



June 16, 2020

Mr. Austin Evers
American Oversight
1030 15th Street NW, Suite B255
Washington, DC 20005-1503

RE: Freedom of Information Act Request – FOIA Case No. 2020-FPRO-01106

Dear Mr. Evers:

This responds to your Freedom of Information Act (FOIA) request dated May 12, 2020, in which you seek access to Postal Service records pertaining to three listed items. Specifically, requested: (1) any legal analysis or records reflecting legal analysis regarding Treasury Department's ability to impose terms on emergency loans to the U.S. Postal Service; (2) any terms and conditions proposed by or agreed upon by either the Treasury Department or Postal Service for the exercise of the borrowing authority under the CARES Act; and (3) all signed borrowing agreements (Note Purchase Agreements) as well as "term sheets" regarding these agreements between the Postal Service and Treasury Department. The specified date range for the record search was from March 1, 2020, to the date of the search.

Based on your description of records sought, a search was conducted of the files maintained by the General Counsel and Executive Vice President and the Senior Vice President, Finance and Strategy, both located at 475 L'Enfant Plaza SW, Washington, DC. The search identified 69 pages of responsive records. This includes 65 pages for the first request and 5 pages for the second request. The third request did not produce any responsive records. All responsive records are being withheld in full, pursuant to Exemption 3 and Exemption 5. For the first request, Exemption 5 is asserted through the attorney-client and deliberative process privileges. For the second request, Exemption 5 is asserted through the deliberative process privilege. In both the first and second request, Exemption 3 is asserted in combination with Section 410(c)(2) of the Postal Reorganization Act.

Exemption 3 allows an agency to withhold information that is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Section 410(c)(2) of the Postal Reorganization Act qualifies as an Exemption 3 statute. 39 U.S.C. § 410(c)(2). Section 410(c)(2) permits the Postal Service to withhold "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." 39 U.S.C. § 410(c)(2). Information of a commercial nature under Section 410(c)(2) is broadly defined to include all information that "relates to commerce, trade, profit, or the Postal Service's ability to conduct itself in a businesslike manner." 39 C.F.R. § 265.14(b)(3). In determining whether particular information is commercial in nature, the Postal Service considers six factors relating to whether the information is more akin to its role as a business entity, a competitor in the market or a provider of basic public services. See 39 C.F.R. § 265.14(b)(3)(i). In addition, the Postal Service has identified an extensive, though not exhaustive, list of information that is commercial in nature and thus, exempt from disclosure under Section 410(c)(2). See 39 C.F.R. § 265.14(b)(3)(ii).

Here, the records responsive to the first request qualify as “information of a commercial nature” under Section 410(c)(2) because they reflect analyses of business interactions with a lender. This information is critical to the Postal Service’s business operations and financial status. The Postal Service is not aware of any competitors or similar private sector entities that release such internal analyses as part of good business practice. Accordingly, this information is exempt from disclosure under Exemption 3 of the FOIA and Section 410(c)(2).

Relatedly, the record responsive to the second request qualifies as “information of a commercial nature” under Section 410(c)(2) because the records reflect proposed terms to an agreement. Postal regulations show that negotiated terms of agreements qualify as commercial information. See 39 C.F.R. § 265.14(O–Q). The Postal Service is not aware of any competitor or similar private sector entities that release the terms of such agreements under good business practice. Thus, this information is withheld from disclosure under Exemption 3 and Section 410(c)(2).

Exemption 5 permits the Postal Service to withhold “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, 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). Courts have found Exemption 5 to “exempt those documents, and only those documents, that are normally privileged in the civil discovery context,” including the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). To meet the “inter-agency or intra-agency memorandums” threshold requirement, the “source [of the withheld records] must be a Government agency,” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 2 (2001), or the source of the withheld records could be a consultant if the agency sought outside advice and the consultant functioned as an agency employee in providing advice similar to that of an agency employee. See *Nat’l Inst. Of Military Justice v. Dep’t of Defense*, 404 F. Supp. 2d 325, 345 (D.D.C. 2005).

The deliberative process privilege of Exemption 5 protects from disclosure records that reflect opinions, advice, recommendations, and other deliberations comprising part of a process by which federal governmental decisions and policies are formulated. *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). The privilege protects pre-decisional, deliberative records that were created less than 25 years before the date on which the records were requested. 5 U.S.C. § 552(b)(5).

The records responsive to the first request consist of materials containing opinions and advice reflecting intra-Postal Service deliberations and inter-agency deliberations between the Postal Service and Treasury, all of which are pre-decisional and deliberative in nature. These documents contain opinions, analysis, advice, and recommendations to be used in the decision-making process regarding the subject matter of the request, and, therefore, are within the scope of the deliberative process privilege. The record responsive to the second request consists of materials reflecting inter-agency deliberations between the Postal Service and Treasury, all of which is pre-decisional and deliberative in nature, and therefore is within the scope of the deliberative process privilege. Records responsive to both requests have all accordingly been withheld from disclosure.

The attorney-client privilege of Exemption 5 protects from disclosure confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought professional advice. *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The first request seeks legal analyses and records of legal analyses. The responsive records withheld here consist of confidential communications between or among attorneys and clients or between or among attorneys. They have accordingly been withheld from disclosure.

Finally, we have determined that there are no portions of the responsive records that fall outside of the scope of the applicable FOIA exemptions. See 5 U.S.C. § 552(b) (requiring each agency to disclose “reasonably segregable” portions of responsive records). Accordingly, we are withholding the responsive records in their entirety pursuant to the aforementioned FOIA exemptions.

If you are not satisfied with the response to this request, you may file an administrative appeal within 90 days of the date of this response letter by writing to the General Counsel U.S. Postal Service 475 L'Enfant Plaza SW Washington, DC 20260 or via email at FOIAAppeal@usps.gov. Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. The letter of appeal should include, as applicable:

- (1) A copy of the request, of any notification of denial or other action, and of any other related correspondence;
- (2) The FOIA tracking number assigned to the request;
- (3) A statement of the action, or failure to act, from which the appeal is taken;
- (4) A statement identifying the specific redactions to responsive records that the requester is challenging;
- (5) A statement of the relief sought; and
- (6) A statement of the reasons why the requester believes the action or failure to act is erroneous.

For further assistance and to discuss any aspect of your request, you may contact any of the following:

- HQ FOIA Requester Service Center:
Email: FOIA12@usps.gov
Phone: (202) 268-2608
- FOIA Public Liaison:
Name: Nancy Chavannes-Battle
Phone: (202) 321-3224

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,



Caroline Rieger Brownlie
Managing Counsel, Legal Strategy
United States Postal Service Law Department