

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-07

August 12, 2015

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Modifying Interpretation of Section 102.117(b)(1) Regarding Redaction of Formal Documents Before the Opening of a NLRB Public Hearing or Forwarding to the Board on a Stipulated Record

For the reasons explained herein, I am modifying the Agency's interpretation of Section 102.117(b)(1) of the Board's Rules and Regulations, pursuant to which all formal documents have traditionally been made available without redaction. These documents will continue to be available to the public; however, if a Freedom of Information Act (FOIA) request is made for a formal document in a case in which a hearing did not open, or has not yet opened, the record should be reviewed by the FOIA Branch for the purpose of redacting individuals' names, titles, phone numbers, addresses, and online identifiers (including e-mail and other electronic information identifying individuals).¹ Other than redaction of individual names and personal identifiers, such formal documents will continue to be released to the public in full.² **In order to maintain consistency of FOIA processing, Regions are directed to no longer make Agency documents available to the public, such as by maintaining charges and petitions in binders available for viewing in Regional offices. Instead, all requests for documents, whether made by way of a formal FOIA request or otherwise, must be made through the FOIA Branch, consistent with the Agency's centralized processing of FOIA requests pursuant to the Headquarters restructuring announced in 2013. See 78 Fed. Reg. 44981, 44982.**

This interpretation of the Rules and Regulations reflects the Office of General Counsel's continuing commitment to both transparency in case handling, and to protecting the privacy of individuals whose names and personal identifiers do not themselves shed light on the Agency's performance of its duties. It is intended to better align the Agency's

¹ This interpretation would also apply to cases submitted to the Board on a stipulated record (i.e., without a hearing). That is, once parties request the Board to take a case on a stipulated record, no requested formal documents should be redacted.

² This policy does not apply to NLRB final opinions and orders, or to non-final orders served on parties to an administrative proceeding conducted pursuant to section 9 or 10 of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 159, 160. It also does not apply to disclosures made consistent with other NLRB regulations to parties during ongoing Board cases and proceedings.

disclosure practices with the policies underlying individual protections codified in Section 7 of the NLRA, 29 U.S.C. § 157, and in the privacy-protecting exemptions in the FOIA, 5 U.S.C. § 552 (b)(6) and (b)(7)).³

I. Background

The administrative record in Board cases includes “formal documents.” 29 C.F.R. § 102.117(b)(1). Unfair labor practice case formal documents include documents such as: charges, settlement agreements, complaints, answers, and briefs filed. 29 C.F.R. § 102.45(b). Representation case formal records include items such as: petitions, election agreements, election objections, motions, service sheets, and rulings. *See* 29 C.F.R. § 102.68, 102.69(d)(1). Disclosure of formal documents is authorized by Section 102.117(b)(1): “The formal documents constituting the record in a case or proceeding are matters of official record and, until officially destroyed pursuant to applicable statutory authority, are available to the public for inspection and copying during normal business hours at the appropriate Regional Office of the Board or at the Board's office in Washington, DC, as the case may be.” 29 C.F.R. § 102.117(b)(1).

The FOIA similarly requires that certain agency documents be made “available to the public,” 5 U.S.C. § 552(a)(2), but at the same time, permits agencies to redact such documents for privacy. *Id.* (“[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records.”).⁴

Until recently, the Agency’s official case records existed solely on paper and were maintained solely in paper files, not available or accessible in electronic form. However, that has changed with the advent of the Agency’s electronic case-management system, making these documents available electronically to requesters who seek them.⁵ Prior to

³ This memorandum rescinds the Agency’s FOIA Manual provisions permitting release of unredacted formal documents. A revised FOIA Manual is being prepared.

⁴ This FOIA language permits the Agency to read such a redaction proviso into its FOIA regulation. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (where regulation “parrots” the statute, the court must address the meaning of the statute). In addition, the new policy is consistent with the portion of the Agency’s FOIA regulation that generally requires withholding when exemptions are applicable to requested information. *See* Section 102.117(e).

