

December 4, 2012

Matthew R. Lee, Esq.
Inner City Press
P.O. Box 580188
Mount Carmel Station
Bronx, New York 10458

Re: FOIA Appeal Request No. 12-032

Dear Mr. Lee:

The Broadcasting Board of Governors ("BBG") Access Appeal Committee ("AAC") met to consider the Appeal related to your June 24, 2012 request for any and all records in the possession of Voice of America ("VOA") or BBG related to the June 20, 2012 communication by VOA Executive Editor Steve Redisch to the United Nations' Stephane Dujarric which alleged "harassment" of VOA and its UN correspondent Margaret Besheer and asked the UN to review your accreditation status, including but not limited to;

- (1) All records reflecting communication by Ms. Besheer to Mr. Redisch or others at VOA alleging harassment or other interactions with Inner City Press, Mr. Matthew Lee, or the UN Correspondents Association;
- (2) All records reflecting Mr. Redisch's review or investigation prior to filing his complaint against Mr. Matthew Lee with the UN

This was the second meeting of the ACC related to this FOIA request. The Agency first received your appeal letter on August 26, 2012 with extensive redactions as the result of an electronic transmission error. You provided a complete and unredacted version of your August letter on October 31, 2012. A second meeting of the ACC was granted in order to evaluate the full contents of your appeal letter. The AAC was comprised of three members: Marie Lennon, International Broadcasting Bureau ("IBB") Chief of Staff; Terry Balazs, Deputy for Engineering and Transmission, Office of Technology, Services, and Innovation; and Kelu Chao, Director of the Office of Performance Review.

On August 7, 2012, Andrew Krog, the Agency's FOIA and Privacy Act Officer, released almost 800 pages of records in response to your request. The Agency redacted privileged attorney-client communications pursuant to FOIA Exemption 5, information subject to the deliberative process privilege under FOIA Exemption 5, and personal information protected under FOIA Exemption 6. Additionally, 150 pages of records were withheld in full as privileged attorney-client communications pursuant to FOIA Exemption 5. Your Appeal challenges "all the redactions and withholdings" of the Agency's response to your request.



Records Withheld in Full

In light of your objections, the Agency reviewed the 150 pages of documents withheld in full and the AAC determined that an additional 20 pages may be released to you. The AAC found that 130 of the 150 pages were duplicates of records that have already been released, but the segregable portions of the remaining 20 pages should be released with redactions. The additional records are attached to this letter as Attachment 1. Privileged attorney-client communications have been redacted pursuant to FOIA Exemption 5 and personal information has been redacted pursuant to FOIA Exemption 6.

Redactions Pursuant to FOIA Exemption 5 (Attorney-Client Privilege)

The Agency invoked attorney-client privilege under FOIA Exemption 5 to protect privileged communications between agency counsel and agency employees. FOIA Exemption 5 is intended protect confidential communications between an attorney and his client relating to legal matters and professional advice. Here, all redacted attorney-client information consists of communications with agency attorneys (including Paul Kollmer-Dorsey, Sheila Rajabiun, and Kataryna Lyson DeLisle) and was properly withheld under Exemption 5.

In your appeal, you claim that attorney-client privilege may not be invoked because Margaret Besheer, an agency employee, is not a "client" of agency counsel, Kataryna Lyson DeLisle. However, it is well-settled that attorney-client privilege extends to communication between an agency attorney and *all* level of agency employees if the employees are acting within the scope of their employment. *Upjohn v. United States*, 449 U.S. 383, 392-97 (1981); *Alexander v. Fed. Bureau of Investigation*, 198 F.R.D. 306, 314 (D.D.C. 2000). It was clearly within the scope of Ms. Besheer's duties to seek legal advice on an issue arising during the performance of her duties. Your Appeal also states that "Mr Kollmer's June 22 'good points'" should be released. Paul Kollmer-Dorsey is the Agency's Deputy General Counsel/Acting General Counsel and legal advice that Mr. Kollmer-Dorsey provides to agency management falls squarely within the protection of Exemption 5.

For these reasons, the AAC denies your appeal as it relates to the Agency's use of FOIA Exemption 5 to protect attorney-client communications.

Redactions Pursuant to FOIA Exemption 5 (Deliberative Process Privilege)

The Agency invoked the deliberative process privilege under FOIA Exemption 5, which protects "predecisional" and "deliberative" documents from release. In your appeal, you claim that the deliberative process privilege is inapplicable because Ms. Besheer was not "deliberating." However, the Agency only invoked the deliberative process privilege to

redact information prepared by Agency senior management to advise the BBG's Board of Governors. Records created by Ms. Besheer were not redacted pursuant to this privilege. Furthermore, the deliberative process privilege expressly extends to documents that consist of advice to a higher authority, including briefing materials, reports, or other documents that are created to advise superiors either generally or in preparation for an event such as congressional testimony. *AFGE v. U.S. Dep't of Commerce*, 907 F.3d 203, 208 (D.C. Cir. 1990); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F.Supp.2d 146, 174 (D.D.C. 2004). The information redacted here is precisely the type of information protected under Exemption 5. Therefore, the AAC denies your appeal as it relates to the Agency's use of FOIA Exemption 5 to protect information subject to the deliberative process privilege.

Redactions Pursuant to FOIA Exemption 6 (Personal Privacy Interest)

The Agency also redacted personal information under FOIA Exemption 6 in order to protect personal privacy interests. The Agency is required under FOIA to withhold personal information if the privacy interest in that information outweighs any public interest in disclosure. The relevant public interest is whether the information would reveal how an agency conducted some aspect of its business. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771, 773 (1989); *Baltimore Sun v. U.S. Marshals Service*, 131 F. Supp. 2d 725, 729-30 (D.Md. 2001).

In your appeal, you claim that the Agency inconsistently applied Exemption 6 because names of Congressional staff and public figures were not redacted while the names of other individuals were redacted. However, courts have made it clear that government employees and public figures have a diminished privacy interest in their identity because of their public activities. *Leadership Conf. of Civil Rights v. Gonzalez*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). Therefore, the FOIA Officer correctly determined that names of federal employees and public figures should be released, while the names and information of private individuals should be redacted. You also claim that many of the redacted names should be released because they are "publically available." Public availability of personal information does not negate an individual's privacy interest in not having that information further disseminated by the government. *Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008).

Here, the private individuals at issue were not parties to any decision made by the Agency, nor were these individuals providing documents or information to the Agency for public use. Specifically, UNCA Executive Committee members, employees of other news organizations, and employees of the Heritage Foundation were not transacting business with the Agency. Therefore, the AAC has determined that the FOIA Officer properly withheld names and other personal information of these individuals because release would not shed any light on Agency operations. Additionally, while UN officials were

corresponding with Agency employees, information regarding individual UN officials was properly redacted because the officials were not *personally* corresponding with the Agency and employees that are not public servants still retain a privacy interest in his or her name.

However, after examining your specific complaints, the AAC determined that a name redacted from a June 23 email from Steve Redisch to David Jones may be released. Upon further review, it has been determined that "Stewart Sogel" was conducting official business with the Agency and his name would be a legitimate matter of public interest. However, Mr. Sogel's private email address remains redacted as it is not a matter of public concern. The amended documents are attached to this letter as Attachment 2.

Finally, you specifically note that a number of "addressees" were redacted from various Agency emails. In these instances, the Agency's email program identified the email recipient by email address, rather than by name. The AAC has determined that the FOIA Officer properly withheld these personal email addresses, because any public interest in knowing who might have been included on these particular emails was outweighed by a substantial privacy interest in the individuals' personal email addresses.

Redaction of Non-Responsive Information

Your Appeal also challenges the redaction of "non-responsive" information from a June 1 email from Sonja Pace to Steve Redisch. Although federal agencies are not required to release non-responsive information under FOIA, the AAC has determined that information may be released in this case because you have specifically requested it and because the AAC does not foresee any harm in releasing the material. The amended document is attached to this letter as Attachment 3.

Unredacted Information Missing from Record

Additionally, your Appeal requests information that appears to be missing from a June 1 email from Lynne Weil to Kyle King. You are correct that the information you request has not been redacted. The AAC has examined the original record and this information does not exist in the original document. However, the AAC also requested that Ms. Weil conduct a second search for responsive records to ensure that this record is not maintained in any other form. Ms. Weil's search returned one document, which is attached to this letter as Attachment 4. You should note that this additional record also does not include the name of the individual that wrote "Lee has broken a lot of key stories over the years and his oversight, while idiosyncratic, has been relentless." The Agency does not maintain a record containing this individual's identity.

Response to Congressional Requesters

Finally, your appeal asks "where IS the response to Congressional requesters?" This FOIA request was closed out on June 28, 2012. Any records generated after this date would not be within the scope of the Agency's response to FOIA Request No. 12-032.

Please note that this constitutes the BBG's final action on FOIA Request 12-032 and concludes your administrative recourse for this matter. If you choose to further appeal the Agency's decision to exercise the exemptions discussed above, you may seek judicial review in the manner described in 5 U.S.C. § 552.

Sincerely,

A handwritten signature in black ink, appearing to read "Marie Lennon", written in a cursive style.

Marie Lennon
Chair, Access Appeal Committee
Broadcasting Board of Governors

Enclosures