MEMORANDUM

June 21, 1995

ATTORNEY-CLIENT
PRIVILEGED and CONFIDENTIAL

To: Tom Samoluk, Esq., Associate Director for Communication

From: Laura Denk, Esq.

Subject: Freedom of Information Act Requests for Experts Conference Materials

Pursuant to the Freedom of Information Act (FOIA), codified at 5 U.S.C. § 552, on July 15, 1995, Bill Adams submitted to the Review Board a request for all records pertaining to the May 16, 1995, ARRB experts conference. Joseph Backes has also requested copies of minutes or notes from the experts conference.

In response to these requests, I understand that you sent Mr. Backes a copy of the experts conference agenda and that you will enclose the agenda with your response to Mr. Adams' request. In addition, Jeremy mentioned that we would also send Mr. Adams information on expenses from the conference. However, the remainder of the ARRB's documents on the Experts conference will not be sent to Mr. Adams or to Mr. Backes pursuant to the ARRB's need to protect its deliberative processes.[1]

This memorandum analyzes the ARRB's authority to deny in part these FOIA requests pursuant to the deliberative process exemption incorporated into the FOIA at 5 U.S.C. § 552(b)(5).

I. SUMMARY

The ARRB materials generated before, during, and after the experts conference are exempt from disclosure under the FOIA, because they fall within the deliberative process privilege. The deliberative process privilege exists to prevent agencies from having to operate in a "fishbowl."

In order to fall within the deliberative process privilege, documents must be (1) predecisional and (2) deliberative. These two concepts are discussed in more detail below, but as a practical matter, it is useful to note that the distinction between the two requirements often becomes blurred. The primary principle is that agency personnel can protect their work product from disclosure, as long as the

[1]The remainder of the documentation on the experts conference falls into one of the three following categories: (1) pre-conference staff ideas and recommendations about conference participants and conference discussion topics, (2) contemporaneous staff notes from the conference, and (3) the staff "follow-up worksheet" that Kevin and I created after the conference. We also have the audiotape from the morning session of the conference.

material does not simply explain or implement a decision that has already been made and as long as the material is used as part of the agency's "deliberative process."

II. RELEVANT STATUTORY SECTIONS

The FOIA requires each agency, upon any request for records under the statute, to:

- determine, within ten business days after the receipt of the request, whether to deny the request or make the requested documents available,
- and, immediately notify the requester of :
  - the agency determination,
  - the reasons for the agency determination,
  - and his or her right to appeal any adverse determination to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

However, the FOIA does not apply to those documents or records that are, inter alia:

- inter-agency or intra-agency memoranda or letters which would not be available by law to a party...in litigation with the agency. 5 U.S.C. § 552(b)(5) ("Exemption 5").

III. DISCUSSION OF EXEMPTION 5: DELIBERATIVE PROCESS PRIVILEGE

The plain language of Exemption 5 does not provide agencies clear guidance on what materials it protects. However, courts construing Exemption 5 hold that it encompasses many of the privileges normally accorded to agencies in the civil discovery context.[2] Thus, if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.[3] The three most commonly invoked privileges incorporated into Exemption 5 are the deliberative process (or executive) privilege, the attorney work-product privilege, and the attorney-client privilege. With the exception of certain administrative material (e.g. expenses), all of the experts conference materials that Mr. Adams and Mr. Backes have requested fall within the deliberative process privilege.

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[2] Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1122 (D.C. Cir. 1989).

[3] Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982 (9th Cir. 1985). See, e.g., United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier, Inc., 462 U.S. 19, 26-27 (1983).

The deliberative process privilege protects advice, recommendations, opinions, and other material reflecting the deliberative or policy-making processes of the government.[4]

A. Purpose of Deliberative Process Privilege

The Supreme Court has held that the ultimate purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions."[5] Courts recognize that, in order to engage in thoughtful decision making, agency personnel must be able to freely exchange ideas and have candid discussions with each other and with outside consultants.[6]

The experts conference epitomizes the situation in which agency personnel freely exchanged ideas in order to make better ultimate decisions. Releasing documents in which these candid discussions are memorialized would jeopardize the candor of such discussions in the future. The deliberative process privilege exists to avoid causing a chilling effect on internal agency discussions.

B. Two-Part Test

In order to deny Mr. Adams' and Mr. Backes' request for materials from the experts conference under Exemption 5, the ARRB must prove that the materials are (1) *predecisional* and (2) part of the Review Board's *deliberative process*.[7] The D.C. Circuit has recognized that, in the Exemption 5 analysis, the "predecisional" and "deliberative" requirements tend to merge, because both requirements exist to ensure that agencies do not try to withhold from the public explanations for decisions that the agency has already made.[8]

1. Document must be Predecisional

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[4]See e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-151 (1975); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971); Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973).

[5]NLRB v. Sears, Roebuck & Co., 421 U.S. at 151.