⁵ For all cases filed with the NLRB on or after October 1, 2012, the official formal Board records are maintained in that system. *See* Memorandum OM-12-80 (NxGen) Revised (February 15, 2013) available at <http://apps.nlr.gov/link/document.aspx/09031d4580fd7c94>.

this technological advance, without a careful document-by-document review, these documents were not searchable for information about particular named individuals. The Board's release of unredacted formal case records thus raised no serious concern that they could become a practical tool for invading the privacy of persons identified in them.

That is no longer the case. In recent years, there have been remarkable advances in information and communication technology. The ability to search, collect, use, maintain, and redistribute publicly- available information has expanded and improved in ways that could not have been anticipated in earlier decades.⁶

Indeed, this Agency's records have been made more publicly available in recent years. The NLRB's move to NxGen has made it much easier for our public website to contain a broad array of information, significantly contributing to the transparency of its case processing.⁷ These efforts to increase public awareness of NLRB proceedings -- well beyond mere access to final agency decisions -- have generally improved the ability of "citizens to know 'what their Government is up to.'" *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

However, the Agency's formal documents routinely contain persons' names and identifiers associated with factual claims made by private parties seeking to advance their positions before the Board. For this reason, electronic internet publication of formal Board records raises a serious concern that too much personal information about the lives of private citizens is being exposed. This concern is underscored by the fact that well over 90 percent of NLRB proceedings -- about nineteen thousand unfair labor practice cases each year -- are resolved without adjudication or evaluation by an administrative law judge or the Board.⁸ Often such cases include unresolved disputes about the

⁶ The relevance of these technological changes to federal disclosure practices was recognized by Congress in 1996, when it amended the FOIA's affirmative disclosure requirements. *See* 1996 Electronic Freedom of Information Act Amendments (Pub. L. No. 104-231, 110 Stat. 3048).

⁷ In addition, the NLRB's Congressional and Public Affairs Office uses e-mail and social media to disseminate information such as Board decisions and General Counsel memoranda to reach persons who might not otherwise visit the Agency's website. Further, each Regional Office has its own page on NLRB.gov, and Regions are encouraged to continue adding new information in real time relevant to their Region.

⁸ Most unfair labor practice cases are either settled or dismissed without a complaint being issued. For fiscal year 2014, 20,415 unfair labor practice charges were filed. *See* <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints>. In that same fiscal year, 7,251 unfair labor practice charges were withdrawn, 7,209 were settled or adjusted, and 5,055 were dismissed. Accordingly, only a small minority of cases are resolved by a neutral factfinder resolving disputes.

accuracy of the “facts” averred in many formal records, such as the initiating charge, or a Regional Director’s letter dismissing charges. These records contain assertions of union or other protected activities of named employees (such as alleged discriminatees, including those who are not charging parties), descriptions of alleged coercion or discrimination committed by named agents of employers and unions, as well as employer and union assertions of employee misconduct. Some representation case formal records, such as objections to the conduct of an election, include parties’ descriptions of named individuals’ protected activity and misconduct. Readers of these formal records naturally might credit “facts” asserted about these individuals, having no easy way of knowing what parts were disputed, or may have become disputed if the case had proceeded to a final agency adjudication. This becomes particularly significant in this internet age where such information, once placed in the public domain, will likely will be seen, read and searched by many, including prospective employers and entities that could provide such information to prospective employers.

One published report discussed that evidence adduced during an unfair labor practice trial revealed that a company manager searched a perceived pro-labor internet “bulletin board” to uncover union supporters’ identities.⁹ Other studies have reported that a large percentage of American companies search the internet for information about job applicants. The reports differ in the actual percentage of companies conducting such searches, ranging between 37 and 75 percent.¹⁰ However, our determination that such

⁹ See Kris Maher, *Starbucks Emails Describe Efforts to Stop Unionization*, Wall Street Journal, January 23, 2008, available at <http://online.wsj.com/article/SB119992798501479685.html>; see also Eric Lee, *How the Internet Makes Union Organizing Harder*, http://www.ericlee.info/2008/02/how_the_Internet_makes_union_o.html. (February 1, 2008, 08:35 EST) (union organizers increasingly concerned about Internet privacy issues raised by the Starbucks case).

¹⁰ See Lawrence E. Dubé, *Mobile Technology Changes Workplaces and Employment Lawyers Race to Adapt*, 84 Daily Labor Report C-1 (May 4, 2010) (75% reported); *Best Practices for Employers Choosing to Google Job Applicants*, Peter J. Pizzi, Connell Foley LLP, (45% reported), available at http://www.connellfoley.com/sites/default/files/USLAW%20Best%20Practices%20For%20Employers%20Choosing%20to%20Google%20Job%20Applicants_PPizzi0910_1.pdf; ABA Labor And Employment Law publication “*Googling Job Applicants*” by Robert Sprague, March 2008 (50 percent), available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/labor_googlingjob.html

Performing Web searches on job applicants carries risks, [Jean Ohman Back](#), Attorney (November 27, 2012) (37 percent of employers perform internet searches on job applicants) <http://employmentupdate.schwabeblog.com/2012/11/27/performing-web-searches-on-job-applicants-carries-risks/>.

searches create a significant privacy issue does not depend upon the precise percentage of companies searching for information about their prospective hires. It simply cannot be disputed that these searches are increasingly used by many employers in the hiring process. Thus, the continued unredacted disclosure of formal documents pursuant to FOIA requests would enable such a requester to create their own database, searchable for the names and activities of individual charging parties, discriminatees, and petition filers, and to provide this information to others.

Importantly, the redaction of individuals' names and personal identifiers from formal documents will otherwise leave intact the documents' factual and legal content. The formal documents will thus continue to inform the public about "what their Government is up to." *Favish*, 541 U.S. at 171-72. It is not also necessary that the Agency disclose the names of private individuals and thus expose them to potential embarrassment, public opprobrium, or damaged employment prospects. *Id.*¹¹

II. This Change Is Consistent With the NLRA and the FOIA, Both of Which Reflect Congress' Intent to Protect Individuals from Involuntary Disclosure of Sensitive Information About Them

NLRA Protection of Individuals

Protecting the identity of employees who engage in union or other concerted activity, or who participate in NLRB proceedings, is consistent with the policies of the NLRA. The Board has recognized the chilling effect that results from an employer's knowledge of an individual's concerted activities. "Section 7 of the Act gives employees the right to keep confidential their union activities, including their attendance at union meetings. . . . This right to confidentiality is a substantial one, because the willingness of employees to attend union meetings would be severely compromised if an employer could, with relative ease, obtain the identities of those employees." *Guess?, Inc.*, 339 NLRB 432, 434 (2003). Indeed, the Board "zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the

¹¹ This approach also serves the E-Government Act of 2002, [Pub. L. 107-347](#)), § 2, Dec. 17, 2002, [116 Stat. 2900](#) (allowing formal documents to be viewed online while redacting private information serves to "provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy. . . ."). It is also congruent with the Office of Management and Budget's disclosure directives. See OMB Memorandum M-07-16 at 2, (May 22, 2007) available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf> (memorandum directing agencies to reduce access regarding personally identifying information "to only those individuals who must have such access."); *see also* OMB Director Memorandum M-10-06 (December 8, 2009) ("[N]othing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would . . . invade personal privacy").

identity of employees engaged in organizing.” *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), *enf’d*, 200 F.3d 1162 (8th Cir. 2000). The Board has held that the confidentiality interests of all employees, not just charging parties or witnesses to NLRB proceedings, would be significantly at risk if their conduct was made public. *National Telephone Directory Corp.*, 319 NLRB 420, 421 n.6 (1995). Similarly, supervisors, managers and agents of employers, as well as agents of unions, who are alleged to be participants in unfair labor practices, have confidentiality interests warranting protection.

To be sure, the NLRA is primarily focused upon protecting the rights of employees, not all private individuals, and the FOIA generally favors public access to administrative proceedings. However, when Congress enacted the FOIA, it chose specific means to further this policy, and it codified limitations on the right of public access to agency records. Private information about individuals has long been protected by FOIA Exemptions 6 and 7(C). (5 U.S.C. § 552(b)(6), 552(b)(7)(C)).

FOIA Exemptions 6 and 7(C) Protection of Private Information in Agency Records

Exemption 6 requires agencies to withhold information about individuals in “personnel and medical files and similar files” where the disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).¹² Whether disclosure “would constitute a clearly unwarranted invasion of personal privacy” involves balancing the public’s right to disclosure against the individual’s right to privacy. *U.S. Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976).¹³

Courts have held that specific personal information about named individuals generally possesses an elevated privacy interest. *See U.S. Dep’t of State v. Ray*, 502 U.S. 164, 176 (1990). This includes information concerning current and past employment. *See, e.g., Dunkelberger v. U.S. Dep’t of Justice*, 906 F.2d 779, 781-82 (D.C. Cir. 1990) (employment record, evaluation history, and material in personnel file protected).¹⁴

¹² The threshold requirement “personnel and medical files and similar files” covers all information which “applies to a particular individual regardless of the label of the file in which it is stored.” *U.S. Dep’t of State v. Washington Post*, 456 U.S. 595, 601-02 (1982).

¹³ In considering privacy interests, the agency should consider the universe of possible consequences that release of the information might trigger, since the issue is not simply what the requester might do with the information, but “what anyone else might do with it.” *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996).

¹⁴ Charge and petition filers do not waive their interests in privacy simply by invoking the Board’s processes. *See The Larkin Law Firm, P.C. v. FTC*, 352 F.3d 1122, 1144 (7th Cir. 2004) (personal identifiers of consumers complaining to the Federal Trade Commission protected under Exemption 6 because “the personal privacy interests of consumers did not disappear when they complained to the FTC”); *Ayuda, Inc. v. FTC*, 70 F. Supp. 3d 247 (D.D.C. 2014) (same). This calculation, however, changes once a

FOIA case law also teaches that there is little or no cognizable public interest in the release of information about named individuals in formal documents. *See, e.g., U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Thus, the elevated privacy interest attached to the information about individuals in certain formal documents outweighs the public interest required by FOIA, which notably is absent here, thereby requiring redaction under Exemption 6.

Individuals' names and identifiers linked to additional personal information about them are also exempt from disclosure under FOIA Exemption 7(C). This exemption protects from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁵ Thus, information about individuals in Board formal documents qualifying for Exemption 7 protection that would reveal their identities would also be protected under FOIA Exemption 7(C).

Conclusion

For all these reasons, I have found that public disclosure of private parties' names in NLRB formal records harms the privacy of the very persons the NLRA is intended to protect, while not contributing materially to the public's understanding of NLRB proceedings. Once again, under this interpretation of our regulations, only those formal documents whose production is requested prior the opening of a hearing or the forwarding of the case to the Board on a stipulated record, shall be redacted consistently with the applicable FOIA exemptions described above. This will advance both individual privacy interests and the policies of the NLRA.

/s/
R.F.G.

cc: Release to Public

hearing opens or a stipulated record is presented to the Board for decision, which is why formal documents from such cases will not be redacted.

¹⁵ 5 U.S.C. § 552(b)(7)(C). It is settled that unfair labor practice case records are "compiled for law enforcement purposes." *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 222-23, 234-37 (1978). Exemption 7 also applies to representation case files at least when the representation case is related to an unfair labor practice proceeding, or where election objections have been investigated. *See, e.g., Clements Wire & Mfg. Co., Inc. v. NLRB*, 589 F.2d 894, 897 (5th Cir. 1979).