S. App. LEXIS 19498, **15;
27 Cont. Cas. Fed. (CCH) P80,280

n12. The Air Force also has sought review of the District Court's award of attorney's fees to Shermco under 5 U.S.C. § 552(a)(4)(E). Because we reverse on all of the substantive claims of this appeal, Shermco has no longer "substantially prevailed" in this action, and the award of

attorney's fees is also reversed.

[**16]

REVERSED and REMANDED.

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7 of 17 DOCUMENTS



Caution

As of: Apr 05, 2007

JOHN J. TIGUE, JR., MORVILLIO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C., Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF JUSTICE, INTERNAL REVENUE SERVICE, Defendants-Appellees.

Docket No. 01-6243

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

312 F.3d 70; 2002 U.S. App. LEXIS 23672; 90 A.F.T.R.2d (RIA) 7320; 59 Fed. R. Serv. 3d (Callaghan) 1285

**July 15, 2002, Argued
November 15, 2002, Decided**

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Tigue v. Dep't of Justice*, 2003 U.S. LEXIS 4077 (U.S., May 27, 2003)

(James Comey, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney, on the brief) for Defendants-Appellees.

PRIOR HISTORY: [**1]

JUDGES:

Appeal from orders of the United States District Court for the Southern District of New York (Hellerstein, J.) granting defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment under the Freedom of Information Act, 5 U.S.C. § 552.

Before: CABRANES, SOTOMAYOR, Circuit Judges, and GLEESON, * District Judge.

* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

DISPOSITION:

Affirmed.

OPINION BY:

SOTOMAYOR

COUNSEL:

JOHN J. TIGUE, JR., Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York, NY (Daniel B. Kosove, on the brief) for Plaintiffs-Appellants.

OPINION: [*73] SOTOMAYOR, *Circuit Judge*:

This appeal was brought by a lawyer and his law firm seeking access under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), to a memorandum ("the Neiman Memorandum" or "Memorandum") prepared by

DANIEL S. ALTER, Assistant United States Attorney,

an assistant [**2] United States Attorney in the Southern District of New York ("Southern District") and sent to a public commission. The Neiman Memorandum outlines the Southern District's opinions and recommendations as to how the Internal Revenue Service ("IRS") should conduct criminal tax investigations. The Memorandum was written for, and forwarded to, the Criminal Investigation Division Review Task Force headed by Judge William Webster ("the Webster Commission"), which was established by the IRS to gather information and make suggestions on how to reform its Criminal Investigations Department ("CID"). The district court held that the government did not have to produce the Neiman Memorandum because it was shielded by the FOIA's exemption for documents reflecting an agency's deliberative processes, relying on 5 U.S.C. § 552(b)(5).

On appeal, plaintiffs claim that the Neiman Memorandum was not an intra- or inter-agency document as required for exemption under § 552(b)(5) because it was provided to the Webster Commission, an independent task force that intended to issue a public report of its findings, and that it is not privileged as material of an agency consultant. Plaintiffs [**3] also contend that the Neiman Memorandum is not "predecisional" because it was prepared to assist the Webster Commission rather than the IRS and does not relate to a sufficiently specific agency decision. They further argue that even if the deliberative process exemption applies, the government waived that protection by reproducing a quotation from the memorandum in the report published by the Webster Commission ("Webster Report" or "Report"). Finally, they argue that if the document is protected, any purely factual sections should be made [*74] available. We disagree. We hold that (1) the Webster Commission was a consultant to the IRS that was charged with assisting the agency in developing its policy, rendering a memorandum sent from the Southern District to the Webster Commission an inter-agency document; (2) because the IRS created the Webster Commission in order to help it decide whether and how to reform the CID, the document is predecisional; (3) because the Webster Commission's Report was not a final decision, the government did not waive executive privilege; and (4) after *in camera* review, the district court properly found that there were no reasonably segregable parts of the [**4] Neiman Memorandum subject to disclosure.

BACKGROUND

During his confirmation hearings before the Senate in the fall of 1997, IRS Commissioner Charles Rossotti made a commitment to improving the quality of service provided by each of the major components of the agency. To that end, in July 1998, Rossotti asked Judge William Webster, former director of both the FBI and the CIA, to establish a task force to conduct an "independent review" of the IRS's CID to "determine [CID's] effectiveness in accomplishing its mission, and make recommendations for improvement." Judge Webster recruited a number of experts with extensive experience in criminal investigations, law enforcement and federal prosecution to serve on the Webster Commission.

The Webster Commission spent nine months reviewing "countless" documents and interviewing over 600 people, including a number of law enforcement officials. The Webster Commission specifically requested the opinions of the Southern District because it handled more tax investigations than any other district. Then-Deputy U.S. Attorney Shirah Neiman wrote a sixteen-page memorandum expressing the views of the Southern District on "the various agency components [**5] involved in criminal tax enforcement; ... the then existing focus of tax investigations and prosecutions and the deployment of IRS resources; ... the difference[s] between [the Southern District's] position on various issues and that of other agency components; ... and [the Southern District's] recommendations to ensure the continuation of vigorous criminal tax enforcement." According to Neiman, the Neiman Memorandum expressed the views of the Southern District and not those of the Department of Justice as a whole or Neiman as an individual, and her expectation that the memorandum would remain confidential contributed to her willingness to express the Southern District's opinions and policies about tax investigations.

The Webster Commission released its Report on April 9, 1999 to significant media attention. The 113-page Report includes both a factual inquiry into the practices of the CID and a set of recommendations about how the CID should be improved. Included in the Report is a letter from Commissioner Rossotti stating that the Report "will guide us to improve the work of this critically important component of tax administration for many years to come" and that the IRS concurred [**6] with the specific recommendations in the Report, although noting that "some of the recommendations, particularly those concerning organization structure, need

further analysis and design work in coordination with our other organizational changes.

The Neiman Memorandum is mentioned twice in the Report. First, the Neiman Memorandum is referenced in a footnote as representing an opposing view to the position held by the leadership of the Department [*75] of Justice Criminal Division, most United States Attorneys, and other important figures in criminal enforcement, all of whom apparently believe that the CID should continue to investigate money laundering and narcotics cases. Later in the Report, it is quoted as criticizing the use of administrative investigations and IRS summons because they are slower than grand jury subpoenas: "service of an administrative summons simply does not convey the urgency of a grand jury subpoena, and is not as readily enforceable as a subpoena, and represented subjects of administrative investigations often succeed in dragging out these investigations for unimaginably long periods."

Plaintiff John Tigue, an attorney whose law firm, Morvillo, Abramowitz, Grand, [**7] Iason & Silberberg, P.C., often represents individuals in connection with federal grand jury tax investigations and IRS administrative investigations, enforcement actions, and prosecutions, obtained a copy of the Report and noticed the reference to the Neiman Memorandum. Believing that review of the Neiman Memorandum would improve his understanding of Southern District policy and thus allow him to represent his clients better, Tigue and his law firm ("plaintiffs") submitted a FOIA request for the Neiman Memorandum on August 18, 1999. Following a period of delay in which the Department of Justice ("DOJ") and the IRS attempted to discern which agency should respond to the FOIA request, the DOJ denied the application on April 28, 2000, and, on September 28, 2000, denied the appeal, citing 5 U.S.C. § 552(b)(5), which protects the so-called "deliberative process privilege."

On February 14, 2001, plaintiffs filed suit against the IRS and the DOJ in the United States District Court for the Southern District of New York. The parties cross-moved for summary judgment. Following oral argument on October 23, 2001, Judge Hellerstein ruled that the Neiman Memorandum met [**8] the requirements of § 552(b)(5) and was therefore exempt from production under the FOIA, and that the government had not waived the privilege by citing to and quoting from the Neiman Memorandum in the published

Report. At that time the court also requested that the government review the Neiman Memorandum to determine whether any sections of the document could be produced as purely factual. On October 29, 2001, after in camera review of a marked copy of the Neiman Memorandum, the district court issued an order finding that the Memorandum was "predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service." The district court also found that "there is no factual material in the report that is not inextricably intertwined with evaluations, and recommendations of policy" and thus denied plaintiffs' alternative request for partial production of the Neiman Memorandum.

Plaintiffs appeal both the October 23, 2001 and October 29, 2001 rulings.

DISCUSSION

This Court [**9] reviews *de novo* a district court's grant of summary judgment in FOIA litigation. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999). This Court also reviews *de novo* a district court's decisions whether to require partial production of documents following *in camera* review, in keeping with the spirit and the text of the FOIA and its presumption in favor of disclosure. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 n.2 (2d Cir. 1999).

[*76] The FOIA, 5 U.S.C. § 552, was enacted to ensure public access to information created by the government in order "to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978). Thus, "upon request, FOIA mandates disclosure of records held by a federal agency unless the documents fall within enumerated exemptions." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7, 149 L. Ed. 2d 87, 121 S. Ct. 1060 (2001) (internal citations omitted). The Supreme Court has counseled that these exceptions are to be interpreted narrowly in the face of the overriding [**10] legislative intention to make records public. *See id.* at 7-8.

At issue here is FOIA Exemption 5, which protects 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). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (e.g., attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." n1 *Grand Cent. P'ship*, 166 F.3d 473 at 481 (internal quotation marks and citation omitted).

n1 "This discovery standard can only serve as a rough guide to the courts, since decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, the most fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases. *Coastal States Gas Corp. v. Dep't of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 862 (D.C. Cir. 1980) (internal citations and quotation marks omitted); accord *EPA v. Mink*, 410 U.S. 73, 86, 35 L. Ed. 2d 119, 93 S. Ct. 827 (1973).

[**11]

Specifically, the government claims that the deliberative process privilege, a sub species of work-product privilege that "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,'" *Klamath*, 532 U.S. at 8 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975)), permits withholding of the Neiman Memorandum. The rationale behind this privilege is "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by protecting open and frank discussion among those who make them within the Government." 532 U.S. 1 at 8-9 (quoting *Sears*, 421 U.S. at 151); accord *Coastal States*, 617 F.2d at 866 ("The [deliberative process] privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear [**12] of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally

formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.").

In-order for a document to be protected by deliberative process privilege, it must be: (1) an inter-agency or intra-agency document; (2) "predecisional"; and (3) deliberative. See *Klamath*, 532 U.S. at 8 (discussing the agency-origin [*77] requirement); *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988) (enumerating the predecisional and deliberative requirements); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) (same). Plaintiffs concede that the Neiman Memorandum is, at least in part, deliberative, but challenge the government's right to withhold the Memorandum on the other two grounds.

I. Intra- and inter-agency communications

As noted above, Exemption 5 protects only "intra-agency" or "inter-agency" [**13] communications. While "intra-agency" documents are those that remain inside a single agency, and "inter-agency" documents are those that go from one governmental agency to another, they are treated identically by courts interpreting FOIA. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188, 44 L. Ed. 2d 57, 95 S. Ct. 1491 (1975) ("Exemption 5 does not distinguish between inter-agency and intra-agency memoranda."). The question at issue regarding the intra- or inter-agency requirement is whether the document either originated from or was provided to an entity that is not a federal government agency, in which case the document is not protected by the exemption.

The Supreme Court has cautioned that the term "intra-agency" is not "just a label to be placed on any document the Government would find it valuable to keep confidential." *Klamath*, 532 U.S. at 12. By statutory definition, "agency" means each authority of the Government of the United States," with certain exemptions not relevant here. 5 U.S.C. § 551(1). It is undisputed that the Webster Commission was not an "agency." See *Meyer v. Bush*, 299 U.S. App. D.C. 86, 981 F.2d 1288, 1298 (D.C. Cir. 1993) [**14] (holding that a task force created by the President to study

regulatory relief is not an "agency" under the FOIA). From this uncontested point, plaintiffs reason that Exemption 5 cannot apply. The government, in turn, contends that because the Webster Commission acted as a consultant to the IRS, an agency, in soliciting the Neiman Memorandum, and relied on the Neiman Memorandum in preparing the Webster Report for the IRS, the district court properly concluded that the Neiman Memorandum was an intra-agency communication. The government also argues that the Neiman Memorandum could be deemed an inter-agency communication because it was provided by the Southern District for use in the IRS decision-making process. For the reasons that follow, we conclude that because the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID, the Neiman Memorandum is an inter-agency communication.

