UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION OF ORDER REGARDING
THE DELIBERATIVE PROCESS PRIVILEGE DENIED:
March 3, 2022

CBCA 6597

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Terry R. Marston II of Marston Legal, PLLC, Kirkland, WA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

LESTER, Board Judge.

ORDER[1]

Respondent, the Federal Highway Administration (FHWA), has requested that the Board reconsider its order dated February 8, 2022, requiring the FHWA to produce to appellant, Active Construction, Inc. (ACI), certain documents that the FHWA has withheld

[1] This order is being published to assist in providing greater transparency to the public about the manner in which the Board has addressed issues in cases before it. Nevertheless, although single-judge orders like this one are binding in the appeals in which they are issued, they are, consistent with Board Rule 1(d) (48 CFR 6101.1(d) (2020)), not precedential in other appeals before the Board.

as protected by the deliberative process privilege. The FHWA, citing to court decisions involving the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2018), asserts that "reconsideration is necessary because of the Board's failure to follow binding precedent regarding the treatment of agency deliberations conducted as part of the contracting negotiation process." Respondent's Motion for Reconsideration at 2. The motion is denied.

Discussion

The FHWA's Misinterpretation of the Board's Order

The FHWA claims that the Board, in its prior order, was wrong in holding that internal agency documents created during deliberations to assist in reaching a final decision on contract administration matters do not fall within the deliberative process privilege. The FHWA has misunderstood the Board's order.

In its order, the Board recognized that the deliberative process privilege "protects information from disclosure that is 'predecisional' (that is, generated before the agency adopts a policy or reaches a decision) and 'deliberative' in nature (that is, prepared to assist an agency decision-maker in arriving at a decision through the give-and-take of the collaborative process)." *Active Construction, Inc. v. Department of Transportation*, CBCA 6597, slip op. at 3 (Feb. 8, 2022). That is, "[t]he deliberative process privilege shields documents that reflect an agency's preliminary thinking about a problem, as opposed to its final decision about it." *United States Fish & Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). "Discussions among agency personnel about the relative merits of various positions which might be adopted in contract negotiations are as much a part of the deliberative process as the actual recommendations and advice which are agreed upon." *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977). We expressly recognized in our prior order that the deliberative process privilege could cover deliberations associated with contract negotiation and administration decisions, *Active Construction*, slip op. at 6, an understanding that is supported by the two court decisions that the FHWA cites, *Mead Data Central* and *Brownstein Zeidman & Schomer v. Department of the Air Force*, 781 F. Supp. 31 (D.D.C. 1991).

The Difference Between the FOIA and Production in Discovery

The FHWA urges us to follow the guidance of *Mead Data Central* and *Brownstein Zeidman*, in which the courts allowed the Government to withhold from public release deliberative documents associated with contract administration decisions. Yet, there is a major difference in the two cited court decisions and this case. Both *Mead Data Central* and *Brownstein Zeidman* addressed requests for the release of documents under the auspices of the FOIA. Exemption 5 of the FOIA is the statutory equivalent of the deliberative process

privilege and entitles the Government, in response to a FOIA request, to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." *Id.* § 552(b)(5); *see Sierra Club*, 141 S. Ct. at 785 ("[T]his exemption incorporates the [deliberative process privilege] available to Government agencies in litigation."). But the case before the Board is not a FOIA case. This appeal involves a contract dispute in which appellant seeks the production of documents as part of the discovery process.

In a FOIA action, the need of the requesting party is not considered in evaluating whether documents should be released. *Judicial Watch, Inc. v. United States Department of Homeland Security* (*Judicial Watch I*), 841 F. Supp. 2d 142, 162 (D.D.C. 2012). If the documents in question are found to be predecisional and deliberative and if the agency establishes that it is reasonably foreseeable that disclosure would harm an interest protected by the deliberative process privilege, a court's consideration of a challenge to the privileged nature of the documents ends. *Judicial Watch, Inc. v. Department of Commerce* (*Judicial Watch II*), 375 F. Supp. 3d 93, 97-98 (D.D.C. 2019). When the deliberative process privilege is invoked in response to discovery requests in litigation, FOIA decisions can be helpful in defining the standards to apply in determining whether an agency has properly established the deliberative process privilege, *see* Janice Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act & the Federal Discovery Rules*, 49 Geo. Wash. L. Rev. 843, 852 (1981), but there is an additional analytical element that does not exist in FOIA cases.

