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NLRB FOIA Officer
National Labor Relations Board
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Washington, DC 20570
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**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
DIVISION OF LEGAL COUNSEL**

Washington, D.C. 20570

By email

October 12, 2017

Re: FOIA Case No. NLRB-DLC-2017-001897, formerly LR-2017-0829A

This letter is in response to your Freedom of Information Act appeal, received in this Office on March 8, 2017, of the FOIA Officer's determination pursuant to the Freedom of Information Act, 5 U.S.C. § 552, in FOIA Case No. NLRB-2017-000820, formerly FOIA ID No. LR-2017-0829. We acknowledged your appeal on March 10, 2017. Status updates were provided on April 19 and July 28, 2017. After full consideration of the arguments raised in support of your appeal and a thorough review of the record withheld, I am denying your appeal in part and granting it in part, as explained below.

The FOIA Request and the Agency Response Being Appealed

On January 22, 2016, the FOIA Branch received your initial request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. As modified in a telephone call with a member of the FOIA Branch staff, that request sought a copy of ICG Memorandum 14-04 (Litigation Review and Comprehensive Report on Wins and Losses) ("ICG Memorandum").

On February 27, 2017, the FOIA Officer denied your request pursuant to FOIA Exemption 5, 5 U.S.C. §§ 552(b)(5), and withheld the ICG memorandum in its entirety. The FOIA Officer explained that the ICG Memorandum was privileged from disclosure pursuant to the deliberative process privilege prong of Exemption 5 since it was an inter- or intra-agency memorandum that reflected pre-decisional communications about the quality of the Agency's litigation record and expressed opinions and recommendations on policy matters related to that litigation record.

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Your Appeal

In your appeal, you request reconsideration of the FOIA Officer's decision to withhold the ICG Memorandum in its entirety. Specifically, you assert that Exemption 5 does not apply to the entire document, given that portions of the responsive record are likely not deliberative or not pre-decisional based on the title of the ICG Memorandum. You also contend that the FOIA law requires the Agency to conduct segregability and foreseeable harm analyses in order to determine whether there are any segregable, non-exempt portions of the ICG Memorandum that can be disclosed, and request that the FOIA Officer reexamine her initial determination on these bases.

Appeal Determination

A thorough review of the ICG Memorandum reveals that that it was created as an internal memorandum from attorneys in the Agency's Division of Operations Management and Field Quality Committee ("Quality Committee") to Regional Office management and litigating attorneys. The purpose of the memorandum is to explain the Quality Committee's evaluation of litigation results in the prior fiscal year and provide recommendations and tips for litigating future NLRB cases based on those findings. Among other things, the ICG Memorandum identifies different scenarios and problems that may arise during litigation, including during the pre-trial and post-trial phases, and provides advice on how to handle these situations. It communicates strategies that NLRB attorneys can employ to bolster the Agency's investigations and proceedings and describes factors that should be considered in specific cases or phases of litigation before making particular decisions. In addition, it contains sample language that attorneys may consider utilizing for briefing certain issues to an administrative law judge. It is noted that while there are similar OM and ICG memoranda available on the Agency's website, this particular ICG Memorandum was not posted.

FOIA Exemption 5, 5 U.S.C. § 552(b)(5), permits an agency to withhold all documents normally privileged from discovery in civil litigation, *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997), and thus encompasses material which would be protected under the attorney work product doctrine, in addition to the deliberative process privilege and other privileges. *Id.*; see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

The attorney work-product doctrine shields materials prepared by an attorney in reasonable anticipation of litigation. *Hertzberg v. Veneman*, 273 F.Supp.2d 67, 75 (D.D.C. 2003). The anticipated litigation need not actually occur in order for this privilege to apply. The privilege extends to documents prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the

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privilege protects any part of a document prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, *see Judicial Watch v. United States Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; *see also Wolfson v. United States*, 672 F.Supp.2d 20, 29 (D.D.C. 2009). *See Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

As explained above, ICG Memorandum 14-04 was prepared by (and for) attorneys in anticipation of future litigation. The ICG Memorandum provides strategic counsel and advice about how to win in litigation to the government personnel responsible for overseeing and litigating NLRB cases. To disclose such information would reveal pre-decisional communications among Agency personnel about the consideration of various litigation issues and strategies, and could jeopardize the candid discussions and deliberations that are necessary for effective agency decision making. In my view, in addition to the deliberative process privilege, the attorney work product privilege even more strongly justifies withholding the ICG Memorandum.

Accordingly, I agree with the FOIA Officer and find that the ICG Memorandum is privileged from disclosure by Exemption 5, under the attorney work product privilege, as set forth herein, as well as the deliberative process privilege, as discussed in the initial response. *See Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice Exec. Office for U.S. Attorneys*, 844 F.3d 246, 252, 255 (D.C. Cir. 2016) (finding that a federal criminal discovery manual (the "Blue Book"), containing "confidential legal analysis and strategies to support Government's investigations and prosecutions," qualified for attorney work product protection).