In considering the scope of Exemption 5, this Circuit has recognized that agencies may require assistance from outside consultants [**15] in formulating policy, and has held that "nothing turns on the point that ... reports were prepared by outside consultants ... rather than agency staff." *Lead Indus.*, 610 F.2d 70 at 83 (citing *Soucie v. David*, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971)); accord *Ryan v. Dep't of Justice*, 199 U.S. App. D.C. 199, 617 F.2d 781, 790 (D.C. Cir. 1980) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption [**78] 5."). n2 Instead, "whether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." *Lead Indus.*, 610 F.2d 70 at 80.

n2 In *Klamath*, the Supreme Court recently considered claims that documents submitted by various Indian tribes to the Department of the Interior expressing the tribes' positions on a water allocation project were "intra-agency" documents entitled to protection under Exemption 5. *Klamath*, 532 U.S. at 7-16. In rejecting that argument, the Court observed that "although

neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders, some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum under Exemption 5." *Id.* at 9 (citing *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1137-38 (5th Cir. 1980); *Lead Indus.*, 610 F.2d 70 at 83; *Soucie*, 448 F.2d at 1067). While the Supreme Court declined to rule on the validity of this "consultant corollary," it distinguished the tribes from consultants, noting that the latter typically "have not been communicating with the Government in their own interest or on behalf of any person or group whose interest might be affected by the Government action addressed by the consultant [and thus] may be enough like the agency's own personnel to justify calling their communications 'intra-agency.'" *Klamath*, 532 U.S. at 11, 12. Unlike in *Klamath*, plaintiffs in this case do not argue that the Webster Commission is an interested party.

[**16]

Plaintiffs acknowledge that this Court has held that communications with consultants may be considered intra-agency, but argue, relying heavily on the D.C. Circuit's opinion in *Dow Jones & Co. v. Dep't of Justice*, 286 U.S. App. D.C. 349, 917 F.2d 571, 574 (D.C. Cir. 1990), that because the memorandum was prepared to assist the Webster Commission with its decisionmaking and was never reviewed by any IRS decisionmaker, the consultant principle is inapposite. In *Dow Jones*, the government had argued that documents provided by the Department of Justice to Congress were protected as inter-agency documents. The D.C. Circuit rejected that position on the grounds that documents prepared to assist with Congress's deliberative process could not be entitled to Exemption 5 privilege because Congress was not an agency for FOIA purposes. *Id.* Here, in contrast, the Webster Commission was not acting on its own behalf in requesting the Neiman Memorandum from the Southern District--rather, it was acting as a consultant to the IRS, an agency, to assist that agency with developing policy recommendations regarding the CID. Plaintiffs recognize, as they must, that the privilege would [**17] have been maintained had Neiman given her memorandum directly to the IRS. *Renegotiation Bd.*, 421 U.S. at 188 ("By

including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency."). The fact that Neiman transmitted it to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter our view of the matter.

Plaintiffs also contend that an agency consultant's source material cannot be withheld under Exemption 5 where the author had no reasonable expectation that her material would be kept confidential. According to plaintiffs, "where there is no fear of publicity, there is no basis in policy for extending Exemption 5 to consultants' work, especially where the statutory language does not provide for such a result." The issue here, however, is not whether the Webster Commission's public Report is exempt, but rather, whether the [*79] Commission may be considered a [**18] part of the IRS for purposes of determining whether the Neiman Memorandum falls within the scope of Exemption 5 as an inter-agency communication. Although the Webster Commission may have had no intention to keep private *its* findings and recommendations, this has no bearing on the Southern District's expectation that its opinions would be kept confidential by the Webster Commission and the IRS. In fact, this Court has held that editorial decisions such as determining which parts, if any, of a confidential document to include in a public record are precisely the type of internal agency decisions that Exemption 5 was designed to protect. *See Lead Indus.*, 610 F.2d 70 at 86 ("If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so."). n3

n3 To the extent that plaintiffs argue that the publication of the Report with a reference to the Neiman Memorandum suggests that there is no basis to protect the Memorandum as a consultant's source material, that argument is addressed in greater detail below in the discussion of waiver.

[**19]

Just as predecisional documents prepared by the Webster Commission for the IRS would be deemed intra-agency communications, *see 610 F.2d 70 at 83*, otherwise privileged communications by another agency intended to assist the Commission with its ultimate responsibilities to the IRS are, for purposes of the FOIA, inter-agency communications with the IRS. Cf. *Dow Jones*, 917 F.2d 571 at 575 ("Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of *the agency's* deliberative process."). The Webster Commission was acting as a consultant to the IRS when it solicited the Memorandum. It was charged with assisting the IRS with determining how best to reform the CID, and the Commission's Report proposed solutions to specific problems within the CID based on the information conveyed to the Commission by the Southern District, among its other sources. n4 To conclude that the deliberative process privilege does not apply when an outside consultant to an agency receives information from another agency effectively would condition the use of consultants on both agencies' willingness [**20] to disclose any information the consultant reviews in the process of its work and would unreasonably hamper agencies in their decision-making process.

n4 Although plaintiffs state that the Webster Commission "essentially functioned as a watchdog, providing some measure of public oversight over the IRS," they acknowledge that part of the Commission's assignment included evaluating CD. Policies and making recommendations for improvement.

Insofar as the communications were between the Southern District and a consultant for the IRS, the Neiman Memorandum is more properly considered an inter-agency document than an intra-agency document, in that it was prepared by one governmental agency for use by another agency. n5 The interposition of the Webster Commission between the two agencies does not alter this result. We therefore find the Neiman Memorandum eligible for protection under the first prong of Exemption 5.

n5 Alternatively, as a document prepared for use by a consultant to an agency, the Neiman

Memorandum perhaps could also be viewed as an intra-agency document, as the district court concluded. Because we find that the Memorandum is an inter-agency document, we do not decide that issue.

[**21]

[*80] II. Predecisional

"A document is predecisional when it is prepared in order to assist an agency decisionmaker in arriving at his decision." *Grand Cent. P'ship*, 166 F.3d 473 at 482 (internal quotation marks and citations omitted). Protected by this privilege are "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* (internal quotation marks and citations omitted). However, "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Id.* (quoting *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994) (internal quotation marks omitted)).

Plaintiffs argue that because the Neiman Memorandum was provided to the Webster Commission, rather than to the IRS, it cannot be deemed predecisional, as it was never relied upon by any IRS decisionmaker. As source material for the Webster Report, however, the Neiman Memorandum was prepared for the Commission in order to assist the IRS in its decisionmaking regarding [**22] the future of the CID. This decisionmaking is precisely the type contemplated by *Grand Central Partnership*.

Plaintiffs further contend, citing *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1089, 1094 (9th Cir. 1997), that the district court erred in failing to identify any specific decision connected to the Memorandum. In *Maricopa*, the government had argued that "because agencies are involved in a continual process of self-examination, [they] need not identify a specific decision in which [documents claimed to be protected under Exemption 5] will culminate in order for those materials to be 'predecisional.'" *Id.* The Ninth Circuit disagreed, holding that while an agency need not actually demonstrate that a specific decision was made in reliance on the allegedly predecisional material, the government

must show that the material was prepared to assist the agency in the formulation of some specific decision. *Id.* In other words, while the agency need not show *ex post* that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which executive privilege is claimed related to a specific decision [**23] facing the agency. See *Sears*, 421 U.S. at 151 n.18. The Neiman Memorandum, however, meets the criteria established in *Maricopa*, as it is "not merely part of a routine and ongoing process of agency self-evaluation," *Maricopa*, 108 F.3d at 1094, but rather was specifically prepared for use by the Webster Commission in advising the IRS on its future policy with respect to the CID. As in *Maricopa*, the fact that the government does not point to a specific decision made by the IRS in reliance on the Neiman Memorandum does not alter the fact that the Memorandum was prepared to assist IRS decisionmaking on a specific issue.

We therefore conclude that the district court did not err in holding that the Neiman Memorandum falls within the Exemption 5 privilege.

III. Waiver

Even though protected by Exemption 5, the government nonetheless may be required to disclose the Neiman Memorandum if it waived the deliberative process privilege. Consistent with 5 U.S.C. § 552(a)(2), which requires disclosure of *final* agency decisions, the Supreme Court held in *Sears* that production of ostensibly predecisional material may be compelled where "an agency [**24] chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously [*81] covered by Exemption 5 in what would otherwise be a final opinion." *Sears*, 421 U.S. at 161. In so concluding, the Supreme Court reasoned that:

the probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the

agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District Court's decision below.

Id.

Plaintiffs contend that the citation to and publication of an excerpt of the Neiman Memorandum in the Webster Report, which was ultimately made public, was a waiver of the privilege provided by Exemption 5. Under the circumstances here, however, the minor references to the Neiman Memorandum cannot be said to be an express adoption or incorporation. [**25] *See Access Reports v. Dep't of Justice*, 288 U.S. App. D.C. 319, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (distinguishing between "reference to a report's conclusions [and] adoption of its reasoning," and noting that "it is the latter that destroys the privilege"); *Common Cause v. IRS*, 207 U.S. App. D.C. 321, 646 F.2d 656, 660 (D.C. Cir. 1981) (holding that a "casual allusion in a post-decisional document to subject matter discussed in some pre-decisional, intra-agency memoranda" does not waive Exemption 5). n6 Accordingly, we conclude that the government did not waive its right to assert the deliberative * process privilege as to the Neiman Memorandum.

n6 We also note that this "waiver by incorporation" doctrine applies only where the agency expressly adopts or incorporates an inter-agency memorandum "in what otherwise would be a final opinion." *Sears*, 421 U.S. at 161 (emphasis added). Arguably, as the Webster Report was not drafted by IRS decisionmakers, and it was prepared to aid the IRS in making its decision about internal reforms, it was not a "final opinion."

[**26]

We also reject plaintiffs' position that Neiman's knowledge that the Webster Commission would issue a published report constitutes a waiver of the deliberative process privilege. Even if Neiman could have been expected to know that a report would be published, we find no reason to doubt that she expected that her Memorandum would remain confidential. As previously noted, she prepared the Memorandum to give the Southern District's recommendations, based on its experience, to the IRS, for use in the IRS's internal

evaluation through the Webster Commission. In choosing to reveal the existence of the Memorandum and to publish a very brief excerpt, the Commission exercised its discretion by revealing only information that it determined should be made public and withholding the rest. *Cf. Rockwell Int'l Corp. v. Dep't of Justice*, 344 U.S. App. D.C. 226, 235 F.3d 598, 603-04 (D.C. Cir. 2001) (rejecting claim that partial publication of a document waived the attorney-client privilege as to the remainder of that document). Although the fact that the agency in *Rockwell International* took additional steps to ensure confidentiality also factored into the D.C. Circuit's finding [**27] that the attorney-client privilege had not been waived in that case, we conclude that, for purposes of the deliberative process privilege, the incorporation of one sentence from the Neiman Memorandum in the published Report is not inconsistent with the IRS's or the Southern District's "desire to keep the rest secret." 235 F.3d 598 at 605.

[*82] IV. *In camera* review

Finally, plaintiffs urge us to release any portions of the Neiman Memorandum that contain purely factual information. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

At oral argument, we requested that the government provide a redacted version of the Neiman Memorandum indicating what factual information, if any, was within the public domain. The government complied, but continued to maintain that this information should be withheld because it was intertwined with and provided insight into privileged material. After *de novo in camera* review of the original and redacted memoranda, we conclude that the district court properly found [**28] that "the document is predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service." We also conclude that even the limited factual material admittedly in the public domain is too intertwined with evaluative and policy discussions to require disclosure. *See Lead Indus.*, 610 F.2d 70 at 85.