In a discovery dispute, the deliberative process privilege is not absolute, *Marriott International Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006), and "can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Faced with a challenge to the Government's deliberative process privilege invocation in litigation, a tribunal must compare and balance the requesting party's need for the documents against the harm to the Government that will result from disclosure, a process that can result in a different production outcome than under the FOIA:

> The absence of any consideration of need distinguishes the FOIA request from the discovery process. The FOIA quite explicitly makes the need of the party requesting disclosure irrelevant. Thus, at least in theory, the FOIA promotes increased government accountability by allowing any member of the public to peruse government documents without demonstrating a special interest in the material. On the other hand, even the most pressing need for disclosure cannot overcome an applicable FOIA exemption. The balancing of needs and interests found in the discovery context is not present in FOIA litigation. The courts have consistently held that a requesting party's rights under the FOIA "are neither increased nor decreased by reason of the fact that it claims an

> interest in [requested information] greater than that shared by the average member of the public."
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> When the FOIA is asserted in a negative fashion to block discovery, the information-gathering systems of the FOIA and the Rules must be combined with great care. In an action to compel discovery, the requestor's need for the information is a crucial factor in the balancing test regardless of whether the material is exempt under the FOIA.

Toran, *supra*, at 852, 853-54 (quoting *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975)).

Accordingly, contrary to the FHWA's suggestion, "FOIA exemptions . . . should not operate as absolute barriers to discovery nor should they be assigned controlling weight in discovery rulings." Toran, *supra*, at 871. "The qualified scope of the privileges available to the government . . . permit[s] a party, upon a showing of need, to obtain more relevant documents in discovery than under the FOIA." Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119, 139 (1984). That the courts in *Mead Data Central* and *Brownstein Zeidman* allowed the Government to withhold contract administration deliberation documents under the FOIA, where the contractor's need is irrelevant, does not mean that such documents will similarly be exempted from production in a discovery dispute, where need must be considered. By requesting that we defer to FOIA decisions that did not require production of deliberative process documents, the FHWA is essentially attempting to convert a qualified privilege when raised as part of a discovery dispute into an absolute one. The FHWA has identified no viable basis for that request.

The Reasons That the FHWA's Privilege Claim Failed

In our order dated February 8, 2022, we identified three reasons for finding that the deliberative process privilege did not support withholding the sampling of documents that the FHWA had provided to the Board: (1) that a few of the documents were post-decisional; (2) that some documents had no discernible tie to a "decision" that the agency was deliberating; and (3) that, in the context of a contract dispute about the very contract at issue in the contract administration documents that the FHWA sought to withhold, the privilege could not stand absent very good reasons that the FHWA had not supplied. In its motion for reconsideration, the FHWA challenges our characterization of the documents that we identified as falling into the first two categories above. We need not delve into the FHWA's disagreement with the first two reasons because, regardless of that outcome, all of the documents that the FHWA provided to the Board for in camera review would have to be

produced for the third reason. The FHWA expresses confusion about our rationale for requiring production of allegedly deliberative contract administration documents in the discovery dispute here, which we address below.

The FHWA's Failure to Establish Reasonably Foreseeable Harm. The FHWA failed to meet its obligation of identifying reasonably foreseeable harm that would result from disclosure of its employees' contract administration deliberations.

