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BY FACSIMILE – (202) 514-1009

Office of Information Policy
U.S. Department of Justice
1425 New York Avenue, N.W.
Suite 11050
Washington, DC 20530

Re: FOIA Appeal; CRM-200900733F

To Whom it May Concern:

This letter constitutes an administrative appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of my client, the National Security Archive. By letter to DOJ’s Criminal Division dated October 7, 2009 (attached hereto), the Archive requested the following agency record:

A report documenting the work of the Office of Special Investigations (OSI), the preparation of which was authorized by former Attorney General Janet Reno in 1999. The report was prepared by Judy Feigin, a career DOJ attorney, and edited by Mark Richard, former Deputy Assistant Attorney General of the Criminal Division.

The Criminal Division responded to the request by letter dated November 18, 2009 (attached hereto) and indicated that it had located a responsive record: a report titled, “The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust.” The letter further informed the Archive that the report was being withheld from disclosure in its entirety under FOIA Exemption 5 on the ground that it is “deliberative and pre-decisional.” In addition, the agency claimed that certain “portions” of the report are exempt from disclosure under Exemptions 6 and 7(C) & (E).

In support of its invocation of Exemption 5, the Criminal Division asserted that “[b]ecause this report was never finalized nor approved by the Assistant Attorney General of the Criminal Division, it is still a draft. A draft is a preliminary version before a final determination and *by definition, such a document is deliberative and pre-decisional, and is therefore exempt from disclosure.*” (emphasis added). Such a determination appears to contravene the guidance your

office issued on April 17, 2009, in the wake of the new FOIA “presumption of openness” established by the President and the Attorney General. That guidance provides, in pertinent part:

. . . before withholding a record, the agency must reasonably foresee that disclosure would harm an interest protected by one of the exemptions. . . . Each record should be reviewed by agencies for its content, and the actual impact of disclosure for *that particular record*, rather than simply looking at *the type of document* or the type of file the record is located in.

Thus, for example, a requested record might be a draft, or a memorandum containing a recommendation. Such records might be properly withheld under Exemption 5, but *that should not be the end of the review*. Rather, the content of that particular draft and that particular memorandum should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, *given its age, content, and character*, would harm an interest protected by Exemption 5. In making these determinations, agencies should keep in mind that mere “speculative or abstract fears” are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Moreover, agencies must be mindful of the President’s directive that in the face of doubt, openness prevails.

OIP Guidance: President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines; Creating a “New Era of Open Government” (emphasis added). The determination of the Criminal Division that a draft document “by definition . . . [is] exempt from disclosure” clearly cannot be sustained under the foregoing guidance.

The determination to withhold the report in its entirety is also at odds with your office’s directive that “even if an exemption would apply to a record, discretionary disclosures are encouraged,” and that such an approach “will be most applicable under Exemption 5.” As the OIP Guidance explains:

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General’s Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. *Records covered by the deliberative process privilege in particular have significant release potential*. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate.

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Id. (emphasis added).

The report at issue here “document[s] the work of the Office of Special Investigations” and its preparation was authorized by former Attorney General Janet Reno in 1999. Both the age of the material and its content seem to suggest that invocation of the deliberative process privilege is inappropriate under the standards your office has articulated. In addition, it seems likely that the content of the report is predominantly factual. It is well-established that the deliberative process privilege does not shield purely factual information from disclosure. *See, e.g., Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004); *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). As such, even if it were appropriate to withhold some small portion of the report under Exemption 5, we challenge the Criminal Division’s unsupported assertion that “it would be impossible to reasonably segregate out factual information from the deliberative parts of the documents [sic].”

Finally, with respect to the agency’s withholding of “portions” of the report under Exemptions 6 and 7(C) & (E), the Archive is hampered in addressing that determination by the fact that the report has been withheld in its entirety and the extent of the redactions thus cannot be assessed. We nonetheless believe that the new “presumption of openness,” as well as the fact that a great deal of information concerning OSI’s activities – including the identities of many of the individuals it investigated – is already in the public domain, should result in the release of the vast majority of the information contained in the report.

As the FOIA requires, I will anticipate your determination of this administrative appeal within twenty (20) working days.

Sincerely,

A handwritten signature in cursive script that reads "David L. Sobel". The signature is written in dark ink and is positioned above the printed name.

David L. Sobel

attachments