312 F.3d 70, *82; 2002 U.S. App. LEXIS 23672, **28;
90 A.F.T.R.2d (RIA) 7320; 59 Fed. R. Serv. 3d (Callaghan) 1285

CONCLUSION

For the foregoing reasons, we affirm the orders of
the district court granting defendants' motion for

summary judgment and denying plaintiffs' cross motion
for summary judgment.

Deliberative Process
Privilege

FAX

Date 3-21-06

Number of pages including cover sheet -7-

TO: *Juliet Hodgkins*

FROM: Gracia Hillman
2710 Unicorn Lane, NW
Washington, DC 20015

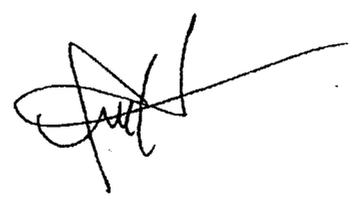
Phone
Fax Phone

Phone (202) 244-0305
Fax Phone (202) 244-4504

CC:

REMARKS: Urgent For your review Reply ASAP Please Comment

*Comments to Serrano letter -
pages 3, 4, 5, 7, 8, 9*



Congressman Jose Serrano, Chairman
House Appropriations Subcommittee on Financial Services and General Government
Page 3

EAC needed to provide accredited labs on a temporary, interim basis to ensure that the agency had the means to implement its certification program. Additionally, EAC would be compelled to implement a provisional, pre-election certification program to replace services offered by NASED. EAC could not wait for NIST to recommend laboratories. Fortunately, HAVA provided a mechanism for EAC to take such action in Section 231(b)(2)(B). This section requires that EAC publish an explanation when accrediting a laboratory without a NIST recommendation. A notice was published on EAC's Web site to satisfy this requirement.

EAC's Interim Accreditation Program. At a public meeting in August 2005 held in Denver, the commissioners received a staff recommendation outlining the details of the interim accreditation program. The staff recommendation included a process in which the three laboratories previously accredited by NASED – CIBER, SysTest Labs, and Wyle Laboratories – would be allowed to apply for interim accreditation. In December of 2005, EAC officially began accepting applications for a limited interim accreditation program. As stated in the letters, the purpose of the interim accreditation program was to provide accredited laboratories to test voting systems to federal standards, until such time as NIST/NVLAP was able to present its first set of recommended laboratories. This accreditation was limited in scope to the 2002 Voluntary Voting System Standards and required the laboratory to apply to the NVLAP program to receive a permanent accreditation. The letters also sought variety of administrative information from the laboratories and required them to sign a Certification of Laboratory Conditions and Practices. This certification required the laboratories to affirm, under penalty of law, information regarding laboratory personnel, conflict of interest policies, recordkeeping, financial stability, technical capabilities, contractors, and material changes.

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HAVA
requirements
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In order to accredit a laboratory (even on an interim basis), EAC needed to contract with a competent technical expert to serve as a laboratory assessor. EAC sought a qualified assessor with real-world experience in the testing of voting systems. Ultimately, only one individual responded to EAC's solicitation. The individual was (at the time) the only individual known to have the requisite experience and assessor qualifications. The contractor reviewed each of the laboratories that applied. The review was performed in accordance with international standards, the same standards used by NVLAP and other laboratory accreditation bodies. This standard is known as International Standard ISO/IEC 17025, *General Requirements for the Competence of Testing and Calibration Laboratories*. In addition, the EAC assessor (who also currently serves as a NVLAP assessor) applied NIST Handbooks 150, *Procedures and General Requirements* and NIST Handbook 150-22, *Voting System Testing*.

CIBER, SysTest Labs, and Wyle Laboratories applied for accreditation under the interim program. Each, as required, had previously received a NASED accreditation. EAC's

scope, (1) it did not certify voting systems, just modifications and (2) the certification was provisional and, thus, expired.

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House Appropriations Subcommittee on Financial Services and General Government
Page 4

assessor visited each of the labs and conducted a review consistent with the standards noted above. The assessor reviewed laboratory policies, procedures and capabilities to determine if the laboratories could perform the work required. Laboratory assessments do not make conclusions regarding past laboratory work product. Two of the applicant laboratories, SysTest Laboratories, L.L.C., and Wyle Laboratories, Inc. received an interim accreditation. The assessor's reports and EAC action regarding these laboratories are available on the EAC Web site.² EAC promptly published on its Web site information regarding its decision on accreditation (August and September of 2006). This notice provides some brief background on the interim accreditation process, starting with the fact that three previously NASED accredited laboratories were invited to apply to the program, including information on the program's requirements and limitations and ending with the identity and contact information of the two laboratories accredited. Information was also electronically forwarded to EAC's list of stakeholders via e-mail. The EAC stakeholders e-mail list includes almost 900 election officials and interest groups, nationwide. Staff members for EAC oversight and appropriations committees are included in this list of stakeholders. In addition to EAC's Web site and e-mail announcements, on September 21, 2006 EAC's Executive Director reiterated the Commission's decision at a public meeting Web cast to the EAC Web site. This announcement identified the interim accredited labs by name. Furthermore, in October 26, 2006, the two interim accredited laboratories testified at a nationally televised public hearing.

whose
hearing
?

The Interim Accreditation Program and CIBER. The third laboratory, CIBER, has yet to satisfy the requirements of the interim accreditation program. The initial assessment of CIBER revealed a number of management, procedural and policy deficiencies that required remedial action before the laboratory could be considered for accreditation. These deficiencies are identified in the initial CIBER/Wyle report. They were also brought to the attention of CIBER's President of Federal Solutions in a letter from EAC's Executive Director dated September 15, 2006. The letter outlines, consistent with recommendation of EAC's assessor, the steps the laboratory must take to achieve compliance. The letter requires CIBER to:

- a. *Assign resources, adopt policies and implement systems for developing standardized tests to be used in evaluating the functionality of voting systems and voting system software. Neither ITA Practices, CIBER nor any of its partners will be permitted to rely on test plans suggested by a voting system manufacturer.*
- b. *Assign resources, adopt policies and implement systems for quality review and control of all tests performed on voting systems and the report of results from those tests. This shall include provisions to assure that all*

² Note: The Wyle and CIBER assessment was completed as a joint report. The two labs have a cooperative agreement to work together in test voting systems (Wyle performing hardware testing and CIBER software testing).

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House Appropriations Subcommittee on Financial Services and General Government
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required tests have been performed by ITA Practices, CIBER or its accredited partner lab.

Finally, the letter required an additional "follow-up" assessment of the laboratory.

The follow-up assessment of CIBER was performed by EAC's assessor in December of 2006. The findings of this assessment were documented in a report, which is available on the EAC Web site. In the findings, the assessor recognized significant changes CIBER had made to its program in response to the initial assessment, including new policies regarding test procedures, management and personnel. The report also noted a number of non-conformities that had yet to be addressed by the laboratory.

In a letter dated January 3, 2007, CIBER provided a written response to EAC's follow-up assessment and report. The response sought to address the deficiencies noted in the December assessment. Additionally, CIBER officials requested to meet with EAC staff to discuss their January 3 response. This meeting took place at EAC on January 10, 2007. At the meeting, EAC staff informed CIBER that their report could not serve as the basis of accreditation because it failed to resolve all outstanding issues. A number of CIBER responses to noted deficiencies were listed as "TBD." EAC's assessor and Certification Program Director formally reviewed CIBER's response. EAC provided CIBER notice of the deficiencies that remain outstanding and informed them of the steps they must take to come into compliance by a letter dated February 1, 2007. Due to the fact that the purpose and usefulness of the interim accreditation program is coming to a close, EAC allowed CIBER 30 days in which to document their full compliance. After this time, the program will be closed and no further assessment actions will be performed under the interim program. CIBER was notified of this procedure by letter dated January 26, 2007, and on February 8, 2007, EAC voted to close its interim laboratory accreditation program effective March 5, 2007.

Information related to CIBER's status in the EAC interim accreditation program was not released prior to January 26, 2007. It was EAC's belief, in consultation with NIST, that it would be improper to release information regarding an incomplete assessment. However, on January 25, 2007, CIBER took the affirmative action of making this information available to a third party, the New York State Board of Elections. With this action, CIBER made the information public and EAC believed it was incumbent to provide this information to the public. As such, on January 26, 2007, EAC posted on its Web site assessment reports, correspondence, and responses from CIBER related to their progress in the EAC interim accreditation program.

Copies of the two reports issued by the EAC assessor concerning CIBER's laboratory accreditation assessments are attached as Appendixes 1 and 2 to this letter.

And the current status is - - -

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was requested is a draft of a final document that has already been released after being vetted by staff and approved by the EAC Commissioners. It is available in its final form on EAC's Web site, www.eac.gov. The draft document at issue was created by two contract employees hired pursuant to 5 U.S.C. §3109 (see 42 U.S.C. §15324(b)). Individuals hired under this authority enter into an employment relationship with the EAC. The contract employees were supervised by an EAC program director who participated directly in the project. For example, the supervisor approved, facilitated, scheduled and participated in interviews conducted for the project. Further, the contract employees were provided research materials and other support from EAC law clerks and staff. As stated by their contracts, these consultants were hired so that the EAC could "...obtain consulting services from an individual who can provide advice drawn from broad professional and technical experience in the area of voter fraud and intimidation." Moreover, the contracts clearly forbid the consultants from releasing the draft they created consistent with the privilege covering the draft report. The contract states

All research, information, documents and any other intellectual property (including but not limited to policies, procedures, manuals, and other work created at the request or otherwise while laboring for the EAC) shall be owned exclusively by the EAC, including copyright. All such work product shall be turned over to the EAC upon completion of your appointment term or as directed by the EAC. The EAC shall have exclusive rights over this material. You may not release government information or documents without the express written permission of the EAC.

Finally, the purpose or subject of the draft report at issue was to make an EAC determination on how voter fraud should be studied by the agency. This was to be done by (1) assessing the nature and quality of the information that presently exists on the subject matter, (2) defining the terms and scope of EAC study as proposed by HAVA, (3) determining what is to be studied and (4) determining how it is to be studied. In addition, the Consultants were asked to develop a definition of the phrases "voting fraud" and "voter intimidation."

EAC's interpretation of HAVA and its determination of what it will study and how it will use its resources to study it are matters of agency policy and decision. It would be irresponsible for EAC to accept the product of contracted employees and publish that information without exercising due diligence in vetting the product of the employees' work and the veracity of the information used to produce that product. EAC conducted this review of the draft voter fraud and intimidation report provided by Ms. Wang and Mr. Serebrov. EAC found that the draft report failed to provide a definition of the terms as required, contained conclusions that were not sought under the terms of the contract or were not supported by the underlying research, and allegations that showed bias. EAC staff edited the draft report to correct the problems mentioned above and included all of the consultants' and working groups' recommendations. The final report was adopted by EAC on December 7, 2007 during its public meeting. The final report as well as all of

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House Appropriations Subcommittee on Financial Services and General Government
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the underlying research conducted by Mr. Serebrov and Ms. Wang are available on EAC's Web site, www.eac.gov.

EAC understands and appreciates that the a request from a Congressional committee is exempt from the provisions of FOIA, and as such, EAC is providing this draft document despite the fact that the deliberative process exemption clearly applies to its contents. The draft report has been attached as Appendix 3 to this letter.

Draft Voter Identification Report

The third document requested is the draft report prepared by Rutgers University in conjunction with Moritz College of Law. Rutgers and Moritz served as contractors to EAC and produced this draft document pursuant to the provisions of the contract governing that relationship. This draft report, like the draft voter fraud and voter intimidation report, is predecisional under the deliberative process exemption to FOIA.

With regard to the Voter Identification draft report, it was created by Rutgers University in conjunction with the Moritz College of Law (Ohio State University) to "...provide research assistance to the EAC for the development of voluntary guidance on provisional voting and voting identification procedures." The stated objective of the contract was to:

...obtain assistance with the collection, analysis and interpretation of information regarding HAVA provisional voting and voter identification requirements for the purpose of drafting guidance on these topics... The anticipated outcome of this activity is the generation of concrete policy recommendations to be issued as voluntary guidance for States.

As with the voter fraud and intimidation study mentioned above, the contractors were provided guidance, information, and were directed by EAC personnel. The final product they delivered (draft report sought) was identified as "a guidance document for EAC adoption." Clearly, as noted by the contract, the issuance of Federal guidance to states is a matter of government policy and limited to official EAC action. EAC has not completed review and vetting of this document. However, initial review of this document reveals data and analysis that causes EAC concern. The Contractor used a single election's statistics to conduct this analysis. The two sets of data came from the Census Bureau and included persons who were not eligible to and did not vote. The first analysis using averaged county-level turnout data from the U.S. Census showed no statistically significant correlations. So, a second analysis using a data set based upon the Current Population Survey (which was self-reported and showed a significantly higher turnout rate than other conventional data) was conducted that produced only some evidence of correlation between voter identification requirements and turn out. Furthermore, the initial categorization of voter identification requirements included classifications that actually require no identification at all, such as "state your name." The research methodology and the statistical analysis used by the Contractor were questioned by independent working and peer review groups comprised of social scientists

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and statisticians. The Contractor and the EAC agree that the report raises more questions than provides answers.⁷ After this review process is completed, EAC will make a decision whether to adopt or reject the draft report. ?

Again, recognizing that a request from a Congressional committee is exempt from the provisions of FOIA, EAC is providing this draft document despite the fact that the deliberative process exemption clearly applies to its contents. The draft report has been attached as Appendix 4 to this letter.

Thank you for your requests and your interest in election administration. If you have further questions, please do not hesitate to contact me.

Sincerely,

Donetta Davidson
Chair

cc: Congressman Maurice Hinchey (letter only)

⁷ See EAC Public Testimony, February 8, 2007, page 109.

? Transcript

EAC Study of Voter Identification Requirements

Background

The Help America Vote Act of 2002 (HAVA) authorizes the United States Election Assistance Commission (EAC) to conduct periodic studies of election administration issues. In May 2005, EAC contracted with Rutgers, the State University of New Jersey through its Eagleton Institute of Politics ("Contractor") to perform a review and legal analysis of state legislation, administrative procedures and court cases, and to perform a literature review on other research and data available on the topic of voter identification requirements. Further, the Contractor was asked to analyze the problems and challenges of voter identification, to hypothesize alternative approaches and to recommend various policies that could be applied to these approaches.

The Contractor performed a statistical analysis of the relationship of various requirements for voter identification to voter turnout in the 2004 election. Drawing on its nationwide review and legal analysis of state statutes and regulations for voter identification, the contractor compared states with similar voter identification requirements and drew conclusions based on comparing turnout rates among states for one election – November 2004. For example, the turnout rate in 2004 in states that required the voter to provide a photo identification document¹ was compared to the turnout rate in 2004 in states with a requirement that voters give his or her name in order to receive a ballot. Contractor used two sets of data to estimate turnout rates: 1) voting age population estimates² and 2) individual-level survey data from the November 2004 Current Population Survey conducted by the U.S. Census Bureau.³

The Contractor presented testimony summarizing its findings from this statistical and data analysis at the February 8, 2007 public meeting of the U.S. Election Assistance Commission. The Contractor's testimony, its summary of voter identification requirements by State, its summary of court decisions and literature on voter identification and related issues, an annotated bibliography on voter identification issues and its summary of state statutes and regulations affecting voter identification are attached to this report and can also be found on EAC's website, www.eac.gov.

Comment (GH): In Footnote #2 Regarding the estimate of non-citizens Perhaps this could be clarified to say whether the % of non-citizens was in the VAP or of the US population as whole. It is not clear to me.

EAC Declines to Adopt Draft Report

EAC finds the Contractor's summary of States' voter identification requirements and its summary of state laws, statutes, regulations and litigation surrounding the

¹ In 2004, three of the states that authorized election officials to request photo identification allowed voters to provide a non-photo ID and still vote a regular ballot and two others permitted voters who lacked photo ID to vote a regular ballot by swearing and affidavit.

² The July 2004 estimates for voting age population were provided by the U.S. Census Bureau. Because these numbers include non-citizens, the Contractor ~~reduced the numbers by the same percentage~~ the U.S. Census Bureau estimated ~~were non-citizens in 2000~~. Estimates of voting age population include persons who are not registered to vote. *VAP for 2004. Thus 2004*

³ The Current Population Survey is based on reports from self-described registered voters who also describe themselves as U.S. citizens.

These data did not differentiate between citizens and non-citizens.

of citizens included in voting age population statistics in 2000 to

implementation of voter identification requirements, to be a first step in the Commission's efforts to study the possible impact of voter identification requirements.

However, EAC has concerns regarding the data, analysis, and statistical methodology the Contractor used to analyze voter identification requirements to determine if these laws have an impact on turnout rates. The Contractor used a single election's statistics to conduct this analysis. The two sets of data came from the Census Bureau and included persons who were not eligible to and did not vote. The first analysis using averaged county-level turnout data from the U.S. Census showed no statistically significant correlations. So, a second analysis using a data set based upon the Current Population Survey (which was self-reported and showed a significantly higher turnout rate than other conventional data) was conducted that produced only some evidence of correlation between voter identification requirements and turnout. Furthermore, the initial categorization of voter identification requirements included classifications that actually require no identification at all, such as "state your name." The research methodology and the statistical analysis used by the Contractor were questioned by independent working and peer review groups comprised of social scientists and statisticians. The Contractor and the EAC agree that the report raises more questions than provides answers.⁴ Thus, EAC will not adopt the Contractor's study and will not issue an EAC report based upon this study. EAC, however, is releasing the data and analysis conducted by Contractor.

Further EAC Study on Voter Identification Requirements

EAC will engage in a longer-term, more systematic review of voter identification requirements. Additional study on the topic will include more than one Federal election cycle, additional environmental and political factors that effect voter participation, and the numerous changes in state laws and regulations related to voter identification requirements that have occurred since 2004.

EAC will undertake the following activities:

- Conduct an ongoing state-by-state review, reporting and tracking of voter identification requirements. This will include tracking states' requirements which require a voter to state this or her name, to sign his or her name, to match his or her signature to a signature on file, to provide photo or non-photo identification or to swear an affidavit affirming his or her identify.
- Establish a baseline of information that will include factors that may affect or influence Citizen Voting Age Population (CVAP) voter participation, including various voter identification requirements, the competitiveness of a race and certain environmental or political factors. EAC will use some of the information collected by Eagleton as well as additional data from the states to develop this baseline.

⁴ See Transcript of EAC Public Meeting, February 8, 2007, page 109.

- In 2007, convene a working group of advocates, academics, research methodologists and election officials to discuss EAC's next study of voter identification. Topics to be discussed include methodology, specific issues to be covered in the study and timelines for completing an EAC study on voter identification.
- Study how voter identification provisions that have been in place for two or more Federal elections have impacted voter turnout, voter registration figures, and fraud, study the effects of voter identification provisions, or the lack thereof, on early, absentee and vote-by-mail voting. Included in this study will be an examination of the relationship between voter turnout and other factors such as race and gender.
- Publish a series of best practice case studies which detail a particular state's or jurisdiction's experiences with educating poll workers and voters about various voter identification requirements. Included in the case studies will be detail on the policies and practices used to educate and inform poll workers and voters.

DRAFT

EAC Study of Voter Identification Requirements

Background

The Help America Vote Act of 2002 (HAVA) authorizes the United States Election Assistance Commission (EAC) to conduct periodic studies of election administration issues. In May 2005, EAC contracted with Rutgers, the State University of New Jersey through its Eagleton Institute of Politics ("Contractor") to perform a review and legal analysis of state legislation, administrative procedures and court cases, and to perform a literature review on other research and data available on the topic of voter identification requirements. Further, the Contractor was asked to analyze the problems and challenges of voter identification, to hypothesize alternative approaches and to recommend various policies that could be applied to these approaches.

The Contractor performed a statistical analysis of the relationship of various requirements for voter identification to voter turnout in the 2004 election. Drawing on its nationwide review and legal analysis of state statutes and regulations for voter identification, the contractor compared states with similar voter identification requirements and drew conclusions based on comparing turnout rates among states for one election – November 2004. For example, the turnout rate in 2004 in states that required the voter to provide a photo identification document¹ was compared to the turnout rate in 2004 in states with a requirement that voters give his or her name in order to receive a ballot. Contractor used two sets of data to estimate turnout rates: 1) voting age population estimates² and 2) individual-level survey data from the November 2004 Current Population Survey conducted by the U.S. Census Bureau.³

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EAC Declines to Adopt Draft Report

¹ In 2004, three of the states that authorized election officials to request photo identification allowed voters to provide a non-photo ID and still vote a regular ballot and two others permitted voters who lacked photo ID to vote a regular ballot by swearing and affidavit.

² The July 2004 estimates for voting age population were provided by the U.S. Census Bureau. These data did not differentiate between citizens and non-citizens; because these numbers include non-citizens, the Contractor reduced the numbers by applied the same percentage of citizens included in voting age population statistics in 2000 to the U.S. Census Bureau estimated were non-citizens in 2000 voting age population in 2004. Thus, 2004 estimates of voting age population include persons who are not registered to vote.

³ The Current Population Survey is based on reports from self-described registered voters who also describe themselves as U.S. citizens.

EAC finds the Contractor's summary of States' voter identification requirements and its summary of state laws, statutes, regulations and litigation surrounding the implementation of voter identification requirements, to be a first step in the Commission's efforts to study the possible impact of voter identification requirements.

However, EAC has concerns regarding the data, analysis, and statistical methodology the Contractor used to analyze voter identification requirements to determine if these laws have an impact on turnout rates. The Contractor used a single election's statistics to conduct this analysis. The two sets of data came from the Census Bureau and included persons who were not eligible to and did not vote. The first analysis using averaged county-level turnout data from the U.S. Census showed no statistically significant correlations. So, a second analysis using a data set based upon the Current Population Survey (which was self-reported and showed a significantly higher turnout rate than other conventional data) was conducted that produced only some evidence of correlation between voter identification requirements and turnout. Furthermore, the initial categorization of voter identification requirements included classifications that actually require no identification at all, such as "state your name." The research methodology and the statistical analysis used by the Contractor were questioned by independent working and peer review groups comprised of social scientists and statisticians. The Contractor and the EAC agree that the report raises more questions than provides answers.⁴ Thus, EAC will not adopt the Contractor's study and will not issue an EAC report based upon this study. All of the material provided by the Contractor is attached.

Further EAC Study on Voter Identification Requirements

EAC will engage in a longer-term, more systematic review of voter identification requirements. Additional study on the topic will include more than one Federal election cycle, additional environmental and political factors that effect voter participation, and the numerous changes in state laws and regulations related to voter identification requirements that have occurred since 2004.

EAC will undertake the following activities:

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- Establish a baseline of information that will include factors that may affect or influence Citizen Voting Age Population (CVAP) voter participation, including various voter identification requirements, the competitiveness of a race and certain environmental or political factors. EAC will use some of the information collected by Eagleton as well as additional data from the states to develop this baseline.

⁴ See Transcript of EAC Public Meeting, February 8, 2007, page 109.

- In 2007, convene a working group of advocates, academics, research methodologists and election officials to discuss EAC's next study of voter identification. Topics to be discussed include methodology, specific issues to be covered in the study and timelines for completing an EAC study on voter identification.
- Study how voter identification provisions that have been in place for two or more Federal elections have impacted voter turnout, voter registration figures, and fraud. Study the effects of voter identification provisions, or the lack thereof, on early, absentee and vote-by-mail voting. Included in this study will be an examination of the relationship between voter turnout and other factors such as race and gender.
- Publish a series of best practice case studies which detail a particular state's or jurisdiction's experiences with educating poll workers and voters about various voter identification requirements. Included in the case studies will be detail on the policies and practices used to educate and inform poll workers and voters.