To establish a prima facie case in support of a deliberative process privilege claim, the Government bears the burden of establishing that each protected document is predecisional and deliberative, as well as (particularly in light of a 2016 amendment to the FOIA) that it is reasonably foreseeable that the type of harm that the privilege is intended to preclude – that is, the suppression of openness in internal agency deliberations – would result from disclosure. *Judicial Watch II*, 375 F. Supp. 3d at 97-98. To support its privilege claim, the FHWA provided the declaration of Kevin McLaury, the Division Director for the FHWA's Western Federal Lands Highway Division, who averred that "[a]ll of these documents were related to the negotiations of contract modifications or settlement for the Contract" at issue in this appeal and that production of these documents "will result in a chilling effect on agency deliberations." Declaration of Kevin L. McLaury (May 5, 2021) ¶¶ 4, 5. He tells us that, if negotiation memoranda were released, "and agency officials knew that potential contractors would be able to review them and use them in future negotiations, they would be less willing to set forth their negotiation goals in writing." *Id.* ¶ 6. He provides similar representations with regard to the harm that would result from the public disclosure of independent government estimates (IGEs), emails between government staff regarding the negotiation of contract modifications, and emails discussing changes or the reasoning used in various components of IGEs. *Id.* ¶¶ 10, 11. He even goes so far as to assert that, if "internal emails regarding funding for contract modifications" were released, "government personnel would be less likely to request funds reflecting the government negotiation position prior to entering into negotiations." *Id.* ¶ 9.

Nowhere in the declaration, however, does Mr. McLaury ever explain, for any of the documents that he seeks to protect, *why* disclosure would limit future internal agency deliberations.[2] The declaration must do more than "perfunctorily state that disclosure of all

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[2] We also note that neither Mr. McLaury in his declaration nor the FHWA in its briefing adequately explains why Mr. McLaury, in his role as Division Director for the FHWA's Western Federal Lands Highway Division, is authorized to invoke the deliberative process privilege upon the agency's behalf. The authority to invoke the privilege rests with the agency head, who "can, when carefully undertaken, delegate authority to invoke the deliberative process privilege on the Agency's behalf." *Marriott International*, 437 F.3d at

the withheld information—regardless of category or substance—would jeopardize the free exchange of information." *Rosenberg v. Department of Defense*, 342 F. Supp. 3d 62, 79 (D.D.C. 2018). "While an agency can take a categorical approach, it must provide more than 'boilerplate statements' and 'generic and nebulous articulations of harm.'" *Danik v. Department of Justice*, 463 F. Supp. 3d 1, 10 (D.D.C. 2020) (citations omitted). It has to "articulat[e] 'a link between the specified harm and specific information contained in the material withheld.'" *Judicial Watch II*, 375 F. Supp. 3d at 100 (quoting H.R. Rep. No. 114-391, at 9 (2016)); *see Mead Data Central*, 566 F.2d at 258 ("An agency cannot meet its . . . burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the [privilege].").

Here, the McLaury declaration's allegations of harm are conclusory. Why, if these documents were released, would Mr. McLaury's employees stop requesting funding for contracts? What fears would they have in future contract negotiations, if these documents in dispute were produced, that would essentially deter them from protecting the Government in negotiations? Given Mr. McLaury's focus on public disclosure of these documents, why would a protective order limiting the documents' disclosure to individuals working on this case not ameliorate those concerns? Not only does the declaration provide no insight into the answers to such questions, the unsupported assertion that the possibility of disclosure deters openness in contract administration matters directly conflicts with an opposite view adopted by one of our predecessor boards of contract appeals:

> The [contracting officer (CO)] has claimed that disclosure of the information identified in the Privilege Log as supplemented would have a chilling effect upon the process whereby the CO's subordinates provide the CO with information and recommendations and policy choices. This contention is patently specious in the context of contract administration such as this one. Obviously, the CO cannot perform his functions without the information and recommendations which theoretically might be chilled. Rather, the prospect of disclosure in litigation, with the concomitant need to defend the efficacy of

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1308. In its response to ACI's original motion to compel, the FHWA cited to a delegation order (FHWA M1100.1A, chg. 45, ch. 4, ¶ 49 (Nov. 25, 2005)) as the basis of Mr. McLaury's authority to invoke the privilege. That order, however, seems to provide only "initial determination" authority for someone in Mr. McLaury's position to respond to a FOIA request. It appears that, if that response is challenged, the Associate Administrator for Administration is delegated authority to enforce the privilege on appeal. In further proceedings, the FHWA will have to justify more thoroughly the basis of Mr. McLaury's delegation to support the privilege invocation here.