However, after a review of the contents of the memorandum and a detailed comparison of past Quality Committee Report OM memoranda that have been posted on the Agency's website, I have determined that there are reasonably segregable portions of the requested ICG memorandum that can be released to you without posing foreseeable harm to the Agency. Thus, I am providing you with a copy of the ICG Memorandum, redacted pursuant to Exemption 5, in order to protect certain litigation guidance and other information contained therein that was intended to help NLRB attorneys prevail on specific issues that arise in cases litigated by the Agency.

Barbara A. O'Neill, Associate General Counsel, at the direction of and pursuant to the policies established by the General Counsel, Richard F. Griffin, Jr., is responsible for this determination under the FOIA.

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

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

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

You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, Maryland 20740-6001

E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>

Telephone: 202-741-5770
Toll free: 1-877-684-6448
Facsimile: 202-741-5769

Sincerely,

Richard F. Griffin, Jr.
General Counsel

By:

Barbara A. O'Neill
Associate General Counsel
Division of Legal Counsel
National Labor Relations Board

Attachment: (eight pages)

cc: Freedom of Information Act Officer

**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM ICG 14-04

January 30, 2014

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: FY 2012 Litigation Review and Comprehensive Report on Litigation
Wins and Losses

One of the General Counsel's top priorities is ensuring that litigation by Field offices, like other case processing, is conducted with the highest quality standards. Although the Field continues to be very successful in its litigation, a critical examination of our litigation is an important means to ensure continuation of that success.

In furtherance of this goal, each year the Field Quality Committee reviews and evaluates cases litigated in the prior fiscal year and prepares a report to help maintain a high quality litigation program. Consisting of 11 Field managers and 2 representatives of the Division of Operations-Management, the Committee recently completed a careful review of cases litigated in FY 2012. Based upon this review, and instead of issuing its traditional recommendations and a narrative report, the Committee prepared suggested tips for the litigation process. All Regions are encouraged to review the report with their staffs.

I want to take this opportunity to thank the members of the Quality Committee for their work on this important project.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy.

/s/
A.P.

Attachment

cc: NLRBU

MEMORANDUM ICG 14-04

UNITED STATES GOVERNMENT

National Labor Relations Board



Memorandum

DATE: November 18, 2013

TO: Richard F. Griffin, Jr., General Counsel
Jennifer Abruzzo, Deputy General Counsel

THRU: Anne Purcell, Associate General Counsel
Nelson A. Levin, Deputy Associate General Counsel

FROM: FY 2013 Quality Committee
(Peter Ohr, RD, R-13; Marlin Osthus, RD, R-18; Mori Rubin, RD, R-31; Paul Murphy, ARD, R-3; Leonard J. Perez, ARD, R-14; Anne Pomerantz, RA, R-19; Timothy Watson, RA, R-16; Tirza Castellanos, SFX, R-21; Lisa Y. Henderson, SA, R-10; Richard Wainstein, SA, R-4; Andrea Wilkes, DRA, R-15; Richard A. Bock, DAGC, Ops-Mgmt; and Dorothy D. Wilson, AGC, Ops-Mgmt)

SUBJECT: Quality Committee's Report on FY 2012 Litigation

Each year, the Quality Committee carefully reviews selected litigation losses in an effort to identify important lessons and improve future litigation. The nationwide litigation success rate in FY 2012 of 90.1 percent confirms that, as in prior years, Regions do a superb job litigating cases before administrative law judges and the Board. To improve upon these fine results, this year the Quality Committee reviewed 34 cases decided in FY 2012, in which the complaint was dismissed in its entirety after hearing -- 15 losses before the Board¹ and 19 losses before administrative law judges.

In prior years, the Committee generally confined its review solely to Board or ALJ decisions and any available Regional Office loss memoranda. Based upon that review, the Committee issued recommendations contained in a full report with narrative sections. This year, the Committee not only examined Board and ALJ decisions and available loss memoranda, but also reviewed briefs to the ALJ and briefs in support of exceptions that were available in NxGen. Based upon this review, and instead of issuing its traditional recommendations and narrative report, the Committee decided to prepare suggested tips for the litigation process. The tips are broken into three broad categories: (1) tips on litigating, which include suggestions for issues arising pre-trial

¹ Losses before the Board include only those cases where the General Counsel filed exceptions to a loss before an administrative law judge or the Region was defending against exceptions filed by a respondent to a victory before an administrative law judge. If the charging party filed exceptions to a loss before an ALJ but the General Counsel did not, the case is not counted as a loss in the litigation success rate.

and during trial, as well as special issues arising in protected concerted activity cases; (2) tips on writing a brief to the ALJ, including two sample credibility sections; and (3) tips on writing exceptions and briefs in support of exceptions, including a sample credibility discussion. The Committee hopes that this change in format will be helpful and will lead to a discussion between agents and their supervisors and managers about these tips and other ways to improve Regional litigation. The Committee plans to add the tips from this report to the Committee's (b)(5) [REDACTED] (b)(5) [REDACTED] prepared earlier this year.