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Attorney-Client
Privilege

Deliberative Process
Privilege

Juliet E. Hodgkins/EAC/GOV
02/01/2007 03:53 PM

To Thomas R. Wilkey/EAC/GOV@EAC

cc

bcc

Subject Fw: More thoughts on Eagleton draft report

Juliet Thompson Hodgkins
General Counsel
United States Election Assistance Commission
1225 New York Ave., NW, Ste 1100
Washington, DC 20005
(202) 566-3100

— Forwarded by Juliet E. Hodgkins/EAC/GOV on 02/01/2007 03:53 PM —

Juliet E. Hodgkins/EAC/GOV

02/01/2007 03:29 PM

To Donetta Davidson, Karen Lynn-Dyson

cc

Subject More thoughts on Eagleton draft report

After having read the Eagleton draft report, I have some thoughts and questions:

I am troubled by the concept that Eagleton compared states as if they were equal. They assume that, all factors being equal, that the voter turn out in each state would be equal. I am not at all certain that this is the case. Further, there is no evidence that the staticians actually compared previous years' turnout in the same state to determine whether 2004 was some sort of anomaly for that state (high or low). Long story short, I am very skeptical of the data that they used to draw conclusions. We should ask questions about what data they used, how they parsed it, why they used the data, what other data could have been used to provide better, more reliable results.

My second concern is how they (statistically speaking) differentiate between a minimum requirement (i.e. state name, photo i.d., etc) and a maximum requirement (i.e., state name, photo i.d., etc.). It makes no sense to me how they could possibly arrive at a different percentage for these requirement levels.

My third issue is the persistent use of the phrases "ballot access" and "ballot integrity" without some definition or some explanation of what those concepts are.

Juliet Thompson Hodgkins
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027658



U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW – Suite 1100
Washington, DC 20005

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

MEMORANDUM

TO: Commissioners DeGregorio, Martinez, Davidson & Hillman
FROM: Juliet Thompson Hodgkins
DATE: February 6, 2006
RE: Open Meetings

BACKGROUND

Based upon the number of questions that we have recently had concerning meetings of the Commission and meetings that groups of Commissioners want to have with various of our stakeholders, I thought it prudent to distribute this memorandum that sets forth the basic principles of the federal open meetings law, what is an open meeting and which meetings must be publicized.

WHAT IS A MEETING?

A meeting is considered to be the gathering and deliberation of a sufficient number of the agency members to constitute a quorum that can act on behalf of the agency and wherein the members conduct or dispose of official agency business:

the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e)...

5 U.S.C. 552b(a)(2).

Each agency should have a set of regulations that further defines meetings for purposes of the Government in the Sunshine Act. For example, the FEC has defined meeting to exclude the type of circulation voting procedure that this

Commission has adopted. This agency has not yet adopted regulations governing its public meetings, but should do so in this fiscal year.

In addition to these statutory and regulatory provisions, case law has interpreted the meaning of meeting. Discussions between Commission staff and the Commissioners as well as circulation of memoranda regarding a subject are **not** considered a meeting for purposes of the Government in the Sunshine Act.

Discussions between members of Civil Aeronautics Board and staff and circulation of memoranda among Board members were activities common to any body of responsible public officials preparing to make important decision, and the kind of activity forbidden by Sunshine Act did not occur. Republic Airlines, Inc. v. C.A.B., C.A.8 1985, 756 F.2d 1304.

Furthermore, meetings to discuss whether to have another meeting are not considered to be covered by the Sunshine Act.

This section exempts from its definition of "meeting" deliberations about whether to schedule future meetings with shorter than seven-day notice; thus, meeting at which Federal Communications Commission did no more than set a date to consider applicant's amended application for transfer of television status was not subject to notice provisions of this section. Washington Ass'n for Television and Children v. F. C. C., C.A.D.C.1981, 665 F.2d 1264, 214 U.S.App.D.C. 446.

WHEN MUST A MEETING BE OPEN?

Federal law requires that meetings of a government agency be open.

Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of **every meeting of an agency shall be open to public observation.**

5 U.S.C. 552b(b).

For purposes of this requirement, the term agency means:

any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

5 U.S.C. §552b(a)(1).

There are ten statutory exemptions for the requirement of an open meeting. In these instances, a meeting may be closed by vote of the Commission:

- (1) disclose matters that are
 - (A) specifically authorized under criteria established by an Executive order to be **kept secret in the interests of national defense or foreign policy** and
 - (B) in fact properly **classified** pursuant to such Executive order;
- (2) relate solely to the **internal personnel rules and practices** of an agency;
- (3) disclose matters **specifically exempted from disclosure by statute** (other than section 552 of this title), provided that such statute
 - (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
 - (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (4) disclose **trade secrets and commercial or financial information** obtained from a person and privileged or confidential;
- (5) involve **accusing any person of a crime**, or formally censuring any person;
- (6) **disclose information of a personal nature** where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (7) **disclose investigatory records compiled for law enforcement purposes**, or information which if written would be contained in such records, but only to the extent that the production of such records or information would
 - (A) interfere with enforcement proceedings,
 - (B) deprive a person of a right to a fair trial or an impartial adjudication,
 - (C) constitute an unwarranted invasion of personal privacy,
 - (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,
 - (E) disclose investigative techniques and procedures, or
 - (F) endanger the life or physical safety of law enforcement personnel;
- (8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
- (9) disclose information the premature disclosure of which would—
 - (A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to

(i) lead to significant financial speculation in currencies, securities, or commodities, or
(ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

5 U.S.C. 552b(c)(1) – (10).

Obviously, numbers 1, 8, 9, and 10 do not and will not apply to this Commission.

REQUIREMENTS OF AN OPEN MEETING

Notice must be provided at least one week in advance of the meeting.

In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

5 U.S.C. 552b(e)(1).

In addition, each and every portion of the meeting must be open to the public unless the meeting is closed by vote due to the discussion of a topic covered under the exemptions discussed above. (See 5 U.S.C. 552b(b) and (c)(1) – (10))

CONCLUSION

A quorum for this Commission is set by statute. HAVA provides that any action requires a vote of three Commissioners. As such, the presence and deliberation of three Commissioners constitute a quorum of the Commission.

Meetings must be held in compliance with the Government in the Sunshine Act. Thus, all meetings of the Commission (that is where 3 or more Commissioners and present and deliberating) shall be noticed and open to the public, unless one or more exceptions for closure of the meeting applies. No meetings of three or more Commissioners should be held with persons other than staff of this Commission without following the provisions of the Government in the Sunshine Act.



**U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW - Suite 1100
Washington, DC 20005**

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

MEMORANDUM

TO: Chairman Soaries

FROM: Julie Thompson

RE: Open Meetings

DATE: November 12, 2004

The open meetings requirement is found in 5 USC § 552b. Generally, that statute defines a meeting of a covered agency to be:

the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e)

5 USC 552b(a)(2). The statute, further specifically prohibits the conduct or disposition of agency business other than in accordance with the provisions of the open meetings law. 5 USC 552b(b). There are several enumerated exceptions to what must be conducted in an open and public meeting:

- (1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;
- (2) relate solely to the internal personnel rules and practices of an agency;
- (3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) involve accusing any person of a crime, or formally censuring any person;

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

- (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
- (8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
- (9) disclose information the premature disclosure of which would--
 - (A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or
 - (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

5 USC §552b(c). In addition, the exceptions to the public records law, those documents which are not required to be made open and available to the public, are also exceptions to items that must be discussed in an open and public meeting.

- (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

- the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
 - (5) 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;
 - (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
 - (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
 - (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
 - (9) geological and geophysical information and data, including maps, concerning wells.

5 USC § 552(b).

The open meetings law does not require the agency to hold meetings. Rather, if the agency holds a meeting it must comply with the open meeting requirements where applicable. This is why the agency can use notation voting (tally votes) in lieu of a meeting.

With regard to the specific discussion that we had concerning the possibility of holding a meeting with certain advocacy groups, I believe that this will run afoul of the open meetings law, as such meeting will inevitably reveal information and spurn deliberations, analysis and ultimately decisions related to the past election. It would be preferable to have these advocacy groups present at a public meeting of the Commission for a number of reasons: (1) it would allow an open and public discussion of their impressions of the election; (2) it would allow the Commission to invite all advocacy groups with an interest in this topic; and (3) it would prevent any allegations that the Commission met behind

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

closed doors with certain but not all advocacy groups – thus avoiding any appearance of favoritism. We have already discussed the possibility of having a public meeting on December 16 (or the date that is finally selected) where certain elections stakeholders are asked to give reports on their sense of the election. In addition, we have discussed the possibility of having public hearings in the field wherein we gather information regarding the positives and negatives associated with the November 2, 2004 election. These would be perfect opportunities to publicly gather the information that we are seeking through a meeting with the advocacy groups.

Attorney-Client
Privilege

Juliet E.
Thompson-Hodgkins/EAC/G
OV

08/30/2006 05:23 PM

To Gavin S. Gilmour/EAC/GOV@EAC, jlayson@eac.gov
cc
bcc
Subject Eagleton letter

Kind of tough. Let me know what you think.



letter regarding release of Eagleton data.doc

Juliet Thompson Hodgkins
General Counsel
United States Election Assistance Commission
1225 New York Ave., NW, Ste 1100
Washington, DC 20005
(202) 566-3100

027668

John Weingart
Associate Director
Eagleton Institute of Politics
Rutgers University

New Brunswick, NJ

Dear Mr. Weingart:

Thank you for your recent inquiry of August 16, 2006 regarding the anticipated release of data contained in the Eagleton Institute of Politics and Moritz College of Law studies on provisional voting and voter identification, which were conducted for the U.S. Election Assistance Commission.

While your assertion that election officials could benefit from the data compiled in the course of your research may be true, I would urge Eagleton and Moritz to exercise caution in the release of this information without further work to ensure its accuracy and completeness. Eagleton and Moritz received information from several election officials at the Standards Board and Board of Advisors meetings that information contained in the data set and draft report are inaccurate or incomplete. Furthermore, as you will recall, EAC accepted the report based on this data in "draft" as the completion of your contract due to our concerns about the data and the analysis of that data. In light of those concerns, EAC has not yet completed its review of the "draft" report and has not made final determinations on the release of any future document based on that data and draft report.

As such, any release of the data gathered by Eagleton or Moritz may not be released in conjunction with or using EAC's name as endorsing the content, quality or veracity of such data. I trust that this clarifies how Eagleton and Moritz may use the data gathered in the performance of its contract with the EAC. If you have any questions, please feel free to contact me.

Sincerely,

Thomas Wilkey
Executive Director

Attorney-Client
Privilege

Deliberative Process
Privilege

Juliet E. Hodgkins/EAC/GOV
03/13/2007 06:06 PM

To "Davidson, Donetta" <ddavidson@eac.gov>, Gracia
Hillman/EAC/GOV@EAC, Caroline C.
Hunter/EAC/GOV@EAC, [REDACTED]
cc Thomas R. Wilkey/EAC/GOV@EAC

bcc

Subject Edited version of the Voter ID statement

Commissioners,

I intended to get this out to you much earlier today, but the day got away from me. After our hearing last week before the House Appropriations Subcommittee and the requests that were made for the draft reports of the Eagleton and Voter Fraud studies, I think that we must take a different approach to addressing the quality of these reports. While it may or may not be our intention to release these documents publicly, we MUST respond to the request made from a Congressional Committee and cannot use FOIA exemptions as FOIA does not apply to them. I believe that it is safe to assume that if we provide these documents to the Committee, even with a letter explaining their predecisional nature, that these documents will be released into the public spectrum. As such, I feel that EAC needs to make a statement regarding the quality of these reports and why we are making (or have made) a decision not to adopt the draft reports that were produced by our contractors.

