



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL

FREEDOM OF INFORMATION OFFICE  
Washington, D.C. 20570

Date: August 11, 2011

John Althen  
Judicial Watch  
425 Third Street, SW, Suite 800  
Washington, DC 20024

Re: FOIA ID/LR-2011-0727

Dear Mr. Althen:

This is in response to your telefax, dated and received in this Office on July 14, 2011, in which you request, pursuant to the Freedom of Information Act (FOIA), the following documents:

- "1) Records of communications between officials, officers, or employees of the NLRB concerning, regarding, or relating to the Boeing Company.
- 2) Records of communications between the NLRB and the following entities concerning, regarding, or relating to the Boeing Company:
  - The White House;
  - The Executive Office of the President;
  - The State of Washington;
  - The State of Oregon;
  - The Boeing Company;
  - The International Association of Machinists and Aerospace Workers;
  - The AFL-CIO, the SEIU, and/or any additional third party trade union;
  - Any additional non-governmental entities.
- 3) Records concerning, regarding, or relating to the impact of the Boeing Company's new assembly plant in North Charleston, South Carolina on employment in South Carolina.
- 4) Records concerning, regarding, or relating to the decision to file a complaint against the Boeing Company in Case 19-CA-32431.
- 5) Records of communication between officials, officers, or employees of the NLRB concerning, regarding, or relating to the decision to file a complaint against the Boeing Company in Case 19-CA-32431.
- 6) Records of communications between the NLRB and the following entities concerning, regarding, or relating to the decision to file a complaint against the Boeing Company in Case 19-CA-3241:
  - The White House;
  - The Executive Office of the President;
  - The State of Washington;
  - The State of Oregon;
  - The Boeing Company;
  - The International Association of Machinists and Aerospace Workers;

- The AFL-CIO, the SEIU, and/or any additional third party trade union;
- Any additional non-governmental entities.

The timeframe for this request is January 20, 2009 to July 14, 2011.”

An interim reply was sent to you on July 28, 2011.

I am interpreting your request to apply to both the Board-side and the General Counsel-side of the National Labor Relations Board. I have been advised by the Board-side that, after conducting a thorough search of the Board-side offices, there are no responsive documents to your request emanating from the Board-side.

Regarding documents emanating from the General Counsel-side, after conducting a thorough search of our Agency's Office of the General Counsel, the Division of Operations-Management, the Division of Advice, and Region 19, your request is denied. To the extent that any documents responsive to your request may exist, they are privileged from disclosure pursuant to FOIA Exemptions 5 and 7(A), as explained below.

The requested documents are privileged from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), since they are intra-agency memoranda or documents which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda and documents reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. These documents reflect the views of the General Counsel and his staff concerning prosecutorial policies in the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, such documents clearly reflect the deliberative and consultative process of the Agency which Exemption 5 protects from forced disclosure. *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

This exemption was intended to encompass all documents “normally privileged in the civil discovery process,” *Sears*, 421 U.S. at 148-149 (1975); *FTC v. Grolier*, 462 U.S. 19, 20, 26 (1983); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); and it incorporates the attorney work-product privilege. *Sears*, 421 U.S. at 154. The attorney work-product privilege protects documents and other memoranda that reveal an attorney's mental impressions and legal theories and that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n. 13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947). Additionally, the protection provided by Exemption 5 of the FOIA for attorney work-product material is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, the protection against disclosure of work-product documents extends even after litigation is terminated and the case for which they

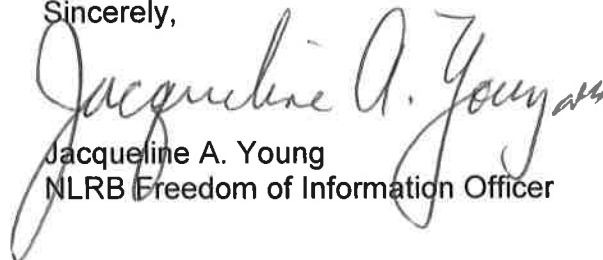
were created is closed. *Id.* The information you seek here contains an evaluation and analysis of the critical facts and legal theories governing the case and other similar matters, thereby falling squarely within the protection of Exemption 5's attorney work-product privilege.

Moreover, because the underlying case is still open, the requested documents are privileged from disclosure under Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A), since they are part of the investigatory record compiled for law enforcement purposes, the disclosure of which could reasonably be expected to interfere with enforcement proceedings. Making such documents available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See, *Wellman Industries, Inc. v. N.L.R.B.*, 490 F.2d 427 (4<sup>th</sup> Cir. 1974), cert. denied 419 U.S. 834 (1974).

Because we have already conducted a search and review of possible responsive documents in the course of preparing our response to other similar FOIA requests, we are not charging you for processing this request. In so doing, however, we are not addressing your request for a fee waiver, nor are we making a determination as to the appropriate fee category in which you would be placed for the purposes of this request.

The undersigned is responsible for the above determination. You may obtain a review thereof under the provisions of the NLRB's Rules and Regulations, Section 102.117(c)(2)(v), by filing an appeal with the General Counsel, Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, within 28 calendar days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Thus, the appeal must be received by the close of business at 5:00 p.m. (ET) on September 8, 2011. Any appeal should contain a complete statement of the reasons upon which it is based. Questions concerning an appeal of this determination should be directed to the Office of Appeals. For questions concerning this letter, please call Diane Bridge, FOIA Supervisor, at (202) 273-3851.

Sincerely,



Jacqueline A. Young  
NLRB Freedom of Information Officer