TIPS ON LITIGATING

I. Pre-Trial Issues

1. **Have a Theme and Prepare Clear Communications** – In the pre-trial phase, attorneys should meet with management to ensure a full understanding of the theory and the facts that support it. This includes considering the plausibility of all arguments in support of the theme. Look at the case from the perspective of an outsider and be prepared to explain things to the ALJ that do not make sense. Such a meeting is important to ensure that all are on the same page with regard to the theory, the necessary witnesses, the information that needs to be subpoenaed and the time needed to fully prepare the case.
2. **Review the Pleadings** – Give a thorough review to ensure that details are not missed, i.e, be sure to plead independent 8(a)(1) and that amendments to the complaint or charge are made to avoid 10(b) problems.
3. **Thoughtful Trial Prep** -- Focus on critical testimony, by clarifying in prep to safeguard against ambiguities and to ensure a detailed record. This is the time to clarify the timing of key events or important conversations so the testimony is not confusing.
4. **Attention to Detail** – Make sure potential gaps in your case are addressed early. For instance, when (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
5. **Full Analyses** – Guard against pitfalls such as focusing on the merits of one prong of a multi-prong analysis without giving sufficient consideration to the other prongs.
6. **Changing the Law** – If at any point you realize that your theory represents an expansion or change in existing law, contact Advice.
7. **Unappealing Facts** – Recognize unappealing facts and prepare to address them whether it is your plan to raise them or to wait to see if they come out in the Respondent’s cross-examination of your witness.

II. Trial Issues

8. **Actively Listen** – Carefully listen to the witness’ answers to your questions and make sure that any ambiguity is clarified on the record.
9. **Take Heed of the ALJ’s Concerns** – If the ALJ is expressing concerns to you during the hearing, especially early, regarding your theory, the pleadings or anything else, convey those concerns to regional management and develop a plan to address them, if possible in the trial and ultimately in the brief.

10. **Educate the ALJ** – When it is your concern that an ALJ is wrong, take the time to diplomatically educate the ALJ. Spend the time providing case or other support for the region’s processing of the case. Similarly, when the ALJ asks a question, do not sidestep it. Answer the question directly and if you do not know the answer, ask for time to get it and make sure you return with a full answer.

III. Special Issues Regarding (b)(5) Cases – Avoid Pitfalls

11. (b)(5) [Redacted]
12. **Full Record/Analysis** –The record must include facts that support all parts of a multi-pronged test.

TIPS ON WRITING A BRIEF TO THE ALJ

13. **Credibility Issues** – Do not overlook making a credibility argument and seeking adverse inferences where appropriate. Attached is a sample well-written credibility discussion.
14. **Arguing the Facts** -- Do not ignore adverse or unappealing facts. Consider how much emphasis you place on these, and how to present them adequately while not overemphasizing them. At the same time, emphasize the facts that support your theory.
15. **Arguing the Law** – Do not ignore cases that are unsupportive of your theory or that you expect to be raised by the Respondent. Make sure to distinguish those cases,.
16. **Stick to the Record/Be Organized** – Make sure to brief the facts that went into the record, not the ones you started with. Keep the facts in the facts section and do not mention facts for the first time in the Argument section.
17. **Supervisory Review** – It is expected that each brief will be carefully reviewed by a supervisor or manager before it issues to ensure a polished final product.

TIPS ON WRITING EXCEPTIONS AND BRIEFS IN SUPPORT

18. **Whether to File Exceptions:** Exceptions are warranted when there is a reasonable possibility of success and the matter involved is of sufficient importance to the overall case. ([CHM 10438.3](#)) The standard for cross-exceptions should be substantially similar. ([CHM 10438.3](#)) If the ALJ is adverse, the Region should determine the likelihood of success before the Board based on the facts as found by the ALJ. Even if the Region strongly disagrees with the ALJ’s factual determinations, the Region must adjust to the ALJ’s view of the facts, unless there is a clear basis to overturn particular findings. The significant loss memo should be used to examine the issues and could provide an outline for exceptions.

19. Content of the Brief in Support of Exceptions -- In filing exceptions, please take heed of the following:

- Tied to Exceptions -- The Brief in Support of Exceptions should not be identical to the one you filed with the ALJ; it should be specifically tied to your Exceptions.
- Make it Presentable – It should contain subheadings in the description of the facts; it need not repeat all the facts of the case.
- Why Was the ALJ Wrong – The Brief should explain why the Judge was wrong in connection to whatever you are filing exceptions on.

Sample

(b)(5)



(b)(5)