Thus, I edited the statement that Karen produced with comments that reflect why we will not adopt the Eagleton report. That document is attached below. I would suggest that we put similar statements regarding Eagleton's report and the Voter Fraud draft report into a letter that I am drafting to go to the Committee with the requested documents. I will edit that letter to include similar comments tonight/tomorrow morning and will circulate it to you.

Please let me know if you have any questions, concerns, comments, etc.



Voter ID edited.doc

Juliet Thompson Hodgkins
General Counsel
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1225 New York Ave., NW, Ste 1100
Washington, DC 20005
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027670

EAC Statement on Future Study of Voter Identification Requirements

Background

The Help America Vote Act of 2002 (HAVA) authorizes the United States Election Assistance Commission (EAC) to conduct periodic studies of election administration issues. In May 2005, EAC contracted with Rutgers, the State University of New Jersey through its Eagleton Institute of Politics ("Contractor") to perform a review and legal analysis of state legislation, administrative procedures and court cases, and to perform a literature review on other research and data available on the topic of voter identification requirements. Further, the Contractor was asked to analyze the problems and challenges of voter identification, to hypothesize alternative approaches and to recommend various policies that could be applied to these approaches.

The Contractor performed a statistical analysis of the relationship of various requirements for voter identification to voter turnout in the 2004 election. Using two sets of data-- aggregate turnout data at the county level for each state, and reports of individual voters collected in the November 2004 Current Population Survey conducted by the U.S. Census Bureau-- the Contractor arrived at a series of findings, conclusions and subsequent recommendations for further research into the topic.

The Contractor presented testimony summarizing its findings from this statistical and data analysis at the February 8, 2007 public meeting of the U.S. Election Assistance Commission. The Contractor's testimony, its summary of voter identification requirements by State, its summary of court decisions and literature on voter identification and related issues, an annotated bibliography on voter identification issues and its summary of state statutes and regulations affecting voter identification are attached to this report and can also be found on EAC's website, www.eac.gov.

EAC Recommendations for further study and next steps

EAC finds the Contractor's summary of States' voter identification requirements and its summary of state laws, statutes, regulations and litigation surrounding the implementation of voter identification requirements, to be a first step in the Commission's consideration of voter identification requirements.

However, EAC has concerns regarding the research data, analysis and statistical methodology the Contractor chose to employ in order to analyze voter identification requirements and the potential variation into determine if these laws have an impact on turnout rates based on the type of voter identification requirements. The Contractor used a single election's statistics to conduct this analysis. The two sets of data came from the Census Bureau and included persons who were not eligible to and did not vote. The first analysis using averaged county-level turnout data from the U.S. Census showed no statistically significant correlations. So, a second analysis using a less reliable data set

based upon the Current Population Survey (which was self-reported and showed a significantly higher turnout rate than other conventional data on that point) was conducted that produced only some evidence of correlation between voter identification requirements and turn out. Furthermore, the initial categorization of voter identification requirements included classifications that actually require no identification at all, such as "state your name." These data and the statistical analysis used by the Contractor were rightly criticized by independent working and peer review groups comprised of social scientists and statisticians. EAC believes that the Contractor's recommendation or draft report is so fundamentally flawed that none of the draft findings can be adopted or rehabilitated to form a reliable, accurate and useful product. Thus, EAC is not adopting the report submitted by the Contractor and, therefore, is not releasing the will not issue a report based upon this study.

EAC will engage in a longer-term, more systematic review of voter identification requirements. Additional study on the topic will include more than one Federal election cycle, additional environmental and political factors that effect voter participation, and the numerous changes in state laws and regulations related to voter identification requirements that have occurred since 2004.

EAC will undertake the following activities:

- Conduct an ongoing state-by-state review, reporting and tracking of voter identification requirements. This will include tracking states' requirements which require a voter to state this or her name, to sign his or her name, to match his or her signature to a signature on file, to provide photo or non-photo identification or to swear an affidavit affirming his or her identify.
- Establish a baseline of information that will include factors that may affect or influence Citizen Voting Age Population (CVAP) voter participation, including various voter identification requirements, the competitiveness of a race and certain environmental or political factors. EAC will use some of the information collected by Eagleton as well as additional data from the states to develop this baseline.
- Convene, by mid-2007, a working group of advocates, academics, research methodologists and election officials to discuss EAC's next study of voter identification. Topics to be discussed include methodology, specific issues to be covered in the study and timelines for completing an EAC study on voter identification.
- Study how voter identification provisions that have been in place for two or more Federal elections have impacted voter turnout, voter registration figures, and fraud, study the effects of voter identification provisions, or the lack thereof, on early, absentee and vote-by-mail voting. Included in this study will be an examination of the relationship between voter turnout and other factors such as race and gender.

- Publish a series of best practice case studies which detail a particular state's or jurisdiction's experiences with educating poll workers and voters about various voter identification requirements. Included in the case studies will be detail on the policies and practices used to educate and inform poll workers and voters.

DRAFT

Juliet E. Hodgkins/EAC/GOV
03/28/2007 09:55 PM

To Rosemary E. Rodriguez/EAC/GOV@EAC
cc Caroline C. Hunter/EAC/GOV@EAC, Donetta L.
Davidson/EAC/GOV@EAC, Gracia
Hillman/EAC/GOV@EAC, Jeannie Layson/EAC/GOV@EAC,
bcc

Subject Re: Comments on Eagleton's response

I have not reviewed the various laws, but I believe that it would require that kind of review to answer your question accurately. My guess is that much like other election-related provisions, the language of the statute and the placement of the statute in the code or statutory scheme will dictate the answer to the question. Some may not even be written into statute. If you want me to, I can get someone to start working on that review.

Juliet T. Hodgkins
General Counsel
United States Election Assistance Commission
1225 New York Ave., NW, Ste 1100
Washington, DC 20005
(202) 566-3100
Rosemary E. Rodriguez/EAC/GOV

Rosemary E.
Rodriguez/EAC/GOV
03/28/2007 06:54 PM

To Juliet E. Hodgkins/EAC/GOV@EAC, Donetta L.
Davidson/EAC/GOV@EAC, Gracia
Hillman/EAC/GOV@EAC, Caroline C.
Hunter/EAC/GOV@EAC
cc Thomas R. Wilkey/EAC/GOV@EAC, Karen
Lynn-Dyson/EAC/GOV@EAC, Jeannie
Layson/EAC/GOV@EAC
Subject Re: Comments on Eagleton's response

Julie, in your legal opinion, is stating one's name considered identification in the states where it is the threshold requirement?

Juliet E. Hodgkins
----- Original Message -----

From: Juliet E. Hodgkins
Sent: 03/28/2007 06:19 PM EDT
To: Donetta Davidson; Gracia Hillman; Caroline Hunter; Rosemary Rodriguez
Cc: Thomas Wilkey; Karen Lynn-Dyson; Jeannie Layson
Subject: Comments on Eagleton's response

Karen will present our discussion and conclusions tomorrow. However, when we left the briefing, I think everyone believed that I would provide comments since I will not be able to be on the phone. As such, I am transmitting my comments through this email. I will respond or address Eagleton's numbered paragraphs (note that there is no paragraph 4).

1. There is no need to address this as Eagleton agrees that they only reviewed one election's statistics. The statement of work for the contract told them to review the status of the law in 2004, but in no way limited their analysis to a single year.

2. I believe that Eagleton's issue here is one of semantics. They don't like the phraseology of this sentence. However, the sentence is true and is demonstrated by the sentence in paragraph 2 of the statement that they reviewed and to which they provided comments. That paragraph specifically contains the following information: "Contractor used two sets of data to estimate turnout rates: 1) voting age population estimates(FN2) and 2) individual-level survey data from the November 2004 Current Population Survey conducted by the U.S. Census Bureau.(FN3)" Eagleton made two sets of comments to Footnote 2, which is imbedded in the sentence that was just quoted. They explained their methodology in those comments and that methodology was captured in footnote 2. That footnote specifically contains the following sentences: "These data did not differentiate between citizens and non-citizens;... Thus, 2004 estimates of voting age population include person who are not registered to vote."

3. Eagleton objects to the use of the word "so" in the second sentence. They believe that this creates an inference that they only used the second set of data because the first did not show significant correlations. While generally speaking, I believe that this inference is at least partially true, since researchers are always searching for a set of data that will show a statistically significant correlation and will proceed to a different set of data if the first does not show it, it is not the intended inference of these two sentences. The point is to show that of the two data sets that they used one showed no significant correlation and the second showed some correlations (however not all variables showed correlation). And, that the second set of data -- the one that showed correlation was questionable because of the unusually high turnout rate that was reported. As such, we have agreed to remove the words "so" at the beginning of the second sentence and "only" in the middle of the second sentence -- see #9).

4. There is no number 4.

5. I believe that the statement as contained in the EAC statement is TRUE. Stating one's name is not an independently verifiable form of identification, and I think those are the forms of identification that we are talking about. I can walk into any polling place in the country and state the name of any person. Unless the poll worker knows me or knows the person whose name I have used, there is no way to independently verify whether my statement is true. Conversely, my signature can be compared, my address can be verified, or my driver's license can be scrutinized to determine if I am the person that I purport to be. While it is true that I identify myself on the phone or in person all the time by stating my name, it is not for the purpose of determining my eligibility to vote in a particular precinct, etc. I believe that when the term identification is used in the context of voting that it must mean that the voter provides some independently verifiable form of identification. Having said this, I understand that this may be a point of disagreement for others. But, as for me, this statement is true.

6. Based on conversations with Karen concerning the two groups-- one assembled by Eagleton and one assembled by EAC -- both "questioned" the methodology and statistical analysis employed by Eagleton. The group assembled by Eagleton was referred to by them in their report as their "peer review group." Karen feels that "working group" is not an accurate description of the group assembled by EAC, so she has language to use to replace "independent working group" that captures the essence of that group.

7. See response to #2, above.

8. See response to #1, above.

9. See response to #3, above.

10. See response to #6, above.

11. I believe that the Commission must act on this report. Merely stating what we will do in the future will not distance us from this work and will result in media and others quoting Eagleton's work as an "EAC" report. It has been my understanding that the consensus of the group is to "decline to adopt." I believe that this is the right action.

My flight departs at 9:20 a.m. (EDT) and I do not arrive until 12:15 p.m. (EDT). However, if you have

027675

questions concerning my comments, I will be around tonight and will be available tomorrow afternoon by Blackberry.

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(202) 566-3100

027676

Attorney-Client
Privilege

Juliet E. Hodgkins/EAC/GOV
03/28/2007 06:19 PM

To "Davidson, Donetta" <ddavidson@eac.gov>, Gracia Hillman/EAC/GOV@EAC, Caroline C. Hunter/EAC/GOV@EAC, Rosemary E. cc Thomas R. Wilkey/EAC/GOV@EAC, Karen Lynn-Dyson/EAC/GOV@EAC, jlayson@eac.gov
bcc

Subject Comments on Eagleton's response

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8. See response to #1, above.

9. See response to #3, above.

10. See response to #6, above.

11. I believe that the Commission must act on this report. Merely stating what we will do in the future will not distance us from this work and will result in media and others quoting Eagleton's work as an "EAC" report. It has been my understanding that the consensus of the group is to "decline to adopt." I believe that this is the right action.

My flight departs at 9:20 a.m. (EDT) and I do not arrive until 12:15 p.m. (EDT). However, if you have questions concerning my comments, I will be around tonight and will be available tomorrow afternoon by Blackberry.

Juliet T. Hodgkins
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027678

SECTION 551 DEFINITIONS

RULE MAKING:

Agency process for making, changing or repealing a rule.

RULE:

An agency statement of general or particular applicability AND future effect -- Designed to

- implement, interpret, or prescribe law or policy OR..
- describing the organization, procedure or practice requirements of the agency...

AND includes the approval or prescription for the future OF:

- rates,
- wages,
- corporate or financial structures or reorganizations thereof,
- prices,
- facilities,
- appliances, services or allowances therefore or of valuations,
- costs,
- or accounting,
- or practices bearing on any of the above.

AJUDICATION:

Agency process for formulating an ORDER.

ORDER:

Final disposition (affirmative or negative) of an agency in a matter other than rule making but including licensing.

LICENSING:

Agency process granting, renewing, denying, suspending, revoking, etc... a license.

LICENSE:

Whole or part of any agency permit, certificate, approval, registration.... or other form of permission.

SECTION 553 Rule Making

- 1) General Notice Required... Notice of proposed rule making published in Federal Register.
 - a. No timeline noted.
 - b. Exceptions. Such notice not required for interpretive rules, general statements of policy, or rules of agency organization, procedure or practice... OR finding of good cause shows such filing is impractical unnecessary, etc...

- 2) After notice, above, agency shall give the public an opportunity to participate in the rulemaking through submissions of written data... or oral presentations.
- 3) After consideration of the relevant materials presented, the agency shall incorporate in the rules adopted, a concise general statement of their basis and purpose. If statutes require a hearing on the record different rules apply (sec 556 & 557)
- 4) Publication of the substantive rule must be made 30 days before it becomes effective. (exceptions are noted).

SEC 554 ADJUDICATIONS (Agency process for making orders –final decisions that are not rules—includes licensing (i.e. certification/approval permit)

Applies only when adjudication required by statute to be determined on the record after opportunity to be heard. ??? does HAVA require this... it is silent to the whole process.

Section set rules for such a proceeding

SEC 556 HEARINGS....

This section on hearings applies only when required by the Rule Making Section (553) or the Adjudication Section (554). Under both sections hearings are only required when required by statute.

Gavin S. Gilmour/EAC/GOV
04/11/2007 04:10 PM

To Juliet E. Hodgkins/EAC/GOV@EAC
cc
bcc
Subject FOIA QUESTION

Per your question concerning draft documents and agency policies, my experience is that such documents are rarely released. First, the basis for withholding such documents is a litigation privilege referred to as the deliberative process privilege. FOIA (as a matter of necessity) incorporates litigation privileges as a statutory exemption. Like most privileges, the deliberative process privilege can be waived by the agency. As such, it is a voluntary exemption under FOIA (unlike exemptions for other matters like the withholding of classified information).

Agencies do have FOIA regulations. I am familiar with the Air Force regulation and took a quick look at those of the DOL and DOE. The regulations are generally focused upon procedure (how a request is processed, appealed, etc...) . Sometimes a regulation will outline or summarize exemptions for the benefit of its employes (the Air Force did this). Generally, they do not contain specific policies regarding the retention of drafts. The closest you will see agencies come to this is a general statement of policy relating to dealing with non-mandatory exemptions. For example the DOE states: "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 522 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. HOWEVER, given that the deliberative process privilege is a privilege based upon public policy (i.e. to protect decision making and avoid public confusion) it is unlikely that this policy would support the release of most drafts. In fact, I pulled a DOE decision on a FOIA appeal regarding a drafts and found this to be the case.(Case No. VFA-0558, 27 DOE 80,270).

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THIS MESSAGE IS FOR ITS INTENDED RECIPIENT ONLY. IT IS A PRIVILEGED DOCUMENT AND SHALL NOT BE RELEASED TO A THIRD PARTY WITHOUT THE CONSENT OF THE SENDER.



U. S. ELECTION ASSISTANCE COMMISSION

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The purpose of this document is to provide a broad overview of the trade secrets and commercial and financial information exemption of the Freedom of Information Act (FOIA) (Exemption 4). The document should be a useful tool in responding to FOIA request. It should also serve as a helpful reference during the creation of the EAC's Voluntary Voting System Certification Program. The certification program should be created with the understanding that the EAC has an interest, legal obligation and responsibility to protect certain proprietary information. Such forethought will make for a more efficient and compliant program in the long run. Please note that this document is a simple overview and should not serve as a replacement for legal counsel, independent research and cases by case—fact specific—analysis.

Exemption 4 of FOIA

The Freedom of Information Act (5 U.S.C. §552(b)(4)) provides for the release of documents to the public upon proper request. The statute does, however, exempt certain documents from release. One such exemption, Exemption 4, protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." This exemption serves to protect both the government and persons who provide information to the government. It does this by ensuring that the government will be able to obtain complete, accurate and useful information and safeguarding those who provide such information from competitive harm.

Generally, FOIA Exemption 4 is viewed in two parts or categories: (1) trade secrets and (2) commercial or financial information. If a document meets the definition of a trade secret no additional inquiry is necessary, it is exempt from the requirements of FOIA.¹ If a document is not a trade secret, it must be reviewed to determine if it is commercial or financial information which is privileged or confidential. This requires an involved analysis under standards set by the courts.² Ultimately any determination that Exemption 4 of FOIA applies to a request for information, will require that the information be withheld. This is because the Trade Secrets Act (18 U.S.C. §1905), a criminal statute prohibiting the release of certain information by the government, has been read as coextensive with Exemption 4.³ Thus, in practice, there may be no discretionary release of materials covered by Exemption 4.

Trade Secrets

The term "trade secrets" is not defined in FOIA and has different meanings under the common law. The courts have determined that in the FOIA context, the term trade secrets should be defined

¹ Public Citizens Health Research Group v. Food and Drug Administration, 539 F.Supp 1320, 1325 (D.D.C 1982).

² National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C.Cir.1974), and refined in National Parks & Conservation Association v. Kleppe, 547 F.2d 673 (D.C.Cir.1976), and Gulf & Western Industries v. United States, 615 F.2d 527 (D.C.Cir.1979).

³ CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

narrowly. For the purpose of FOIA Exemption 4, the term has been defined “*as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.*”⁴ Ultimately, trade secrets information “relates to the productive process itself.” It deals with information describing how a product is made. It does not relate to information describing end product capabilities, features, or performance.⁵

Commercial or Financial Information

Exemption 4 of FOIA provides that documents containing information that is “commercial or financial” may be withheld if it was obtained from “a person” and is “privileged or confidential.”⁶ First, the terms “commercial” and “financial” should be given their ordinary meaning. As such, the terms may be read broadly and include records in which a submitter has any *commercial interest*.⁷ As for the term “person,” it is also read broadly. The FOIA phrase “obtained from a person” encompasses a wide range of entities, including: corporations and state governments who provide information to the government.⁸ This leaves the more complex determination of whether information is privileged or confidential.

The standard for determining whether information is confidential depends upon whether its submission to the government was voluntary or required. Information given to an agency voluntarily is provided greater protection from release. Such information is categorically protected if it is NOT customarily disclosed to the public by the submitter.⁹ Case law and Department of Justice guidance dictate that determining whether a submitter voluntarily provided information is not based upon the nature of their participation in the activity, but whether the information was required if they chose to participate.¹⁰ Thus, despite the fact that the EAC’s voting system certification program will be “voluntary,” it is likely that the documents which vendors provide will be required by the EAC as a condition of participation.

Information required to be submitted to an agency is confidential if its disclosure is likely to produce either of the following effects: (1) impair the government’s ability to obtain necessary information in the future (“impairment prong”) OR (2) cause substantial harm to the competitive position of the submitter (“competitive harm prong”).¹¹

Impairment Prong.

Looking first to the impairment prong, in the context of required information, the government’s ability to collect needed information will be impaired when disclosure under FOIA would result in a

⁴ Public Citizens Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

⁵ Center for Auto Safety v. National Highway Traffic Safety Administration, 224 F.3d 144, 151 (D.C. Cir. 2001).

⁶ Gulf, 615 F.2d at 529.

⁷ Public Citizens Health Research Group, 704 F.2d at 1290.

⁸ Flight Safety Services v. Dep’t of Labor, 326 F.3d 607, 611 (5th Cir. 2003) (Business entities) and Hustead v. Norwood, 526 F. Supp. 323, 326 (S.D. Fla. 1981) (state governments).

⁹ Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992).

¹⁰ Department of Justice, Freedom of Information Act Guide, Exemption 4, Applying Critical Mass (May 2004) (See guidance and various case law cited therein.)

¹¹ National Parks & Conservation Association, 498 F.2d at 770.

diminution of the *reliability* or *quality* of the required submissions.¹² Such a determination by the Government requires a finding that impairment would be significant,¹³ this requires the rough balancing of the extent of impairment with the public's interest in disclosure.¹⁴ This should be considered a high standard. Moreover, such impairment seems unlikely in the certification context, where the reliability and quality of the information provided will be independently determined and provided by an EAC accredited testing laboratory. Furthermore, a lapse in the reliability or quality of information is less likely when a submitter's certification may depend upon such factors.

Competitive Harm Prong

Looking next to the competitive harm prong, required information is confidential if its release "is likely... to cause substantial harm to the competitive position of the person from whom the information was obtained."¹⁵ This harm is focused on that harm "flowing from the affirmative use of proprietary information by competitors," rather than any competitive injury such as that harm associated with angry customers or employees.¹⁶ Before an agency may make a determination regarding the release of information that might cause competitive harm, it must provide the submitter with an opportunity to share its views. This coordination is required by Executive Order 12,600. Coordination with the submitter does not relieve the agency of its responsibility to make a final, independent determination. Ultimately, any determination of competitive harm is highly fact sensitive. The same types of information have been found releasable or not releasable depending on other surrounding facts.

Additional Criteria for Confidentiality ("The Third Prong")

The Courts have held that the impairment and competitive harm prongs laid out in case law are not "the exclusive criteria for determining confidentiality." The key issue is whether the release of information will harm an "identifiable private or government interest which the Congress sought to protect by enacting Exemption 4."¹⁷ Specifically, courts have found records that are "intrinsically valuable" meet this definition and should not be release. This includes records that are themselves valuable commodities sold in the marketplace.¹⁸

Summary Tool

The below is a graphic summary of the information provided above. It may be used to assist individuals in the decision making process. All decision regarding the release of materials should be make on a cases by case basis after due consideration of the facts and law.

¹² Critical Mass, 975 F.2d at 878 and see Department of Justice, *Freedom of Information Act Guide*, Exemption 4, Impairment Prong of National Parks Test (May 2004) (See guidance and various case law cited therein.)

¹³ Such a determination usually requires the agency to contact the submitter and have them make a statement regarding their practice.

¹⁴ Washington Post Co. v. HHS, 690 F.2d 252, 269 (D.C. Cir. 1993)

¹⁵ National Parks & Conservation Association, 498 F.2d at 770.

¹⁶ Public Citizens Health Research Group, 704 F.2d at 1291.

¹⁷ 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1, 10 (1st Cir. 1983).

¹⁸ Department of Justice, *Freedom of Information Act Guide*, Exemption 4, Third Prong of National Parks (May 2004) (citing FOIA Update, Vol. VI, No 1, at 3-4 and Vol. IV, No. 4 at 3-4).

- I. In order to determine if a document is protected from release under Exemption 4 of FOIA, you must first ask whether meets the definition of a Trade Secret.

Trade Secret: A secret, commercially valuable plan, process, or device that is used for the making or processing of a product and that is the end product of either innovation or substantial effort. It relates to the productive process itself, describing how a product is made. It does not relate to information describing end product capabilities, features, or performance.

EXAMPLES

<u>Trade Secret</u>		<u>Not a Trade Secret</u>
<ul style="list-style-type: none"> ➤ Plans, schematics and other drawings useful in production. ➤ Specifications of material used in production. ➤ Source code used to develop software where release would reveal actual programming. ➤ Technical descriptions of the manufacturing processes, quality control methodology and other information directly related to production.¹⁹ ➤ Test results (compliance testing) performed on <u>unfinished</u> products. 	VS.	<ul style="list-style-type: none"> ➤ Information pertaining to a finished product's capabilities or features. ➤ Information regarding a finished product's performance (including testing results of an end product). ➤ Information regarding product components that would not reveal any commercially valuable information regarding production.

- II. If a document does not contain a "Trade Secret," you must determine whether the information is protected as commercial or financial under FOIA Exemption 4. This involves a three part test. Information must meet each part of this test to be withheld under Exemption 4.