[6] Wu v. National Endowment for Humanities, 460 F.2d at 1032; Soucie v. David, 448 F.2d at 1077; Ryan v. Dep't of Justice, 617 F.2d 781, 789-790 (D.C. Cir. 1980); Wolfe v. HHS, 839 F.2d 768, 773, 775 (D.C. Cir. 1988) (en banc).

[7]NLRB v. Sears, Roebuck & Co., 421 U.S. at 152; Formaldehyde Inst. v.HHS, 889 F.2d at 1120-1121; Wolfe v. HHS, 839 F.2d at 774; Access Reports v. Dep't of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

[8]Access Reports v. Dep't of Justice, 926 F.2d at 1195 (both terms have come to apply only to documents that contribute to an ongoing deliberative process within an agency.)

A predecisional memoranda is one that an agency prepares in order to assist agency decision makers in arriving at a decision.[9] On the contrary, post-decisional memoranda are those which explain a decision already made or direct the staff in accordance with what the agency has already decided.[10] In other words, if the document reflects a communication that sets out or implements an official Board policy[11], it is not predecisional.[12]

Although agencies do not need to point to a particular decision that the "predecisional" document predates, it is fairly easy for the ARRB to show how the experts conference documents fit into the decision making chain. Congress charged the Review Board with the task of considering and rendering decisions on which records constitute assassination records. 44 U.S.C. § 2107.7(i)(A). In order to fulfill its statutory mandate, the Review Board must learn as much as possible about what might constitute an assassination record and where such records might be located. The experts conference was a very preliminary step in this decision making process.

[9] Formaldehyde Inst. v. HHS, 889 F.2d at 1122.

[10] NLRB v. Sears, Roebuck & Co., 421 U.S. at 152; United States v. J.B. Williams, 402 F. Supp. 796, 800 (S.D.N.Y. 1975).

[11] Once the ARRB creates post-decisional documents, we must determine whether to publish them in the *Federal Register* or place them in the FOIA Reading Room pursuant to the affirmative disclosure obligations in the FOIA. 5 U.S.C. §§ 552(a)(1) and (2).

[12] Ryan v. Dep't of Justice, 617 F.2d at 791.

As you know, staff members requested that certain consultants (experts) come to the ARRB to give their opinions about (1) which documents are appropriate for inclusion in the JFK Collection and (2) how the Review Board should go about gathering these documents. Some Review Board members and most ARRB staff members listened to the experts and questioned them about their opinions. However, as far as I know, neither the Review Board nor the staff have made any determinations about whether to follow up on any of the suggestions that the experts made at the conference.[13] Thus, documents generated regarding the substance of the conference (e.g. pre-conference ideas for discussion, analysts' notes from the conference, the "Experts Conference Follow-Up Worksheet" that Kevin and I created) do not reflect Review Board policies or decisions.

2. Document must be part of Agency's Deliberative Process

Agencies are generally able to meet the requirement that documents are predecisional under Exemption 5 and the experts conference documents are clearly predecisional. Proving that a document is a direct part of an agency's deliberative process can be more difficult. A *deliberative* document is one that reflects the give-and-take of an agency's consultative process.[14] In other words, it reveals an "agency's group thinking in the process of working out its policy and determining what its law ought to be."[15] Courts look to a number of factors to determine whether an individual document is deliberative. No one factor is determinative and different courts do the analysis differently, but there are several primary principles that recur.

a. Whether the document played a role in the agency's decision making process.

Courts employ a "functional test" when they analyze materials under Exemption 5. If the document functioned as part of the agency's decision making process, it is likely to be exempt from the FOIA.[16] For example, the follow-up chart from the experts conference, although created after the conference, is still a "deliberative tool" in the ARRB's deliberative process. The chart lists, agency by agency, documents that the experts asked the ARRB to pursue for the JFK Collection. The chart memorializes, to a certain extent, selected discussions from the conference. However, the chart will

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[13] If the Review Board decides to follow up on a particular suggestion, and the Board would not have done so except for the suggestion made at the experts' conference, the FOIA *may* require us to release the "adopted" portion of the experts conference documents, as explaining the Review Board's decisions.

[14] NLRB v. Sears, Roebuck & Co., 421 U.S. at 153.

[15] Id.

[16] Lead Industries Ass'n v. OSHA, 610 F.2d 70, 80 (2d Cir. 1979).

be used to assist the Review Board and its staff in making decisions on whether to follow up on any of the experts' suggestions. Therefore, the document does not reflect or explain agency decision-making. Rather, it is a deliberative tool and is therefore exempt from the FOIA under Exemption 5.

b. Whether disclosure of the document would damage the agency's decision making process by discouraging candid discussion within the agency.

Courts recognize that, in order to make quality decisions, agency personnel must be able to engage in frank, open discussions about policy issues. Thus, if disclosure of the document would damage the agency's decision making process by discouraging candid discussion within the agency, the document is exempt from the FOIA.

For example, before the experts conference, Jeremy sent an e-mail to all of the analysts, requesting suggestions for questions to ask the experts during the conference. The analysts answered with their candid thoughts about what they wanted to know from the experts. Documents such as these, written by staff members to their supervisor, are at the heart of the deliberative process, as they reflect subjective opinions of staff and clearly had no binding effect on Jeremy or on the Board.[17] However, if these documents were released at this time under the FOIA, the analysts would surely temper their comments the next time a senior staff member polled them. In enacting Exemption 5, Congress recognized that agency decision-making would be damaged if agencies had to operate in a fishbowl.[18]

c. Whether the material is "purely factual" or part of the deliberative process.

Courts often address the issue of whether factual materials can be part of the deliberative process. The simple rule is that Exemption 5 does not protect purely factual materials.[19] However, because most agency documents contain large factual segments, drawing a distinction between purely factual documents and deliberative documents can be difficult. Courts use a functional test to determine whether a document is purely factual -- they analyze the role that the document plays in the process of

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[17] Access Reports v. Dep't of Justice, 926 F.2d at 1195 (Documents flowing from a junior to a senior are likely deliberative, whereas documents flowing from senior to junior are more likely to reflect instructions to juniors on decisions that have been made.)

[18] Wolfe v. HHS, 839 F.2d at 773.

[19] Soucie v. David, 448 F.2d at 1077.

agency deliberations, instead of examining the text of the document or the decision making authority of the document's author.[20]

[20]Formaldehyde Inst. v. HHS, 889 F.2d at 1122; Wolfe v. HHS, 839 F.2d at 774.

The factual/deliberative distinction is relevant for the experts conference documents because some of the staff memoranda contain factual segments about the mechanics of the conference as well as about topics discussed at the conference. Where an internal memoranda contains factual segments, those segments are exempt from disclosure if: (1) the manner of selecting or presenting those facts would reveal the deliberative process, or (2) the facts are "inextricably intertwined" with the policy-making process.[21] Opinions and other subjective products are not factual.[22]

Although I have not reviewed every document created by the staff before, during, and after the experts conference, if the documents are generally within the three categories described in footnote 1, it seems that they would all clearly be part of the ARRB's deliberations about where assassination records might be located and how the staff might find out where assassination records are located. However, if we have any questions as to whether certain portions of documents are "purely factual," we should review those documents according to the standards set forth above.

d. Quick analysis for analyzing whether a document is part of the deliberative process.

As long as the ARRB can show (1) that the experts conference documents are being used in the agency's deliberative process, (2) that disclosure of the documents would damage the ARRB's decision making process, and (3) that the documents, or segregable portions thereof, are not purely factual, the agency can meet the requirement that the documents are deliberative and should be withheld under Exemption 5.

C. OUTSIDE CONSULTANTS

Finally, participation of non-ARRB members or staff at the experts conference will not exclude the documents at issue from the scope of the deliberative process privilege. Courts recognize that government agencies need to receive the recommendations and opinions of outside consultants, and that the consultants "should be able to give their judgments freely without fear of publicity."[23] Such advice can "play an integral function in the government's decision-making."[24]

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[21] Ryan v. Dep't of Justice, 617 F.2d at 790; Wolfe v. HHS, 839 F.2d at 774.

[22] Wu v. National Endowment for Humanities, 460 F.2d at 1033; Formaldehyde Inst. v. HHS, 889 F.2d at 1122.

[23] Soucie v. David, 448 F.2d at 1078; Wu v. National Endowment for Humanities, 460 F.2d at 1032 (recommendations of volunteer consultants protected from disclosure under Exemption 5).

[24] Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); Lead Indus. Ass'n v. OSHA, 610 F.2d at 83.

The experts need not have a "formal relationship" with the ARRB. As long as the ARRB uses the experts' comments in making agency decisions, the materials is within the scope of the deliberative process privilege.[25]

In fact, courts encourage Federal agencies to seek the assistance of outside consultants to "unravel" their "knotty complexities."[26] Given the ARRB's need to understand the inner workings of CIA, FBI, DIA, NSA, etc., consulting with non-ARRB experts to gather their knowledge, opinions, and recommendations are an important part of the ARRB's deliberative process.

cc: David Marwell, Executive Director
T. Jeremy Gunn, Acting General Counsel

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[25] Formaldehyde Inst. v. HHS, 889 F.2d at 1123-24; Dow Jones & Co. v. Dep't of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (agencies may protect communications outside the agency so long as those communications are part and parcel of the agency's deliberative process).

[26] Formaldehyde Inst. v. HHS, 889 F.2d at 1122, 1125 (Where agency personnel regularly relied upon comments of temporary consultants in order to fulfill their Congressional mandate, the consultative process was deliberative).