NATIONAL ARCHIVES and RECORDS ADMINISTRATION
8601 ADELPHI ROAD - OGIS | COLLEGE PARK, MD 20740-6001
www.archives.gov/ogis | ogis@nara.gov | o: 202.741.5770 | f: 202.741.5769 | t: 877.684.6448

October 4, 2019 — Sent via U.S. mail

Mr. Jordan Henry
Director of Research, Phyllis Schlafly Eagles
jordan@phyllisschlafly.com

Re: Case No. 19-02234

Dear Mr. Henry:

This responds to your May 23, 2019 request for Office of Government Information Services (OGIS) assistance concerning Freedom of Information Act (FOIA) requests submitted to the National Archives and Records Administration (NARA) by Edward Martin, President of the Phyllis Schlafly Eagles. Thank you for your patience as we handled your case.

Congress created OGIS to complement existing FOIA practice and procedure; we strive to work in conjunction with the existing request and appeal process. Our goal is to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. OGIS has no investigatory or enforcement power, nor can we compel an agency to release documents. OGIS serves as the Federal FOIA Ombudsman and our jurisdiction is limited to assisting with the FOIA process.

OGIS provides mediation services to resolve disputes between FOIA requesters and Federal agencies. After opening a case, OGIS gathers information from the requester and the agency to learn more about the nature of the dispute. This process helps us gather necessary background information, assess whether the issues are appropriate for mediation, and determine the willingness of the parties to engage in our services. As part of our information gathering, we contacted NARA FOIA staff to inquire about your requests and the agency's responses.

On February 11, 2019, Mr. Martin submitted a FOIA request (RD-60470) to NARA for access to records "relating to the ratification, purported ratification, submission, relating to any actions taken by the legislatures of Illinois or Nevada received by your office from any agent of those respective states and any response by your office to the states of Nevada or Illinois relating to actions regarding the Equal Rights Amendments passed by Congress in 1972, and as purportedly extended in 1978."[1] His request further stated that he sought copies of "any guidance received by your office or requested by your office on how to handle any 'ratification' made after the original March 22, 1979 deadline through the June 30, 1982 deadline, and similar requests or guidance pertaining to any alleged 'ratification' of the ERA after the June 30, 1982 extension deadline."

On February 27, 2019, the Archives 1 Reference Section (RDT1R) responded to the request. The response letter explained that the staff searched Record Group 11 (General Records of the United States Government) and located 44 responsive pages within the Unratified Amendments, 1810-1985 series.

[1] The reference number for FOIA Request No. RD-604701 was RDT1R-19-19161.

Mr. Martin subsequently sent RDT1R an email on March 4, 2019 questioning its response to his request. NARA's search dissatisfied Mr. Martin because it appeared to cover 1810-1985 and did not include records dating all the way up to the present. RDT1R's response to the email stated that NARA's Office of the Federal Register (OFR) has physical and legal custody of potentially responsive records dating after 1982. RDT1R suggested that Mr. Martin contact the OFR for more information. Per this suggestion, Mr. Martin submitted a second FOIA request (NGC19-277) to NARA for OFR records.

On April 8, 2019, Mr. Martin appealed NARA's action on his first request, disputing the adequacy of the agency's search. On April 29, 2019, the Deputy Archivist of the United States (ND) affirmed the agency's initial response because RDT1R had interpreted the initial request as a request for archival records dating between 1972 and 1982 and provided him with all of the responsive records.

ND's appeal determination letter noted that RDT1R realized that Mr. Martin sought operational records rather than archival records after receiving his March 4, 2019 email. The letter explained that OFR records relating to the ERA dating from 1972-1982 have been accessioned as permanent archival records in NARA's legal and physical custody. These records are located in Record Group 11 and are publicly available at the National Archives Building in Washington, D.C. Most of the archival records in NARA's holdings are unrestricted and available for research without filing a FOIA request.

ERA records dating after 1982 are still in the OFR's legal and physical custody. In other words, they are operational records that the OFR uses and maintains as it supports and carries out NARA's mission as an Executive Branch agency. Generally, operational records are not publicly available unless an agency posts them to its website and a person must file a FOIA request to obtain access to them.