> the assessments or recommendations, should have the effect of inspiring greater accuracy and thoroughness in providing the essential information and recommendations. Any omissions as well as commissions would so reflect upon the quality of the subordinates' performance that performance quality should logically be enhanced, not impaired, by anticipation of disclosure. Nor is the nature of the process involved in routine contract administration such that the prospect of disclosure might stimulate grandstanding or intimidate subordinates from playing the role of devil's advocate, for example, which might be significant concerns if high level policy formulation were involved. It may be taken as given that agency policies are developed by senior level officials, and that, in contrast, discussions between lower level contract administrators regarding routine contract operations would not, ordinarily, in the absence of a specific showing to the contrary, pertain to the formulation of agency policy which would need to be protected by invocation of the deliberative process privilege.

Brero Construction, Inc., LBCA 1997-BCA-4, 1999 WL 624138 (June 18, 1999).

In conducting our in camera review of the sampling of withheld documents that the FHWA submitted to the Board, we could not identify anything in them that would cause individuals concern. In these circumstances, the FHWA did not meet its burden to establish the applicability of the deliberative process privilege over the sampling of documents that were submitted for in camera review.

The Contractor's Need Versus the Agency's Harm. Even if the FHWA's submissions were viewed as minimally sufficient to meet its obligation to establish harm, it is quite clear that the contractor's need to discover evidence to support its lawsuit overwhelms that minimal harm. As we explained in our prior order, "only in unusual situations will an agency be able to preclude production of documents relating to contract administration decisions, particularly those relating to decisions about contract changes and modifications, under the guise of the deliberative process privilege in response to a contract action seeking damages for those same contract administration activities, changes, and modifications." *Active Construction*, slip op. at 5 (citing *4K Global-ACC Joint Venture v. Department of Labor*, CBCA 6683, et al., slip op. at 12-13 (Feb. 10, 2021), and *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA 17717, 73-2 BCA ¶ 10,205); *see Xerox Corp. v. Government Printing Office*, GSBCA 12322-P, 93-3 BCA ¶ 25,936 (finding that an agency "should not be permitted to shield its relevant actions" about the dispute before the Board "by claiming the privilege"). It appears that the FHWA believes that, at the same time that it obtains discovery of the minutiae of the contractor's contract performance and administration activities, it can selectively limit production of its own contract administration documents. Such a position in the context of a contract dispute "smacks of a search for tactical advantage

in a sporting contest rather than a search for truth." *Charlesgate Construction Co.*, LBCA 96-BCA-2, et al., 1997 WL 159854 (Mar. 7, 1997). Having failed to identify good reasons that convincingly indicate reasonably foreseeable harm from disclosure, the agency cannot prevail in the required balancing test.

In its motion for reconsideration, the FHWA argues (for the first time) that, even though it invoked the deliberative process privilege over more than 1100 documents covering forty executed contract modifications, only eleven of those forty modifications are the subject of the current appeal. Accordingly, it asks us to limit its production obligation to those modifications that remain in dispute. The FHWA did not identify this issue in its prior briefing on its privilege claims. For the documents that the Board has already reviewed in camera and ordered be produced, it is too late to raise new grounds for withholding.

Decision

The FHWA shall produce the documents identified in the Board's order dated February 8, 2022, within **ten calendar days** from the date of this order. If it wishes to produce such documents under a protective order to limit their public distribution, it will need to confer with ACI and submit a proposed protective order to the Board.

The FHWA and ACI shall confer to determine whether they can resolve their dispute as to the remaining documents identified in the FHWA's privilege log as subject to the deliberative process privilege and report to the Board within **ten calendar days** from the date of this order on the extent to which further proceedings relating to ACI's motion to compel will be necessary. Any questions about relevance shall be addressed as part of the parties' negotiations.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge