

## Disclosure of Advisory Committee Deliberative Materials

The Federal Advisory Committee Act requires advisory committees to make available for public inspection written advisory committee documents, including predecisional materials such as drafts, working papers and studies.

The disclosure exemption available to agencies under exemption 5 of the Freedom of Information Act for predecisional documents and other privileged materials is narrowly limited in the context of the Federal Advisory Committee Act to privileged inter-agency or intra-agency documents prepared by an agency and transmitted to an advisory committee.

April 29, 1988

### MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL OFFICE OF LEGAL POLICY

#### Introduction and Summary

This responds to your request for the views of this Office concerning the extent to which exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is available to withhold deliberative materials prepared by an advisory committee that would otherwise be subject to the disclosure requirements of section 10(b) of the Federal Advisory Committee Act, 5 U.S.C. app. I ("FACA").<sup>1</sup> Section 10(b) provides in pertinent part that "[s]ubject to section 552 of title 5,

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<sup>1</sup> This memorandum addresses only exemption 5 of FOIA. To the extent one of the other eight statutory exemptions applies, the covered documents are independently protected from disclosure. We also emphasize both that separation of powers may preclude Congress from applying FACA to certain advisory groups and that documents subject to the disclosure requirements of section 10(b) may be withheld pursuant to a valid claim of executive privilege. We do not here address these constitutional bases for withholding documents but observe that several courts have described the threat posed by a literal reading of FACA to presidential powers. See, e.g., *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd and remanded*, 711 F.2d 1071 (D.C. Cir.), *judgment amended*, 566 F. Supp. 1515 (D.D.C. 1983) (FACA is "obscure, imprecise, and open to interpretations so broad that . . . it would threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine"; *Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975), *vacated as moot*, No. 75-1969 (D.C. Cir. Jan. 10, 1977) ("Nowhere is there an indication that Congress intended to intrude upon the day-to-day functioning of the presidency . . ."). Thus, for example, it is the government's position that the American Bar Association Standing Committee on the Federal Judiciary is not "utilized" by the President and therefore not subject to FACA, or alternatively, that the application of FACA to the ABA Committee would unconstitutionally impinge on the President's exclusive authority to nominate and appoint Article III judges, subject to the advice and consent function of the Senate. U.S. Const. art. II, § 2, cl. 2. *Washington Legal Found. v. United States Dept. of Justice*, 691 F. Supp. 483 (D.D.C. 1988). In addition, congressional disclosure statutes, including FACA, necessarily raise separation of powers and executive privilege issues as applied to communications among the President and his advisors and advice prepared for the President by his advisors. See, e.g., *Nixon v. General Serv. Admin.*, 433 U.S. 425, 441-55 (1977); *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971); *National Anti-Hunger Coalition*, 557 F. Supp. at 530. Because the operation of presidential powers in the context of FACA is not the subject of the present inquiry directed to this Office, the discussion herein is simply meant to be illustrative.

United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection."<sup>2</sup> Exemption 5 of FOIA exempts inter-agency and intra-agency deliberative or predecisional documents from disclosure.<sup>3</sup> The issue presented is the scope to be given to exemption 5 in light of section 10(b)'s enumeration of deliberative documents such as working papers and drafts as being specifically subject to disclosure.<sup>4</sup>

We conclude that FACA requires disclosure of written advisory committee documents, including predecisional materials such as drafts, working papers, and studies.<sup>5</sup> The disclosure exemption available to agencies under exemption 5 of FOIA for predecisional documents and other privileged materials is narrowly limited in the context of FACA to privileged "inter-agency or intra-agency" documents prepared by an agency and transmitted to an advisory committee. The language of the FACA statute and its legislative history support this restrictive application of exemption 5 to requests for public access to advisory committee

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<sup>2</sup> Section 10(b) of FACA reads in full:

Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

<sup>3</sup> Exemption 5, 5 U.S.C. § 552(b)(5), provides that the disclosure obligations of FOIA do not "apply to matters that are— . . . (5) 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."

<sup>4</sup> Public Citizen Litigation Group has also requested DOJ to issue a policy statement clarifying that the deliberative process exemption does not "shield from public scrutiny" the drafts, working papers, and other deliberative documents prepared by advisory committees. Public Citizen represented the ACLU in its suit to enjoin the Attorney General's Commission on Pornography from: holding meetings until it released drafts and working papers. *ACLU v. Attorney General's Commission on Pornography, Department of Justice*, No. 86-0893 (D.D.C. filed Apr. 3, 1986). Although the Commission initially asserted that the documents were covered by exemption 5 as incorporated by FACA, the parties stipulated a settlement providing for release of the documents and the suit was withdrawn.

<sup>5</sup> This Office has not previously addressed this issue directly. Soon after FACA was enacted, we noted the potential conflict between exemption 5 and section 10, but did not opine on the proper resolution of the issue. Memorandum for Dwight A. Ink, Assistant Director, Office of Management and Budget, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel. *Re: Treatment of Exemption 5 of the Freedom of Information Act in Denying Access to Meetings and Records of Federal Advisory Committees* (Jan. 2, 1973). In 1974, we advised the Clemency Board that it was an advisory committee and therefore subject to the disclosure provisions of FACA. The memorandum by Assistant Attorney General Antonin Scalia identified three potentially applicable FOIA exemptions, but conspicuously did not cite exemption 5. Memorandum for the Clemency Board, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Sept. 24, 1974). In 1982, in the process of rendering an opinion that activities by staff members on task forces to President's Private Sector Survey on Cost Control did not fall within the ambit of FACA, we noted in dicta and without analysis that materials made available to committee had to be made available to the public under section 10(b), unless exempted under FOIA, in which case it "need not be made publicly available under 10(b) of FACA." Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: President's Private Sector Survey on Cost Control* at 7 (Nov. 1, 1982). We also opined in 1982 that advisory committee documents are available through FOIA requests made to the supervising agency and that the advisory committee must cooperate, but we did not specifically address the impact of exemption 5. Memorandum for Fred F. Fielding, Counsel to the President, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Freedom of Information Act to Federal Advisory Committee* (Dec. 30, 1982).

documents. Moreover, since an advisory committee is not itself an agency, this construction is supported by the express language of exemption 5 which applies only to inter-agency or intra-agency materials.<sup>6</sup>

We emphasize that despite these conclusions many documents that are part of the advisory committee process will not be subject to disclosure. Section 10(b) itself applies only to materials made available to or prepared for or by an advisory committee established by statute or reorganization plan or established or utilized by the President or an agency. 5 U.S.C. app. I, §§ 3(2), 10(b). Accordingly, in determining whether a document is to be disclosed the first issue is not whether it is subject to an exemption under 5 U.S.C. § 552 but whether it meets this threshold definition.

## Analysis

### *A. Defining the Class of Documents to which Section 10(b) Applies.*

By the express terms of section 10(b), deliberative materials, in order to be subject to disclosure, must be "made available to or prepared for or by" an advisory committee, 5 U.S.C. app. I, § 10(b), which is established by statute or reorganization plan or "established or utilized by the President" or an agency. *Id.* § 3(2)(B) (emphasis added).<sup>7</sup> The courts and this Office have construed the concept of advisory committees established or utilized by the President or an agency to preclude section 10(b)'s application to the work prepared by a staff member of an advisory committee or a staffing entity within an advisory committee, such as an independent task force limited to gathering information, or a subcommittee of the advisory committee that is not itself established or utilized by the President or agency, so long as the material was not used by the committee as a whole. The reasoning behind the construction of the concept is straightforward:

[Such staffing entities or subcommittees] do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the Committee. Consequently, they are not directly "established or utilized" by the President or any agency . . . .

*See National Anti-Hunger Coalition*, 557 F. Supp. at 529. *See also* Memorandum for Fred H. Wybrandt, Chairman, National Crime Information Center Ad-

<sup>6</sup> We do not address or express any opinion in this memorandum on the separate issue of the disclosure obligations of the agency under FOIA with respect to written materials delivered from an agency advisory committee to an agency.

<sup>7</sup> FACA defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, . . . which is—(A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. I, § 3(2).

visory Policy Board, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (Apr. 28, 1987) ("Wybrandt Memorandum"). This limitation on section 10(b)'s disclosure requirement has important practical consequences. For example, the President established a presidential advisory committee, the President's Private Sector Survey on Cost Control ("Survey"), funded by the Department of Commerce, but whose staff had to be paid for by the private sector.<sup>8</sup> A non-profit Foundation for the Survey, chaired by members of the Executive Committee, organized the private staff into thirty-six task forces to gather information, perform studies, and draft recommendations and reports for the Executive Committee. Based on this structure, the district and appellate courts concluded that the non-profit task forces were not subject to FACA because they did not provide advice directly to the President or any agency, but rather performed activities analogous to staff work. *National Anti-Hunger Coalition*, 557 F. Supp. at 529-30; 711 F.2d at 1075-76.<sup>9</sup>

Based on the same reasoning, as well as an exhaustive survey of the FACA legislative history, this Office recently concluded that subcommittees of the National Crime Information Center ("NCIC") Advisory Policy Board are likewise not covered by FACA because they "perform preparatory work or professional staff functions in aid of, but not displacing, the actual advisory committee function performed by the Board." Wybrandt Memorandum at 1.<sup>10</sup> Although each advisory committee structure will determine the results in a particular case, the general point can be made that FACA compels disclosure of a limited subset of information, namely the material used by the advisory committee or subgroup established or utilized by the ultimate decision-maker, which typically will be an agency or the President.

### *B. The Scope of Exemption 5 in the Context of Section 10(b)'s Disclosure Requirements.*

Assuming that documents are subject to section 10(b), we turn to the scope of FOIA's exemption 5 under FACA. First, it is necessary to presume that Congress did not intend to create an irreconcilable conflict between the two laws; *i.e.*, on the one hand, to protect deliberative advisory committee materials from public inspection via exemption 5, but on the other, to order detailed disclosure of all "records, reports, transcripts, minutes, appendixes, working papers, drafts, stud-

<sup>8</sup> Exec. Order No. 12369, sec. 3(e), 3 C.F.R. 190 (1983).

<sup>9</sup> On the other hand, the subcommittee officially established by the Survey was held to be covered by FACA because it "is responsible for reviewing the task force reports and making detailed recommendations to the President and the affected federal agencies." *National Anti-Hunger Coalition*, 711 F.2d at 1072. The D.C. Circuit panel also states in dictum that if the task force reports were in fact not exhaustively reviewed and revised by the Executive Committee, but were merely rubber-stamped recommendations given little or no independent consideration, it would be within a district court's power to find that the provisions of FACA apply to the task forces as well. *Id.* at 1075-76.

<sup>10</sup> As in our prior opinion, however, "[w]e must emphasize that our opinion should not in any way be read as support for attempting to use subcommittees to evade the . . . requirements of FACA." Wybrandt Memorandum at 9.

ies, agenda, or other documents" that are otherwise covered by FACA.<sup>11</sup> The potential conflict is underscored by the obligation to disclose committee drafts, working papers and studies, whereas exemption 5 is designed to preserve the integrity of precisely these types of "predecisional" internal deliberations from public view.<sup>12</sup> The two objectives, if not harmonized, would present an insurmountable internal statutory conflict.

We conclude that exemption 5 is not generally applicable to materials prepared by or for an advisory committee, but that it does extend to protect privileged documents delivered from the agency to an advisory committee. This construction gives meaning to exemption 5 without vitiating Congress' enumeration of deliberative documents such as working papers and drafts as subject to disclosure. It is also supported by a close reading of exemption 5 itself. Because by its terms exemption 5 protects only inter-agency and intra-agency documents and because an advisory committee is not an agency, documents do not receive the protection of exemption 5 by virtue of the fact that they are prepared by an advisory committee. On the other hand, documents prepared by an agency do not lose the protection of exemption 5 by virtue of the fact that they are delivered to an advisory committee.<sup>13</sup>

At the outset, we note that the application of FOIA to advisory committees in the FACA statute is not a model of draftsmanship.<sup>14</sup> Most glaringly, Congress incorporated the FOIA exemptions, yet gave no explicit consideration to

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<sup>11</sup> Pursuant to section 10(b), the right of public access to deliberative committee documents expires when the "committee ceases to exist." The material available for public inspection is thereafter restricted by the statute to the "report made by every advisory committee and, where appropriate, background papers prepared by consultants." 5 U.S.C. app. I, § 13. The Director of OMB is responsible for filing this material, subject to FOIA, with the Library of Congress where it is maintained for public inspection in a depository. *Id.* The depository materials will presumably not include the preparatory material covered by section 10(b), such as working papers, drafts, studies, and agendas, unless the materials are incorporated in the committee report or are appropriate background papers prepared by consultants.

<sup>12</sup> Exemption 5 in general protects agency documents that would normally be privileged in civil discovery. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). To date, the Supreme Court has recognized five privileges, including those expressly mentioned in the legislative history, as well as those that are "well-settled" in the case law or are "rough analogies" to privileges recognized by Congress. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-02 (1984). The privilege primarily at issue in the intersection of FOIA and FACA is that protecting advice and recommendations which are part of the deliberative processes of government.

In addition to deliberative process, exemption 5 protects attorney work product, *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); *FTC v. Grolier, Inc.*, 462 U.S. 19, 25-28 (1983), matters covered by attorney-client privilege, *NLRB*, 421 U.S. at 154, confidential commercial information generated to award contracts, *Federal Open Market Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979), third-party witness statements to military investigators, *Weber Aircraft*, 465 U.S. at 792, and perhaps other privileges as well, see *Durns v. United States Dept. of Justice*, 804 F.2d 701 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1122 (D.C. Cir. 1986) (presentence reports); *Hoover v. United States Dep't. of Interior*, 611 F.2d 1132, 1138-42 (5th Cir. 1980) (expert witness reports).

<sup>13</sup> We express no opinion on the operation of exemption 5 in the context of a FOIA request to an agency.

<sup>14</sup> The courts have noted the ambiguity of the FACA statute generally, and the problems that would be created for the conduct of government affairs by the literal application of its terms. See, e.g., *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116, 118-21 (D.D.C. 1986); *National Anti-Hunger Coalition*, 557 F. Supp. at 530; *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), *aff'd in part*, 580 F.2d 689 (D.C. Cir. 1978); *Lombardo v. Handler*, 397 F. Supp. 732, 800 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).