On April 30, 2019, NARA informed Mr. Martin that the agency located 43 pages of email communications and attachments between the agency's Office of General Counsel (NGC) and the Department of Justice responsive his second request. NARA denied the request in its entirety pursuant to FOIA Exemption 5, 5 U.S.C. §552(b)(5). NARA was unable to locate records responsive to Mr. Martin's request for acknowledgements of receipt or any other communications sent by NARA to the states of Illinois or Nevada concerning the ERA.

On June 13, 2019, Mr. Martin submitted an administrative appeal (NGC 19-043A) of NARA's action on his second request. ND granted Mr. Martin's appeal in part and denied it in part. On appeal, NARA personnel conducted a second search for responsive records and reviewed the 43 pages it had withheld in full. The agency was unable to locate additional records responsive to the request and released 36 pages to Mr. Martin in their entirety after determining that they are already in the public domain. NARA reaffirmed its application of FOIA Exemption 5 to withhold seven pages of email communications in full.

RDT1R's response to RD-60470 included information about the search staff conducted in response to the request. In response to our inquiry concerning the second search staff conducted

for records responsive to NGC19-277, we learned that NARA's FOIA office tasked RDT1R, the Chief of Staff at Archives 1, the Office of the Archivist, the Executive Secretariat Director, and OFR staff with searching for responsive records.

Regarding NARA's search for records responsive to Mr. Martin's requests, it may be helpful to know that the FOIA requires agencies to conduct searches that are reasonably calculated to locate all of the responsive documents. This means that an agency's search does not have to be perfect, only "reasonable," a standard varies from case to case. Generally, if an agency conducts its search in good faith based upon the wording of the request, courts will find the agency's search to be adequate. The adequacy of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found—and searched those locations—or whether the agency improperly limited its search to only certain record systems. The FOIA does not require agencies to look beyond the four corners of the request for leads to the location of responsive documents.

In response to our inquiry, NARA FOIA staff affirmed the agency's position that it properly applied Exemption 5 to withhold seven pages in full.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5). The Supreme Court has clarified that Exemption 5 exempts "those documents [that are] normally privileged in the civil discovery context." (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). The three most frequently invoked privileges that courts have held to be covered by Exemption 5 are the deliberative process privilege, the attorney-client privilege, and attorney work-product privilege. In its response to NGC19-277, NARA cited the deliberative process and attorney-client privileges.

The deliberative process privilege is the most commonly used privilege covered by Exemption 5; it protects the "decision making processes of government agencies" in order to safeguard the quality and integrity of governmental decisions. (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).) The courts have suggested three policy reasons for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency's action. (*Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)).

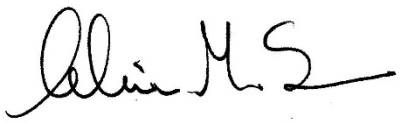
The deliberative process privilege applies to records that are both "predecisional" and "deliberative." A document is predecisional if it was prepared to assist an agency decision-maker reach a final decision, and is typically generated before the adoption of an agency policy. Such documents may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A document is considered "deliberative" if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). In your case, NARA informed us that the emails withheld from disclosure are deliberative and recommend or express opinions on legal

or policy matters prior to a decision, two fundamental requirements of Exemption 5's deliberative process privilege.

The attorney-client privilege "protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." (*Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997)). In the context of government records, the client may be the agency and the attorney may be an agency lawyer. In order to invoke the attorney-client privilege, an agency must show that the document it seeks to withhold: (1) involves "confidential communications between an attorney and his client"; and (2) relates to "a legal matter for which the client has sought professional advice." (*Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)). Please know that an agency is able to apply the attorney-client privilege in a variety of contexts, not just in the litigation context. When agency employees discuss confidential legal advice with their agency attorneys, that information can be withheld under the attorney-client privilege. Courts have held that Federal agencies may enter into a privileged attorney-client relationship with their agency lawyers in order to function effectively.

Although this may not be the outcome you anticipated, we hope that you find this information useful. Thank you for bringing this matter to OGIS. At this time, we can offer no further assistance and we will close your case.

Sincerely,



ALINA M. SEMO
Director

cc: NARA NGC