Test. Exemption 4 also covers information that is (1) obtained from "a person," (2) commercial or financial and (3) is "privileged or confidential."

(A) The first two elements of the test are the most simple to apply. Exemption 4 requires information to have been obtained from a "person" and be "commercial or financial" in nature.

Person. The term "person," is read broadly and includes corporations and state governments.

AND

Commercial and Financial. The terms are given their ordinary meaning and read broadly. They include records in which a submitter has any *commercial interest*.

¹⁹ In compliance testing, where a product awaited marketing approval from the FDA, a court has found the product to be **NOT FINISHED**—and the testing a Trade Secret.

(B) Next the information must meet the more complicated third part of the test, it must be privileged or confidential. This requires yet another series of analysis.

1. Was the information required or provided voluntarily?

Voluntary or Required? Information given to an agency voluntarily is provided greater protection from release. Most information provided the EAC via its certification program will not be voluntarily provided (despite the voluntary nature of the program), because it was most likely provided as a condition of participation. If this is not the case, the information may be withheld if it is not customarily released by the submitter. Such a determination should involve a statement from the submitter and an analysis of the relevant community practices.

2. If the information was required, would release (i) impair the government's ability to obtain necessary information in the future ("impairment prong") OR (ii) cause substantial harm to the competitive position of the submitter ("competitive harm prong")? If either of the below is true than the information may be considered confidential.

Impairment Prong

The government's ability to collect needed information will be impaired when disclosure under FOIA would result in a diminution of the reliability or quantity of the required submissions. The impairment **MUST BE SIGNIFICANT**. This is a high standard, unlikely to apply to certification.

OR

Competitive Harm Prong

Release would likely cause substantial harm to the competitive position of the submitter. The harm at issue must come from the use of proprietary information BY COMPETATORS. This is a fact specific analysis.

3. If the release of information that may cause competitive harm is contemplated, the submitter must be contacted.

Contact Requirement. Before an agency may make a determination regarding the release of information that might cause competitive harm, it must provide the submitter with an opportunity to share its views. This does not relieve the agency of its responsibility to make the final, determination. This action is required by Executive Order.

FACA QUICKIE

GENERAL

1. Federal Advisory Committees (FACs) are entities that provide guidance to Federal agencies. They are heavily regulated. There is the Federal Advisory Committee Act (FACA), a FACA regulation published by GSA, and relevant Executive Orders. You are collecting, maintaining and managing information on behalf of your commissioner who serves as an EAC Designated Federal Officer.

Designated Federal Officer ("DFO"), means an individual designated by the agency head, for each advisory committee for which the agency head is responsible, to implement the provisions of sections 10(e) and (f) of the Act and any advisory committee procedures of the agency under the control and supervision of the CMO. The DFO shall:

- (a) Approve or call the meeting of the advisory committee or subcommittee;
 - (b) Approve the agenda, except that this requirement does not apply to a Presidential advisory committee;
 - (c) Attend the meetings;
 - (d) Adjourn any meeting when he or she determines it to be in the public interest; and
 - (e) Chair the meeting when so directed by the agency head.
2. All EAC FACS are mandated by Congress via HAVA. Thus they are non-discretionary committees.

Non-discretionary advisory committee means any advisory committee either required by statute or by Presidential directive. A *non-discretionary advisory committee* required by statute generally is identified specifically in a statute by name, purpose, or functions, and its establishment or termination is beyond the legal discretion of an agency head.

3. An agency should also have a *Committee Management Officer* (I am not sure if we do). They are responsible for ensuring FACA policies and records are maintained Agency-wide.
4. EAC is also required to have guidelines on managing FACAs. We do not... yet....

DOCUMENTATION:

1. *Advisory committee records*. Official records generated by or for an advisory committee must be retained for the duration of the advisory committee. Upon termination of the advisory committee, the records must be processed in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29-33,

and regulations issued by the National Archives and Records Administration (NARA) (see 36 CFR parts 1220, 1222, 1228, and 1234),

2. Documentation and consultation with the FACA Secretariat (GSA) was originally required when our FACs were created and drafted their Charter. To the extent we have this documentation; it should be sought, gathered and maintained.
3. At a minimum, we need to find copies of the FACA Charters, Bylaws and changes thereto. We also need to maintain accurate lists of all FACA members. Finally, all FACA meetings are required to be reduced to minutes. We must maintain all of these minutes.
4. Must maintain copies of all documents provided to or produced by the FACA.

Subject to section 552 of title 5, United States Code, **the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee** shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist."

5. Reports

Annual comprehensive review of Federal advisory committees. To conduct an annual comprehensive review of each advisory committee as specified in section 7(b) of the Act, GSA requires Federal agencies to report information on each advisory committee for which a charter has been filed in accordance with § 102-3.70, and which is in existence during any part of a Federal fiscal year. Committee Management Officers (CMOs), Designated Federal Officers (DFOs), and other responsible agency officials will provide this information by data filed electronically with GSA on a fiscal year basis, using a Government wide shared Internet-based system that GSA maintains. This information shall be consistent with specific guidance provided periodically by the Secretariat. The preparation of these electronic submissions by agencies has been assigned interagency report control number (IRCN) 0304-GSA-AN.

Annual report of closed or partially-closed meetings. In accordance with section 10(d) of the Act, advisory committees holding closed or partially closed meetings must issue reports at least annually, setting forth a summary of activities and such related matters as would be informative to the public consistent with the policy of 5 U.S.C. 552(b).

Advisory committee reports. Subject to 5 U.S.C. 552, 8 copies of each report made by an advisory committee, including any report of closed or partially-closed

meetings as specified in paragraph (c) of this section and, where appropriate, background papers prepared by experts or consultants, must be filed with the Library of Congress as required by section 13 of the Act for public inspection and use at the location specified § 102-3.70(a)(3).

PUBLISHING MEETINGS.

We are required to publish an announcement of a FACA meeting in the Federal Register 15 day in advance of the meeting. **THUS BEFORE (AT LEAST 4 WORKING DAYS BEFORE) THE 15 DAY DEADLINE YOU NEED TO PROVIDE BRYAN WHITENER AND COUNSEL SPECIFIC INFORMATION ABOUT THE MEETING. If any part of the meeting is to be closed to the public this needs to be discussed with counsel in advance.** FACA requires the following info:

How are advisory committee meetings announced to the public?

- (a) A notice in the **Federal Register** must be published at least 15 calendar days prior to an advisory committee meeting, which includes:
- (1) The name of the advisory committee (or subcommittee, if applicable);
 - (2) The time, date, place, and purpose of the meeting;
 - (3) A summary of the agenda, and/or topics to be discussed;
 - (4) A statement whether all or part of the meeting is open to the public or closed; if the meeting is closed state the reasons why, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure;
 - (5) The name and telephone number of the Designated Federal Officer (DFO) or other responsible agency official who may be contacted for additional information concerning the meeting.
- (b) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 calendar days notice, provided that the reasons for doing so are included in the advisory committee meeting notice published in the **Federal Register**.



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The purpose of this paper is to provide background and make recommendations regarding the procedure for certifying or decertifying a voting system under the EAC's proposed voluntary voting system certification program. The document focuses on the fundamental requirements of due process in the context of this program.

BACKGROUND

EAC's voluntary voting system certification program will provide vendor's the opportunity to have their voting systems tested and ultimately certified by the Federal government. This program is strictly voluntary.¹ The Federal government places no restrictions or requirements nor grants any privileges regarding the sale or operation of voting systems on the basis of its certification. However, states may condition the use of such systems on the receipt of an EAC certification. Thus, at some level, voluntary EAC accreditation may impact the ability of a voting system manufacturer to sell its product. The question is whether or not this impact is proximate enough to trigger due process requirements and what these requirements would be. To start this analysis one must first look to the relevant law. The two principle authorities to consider are (1) the Administrative Procedures Act (APA) and (2) Due Process under the 5th Amendment to the U.S. Constitution (Due Process).

The APA. The APA sets forth procedural requirements for rule making, adjudication and licensing.² It is improbable that a court would find that these APA provisions apply to the EAC's voluntary certification program. Congress (through HAVA) has specifically withheld rulemaking authority from the EAC in all areas impacting state or local governments, with one exception (dealing with the National Voter Registration Act).³ Moreover, legislative rule making requires a specific statutory grant of authority.⁴ As the EAC has not been given this authority, the rule making provisions of the APA cannot apply.

Similarly, the adjudication provisions of the APA (which deals with the process for formulating an order) are triggered only when such determinations are "required by statute to be determined on the record after opportunity for an agency hearing."⁵ HAVA contains no such requirements with regard to certification determinations. Further, the APA's adjudication section specifically exempts from its coverage "proceedings in which

¹ Help America Vote Act of 2002, 42 U.S.C. §15301 *et seq.*

² 5 U.S.C. §§ 553, 554 and 558 (respectively). See also 5 U.S.C. §§ 556, 557, 558 (regarding prescribed procedures)

³ HAVA, 42 U.S.C. §15329

⁴ United States v. Storer Broadcasting Co., 323 U.S. 134 (1956).

⁵ 5 U.S.C. §§ 554(a)

decisions rest solely on inspections, test or elections.”⁶ This exemption arguably covers the proposed certification program which is based primarily on a test report.

Finally, the APA definition of license includes an “agency certificate... or other form of permission.”⁷ This definition has been read liberally by the courts.⁸ However, under the definition, a license must (at least) include some form of “permission.” Under HAVA, the recipient of a certification receives no benefit, access or right provided by the Federal government. Moreover, even if an EAC certification can be viewed as a license as defined by the APA, the statute requires that such a license be “required by law” before it applies. Again, there is no requirement under HAVA that a party hold an EAC certification to participate in any Federal program or receive any Federal benefit.

While the procedural provisions of the APA do not apply to the EAC’s Certification program, a review of the statute’s processes may be helpful in the program’s development. This review does not suggest that the EAC should or has made the APA applicable as a matter of policy. The following are a few APA provisions with some relevance to the EAC certification program.

1. In hearings a party is entitled to present his case by oral OR documentary evidence, to submit rebuttal evidence and confront the evidence against them.⁹
2. In applications for initial licenses an agency may adopt procedures for the submission of evidence in written form.¹⁰
3. The suspension or withdrawal of a license requires, (1) written notice by the agency of the facts that warrant the action and (2) the opportunity to demonstrate OR achieve compliance with all lawful requirements.¹¹
4. A license of a continuing nature does not expire until a final agency determination has been made, if the licensee has timely filed an application for a renewal or a new license.¹²

Due Process. The Due Process clause states that “No person shall... be deprived of life, liberty, or property, without due process of law.” Any analysis under this provision must be twofold. First one must determine if government action will deprive a person of life, liberty or property to determine if due process is required. Next, one must determine “how much process is due.”¹³ At this point we must answer the first question. Ultimately, the issue is limited to whether a voting system vendor has a property interest in the receipt, denial or loss of an EAC certification. As noted above, this is a complicated question. While an EAC certification allocates no rights, privileges or

⁶ 5 U.S.C. §§ 554(a)(3); *See also York v. Secretary of the Treasury*, 774 F.2d 417, 420-421 (10th Cir. 1985)

⁷ 5 U.S.C. §§ 551(8) (see 5 U.S.C. §§ 554(9) for definition of “licensing”).

⁸ *Horn Farms Inc. v. Veneman*, 319 F.Supp 2d 902 (N.D. 2005) (*citing North America v. Dept. of Transportation*, 937 F.2d 1427, 1437 (9th Cir. 1991)).

⁹ 5 U.S.C. §§ 556(d)

¹⁰ 5 U.S.C. §§ 556(d)

¹¹ 5 U.S.C. §§ 558 (c)

¹² 5 U.S.C. §§ 554(c)

¹³ *Administrative Law Treatise*, Vol. II, pg 568, §9.3 Richard J Pierce, Jr. (Aspen Law and Business).