UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

USAID RIF GROUP 2, CONSOLIDATION, Appellants, v.	Docket No. CF-0351-26-0016-I-1
U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, Agency.	Date: October 5, 2026

REQUEST BY THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION TO FILE AN AMICUS BRIEF

Pursuant to 5 C.F.R. § 1201.34(e), the Metropolitan Washington Employment Lawyers Association (MWELA) submits a request to the Merit Systems Protection Board to file the attached amicus brief. As explained in its amicus brief, MWELA has a legitimate interest in the proceedings. This brief is filed with the consent of the Appellants and the Agency.

October 5, 2026

Respectfully submitted,

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AMICUS BRIEF OF THE
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is a local chapter of the National Employment Lawyers Association. MWELA conducts continuing legal education programs for its approximately 400 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice. Many of MWELA's members represent federal employees before the Merit Systems Protection Board (Board), the Equal Employment Opportunity Commission, the Office of Special Counsel, federal courts, and other tribunals.

MWELA's members and their clients who challenge adverse employment actions by Federal agencies before these tribunals need information about the motives and deliberations behind those actions in order to have a full and fair opportunity to prove discrimination,

retaliation, or other prohibited personnel practices. In these cases, government reasoning and intent are squarely at issue. If the Board were to decide that the deliberative process privilege allows Federal agencies to use the privilege as a shield in Board cases, this would deprive appellants of evidence central to their claims. It would significantly impede their search for the truth. The deliberative process privilege was intended to protect governmental deliberative process only when it is collateral to a plaintiff's suit, not, as in employment actions, when it is at the heart of the dispute.

MWELA files this brief with the consent of the parties.

STATEMENT OF THE ISSUE

On April 8, 2026, the Administrative Judge issued an Order Certifying Interlocutory appeal in which the parties were ordered to address before the Board:

> Whether the deliberative process privilege applies in proceedings before the Merit Systems Protection Board, particularly in appeals challenging agency motive and intent in personnel actions such as a reduction in force.

Docket No. CF-0351-26-0016-I-1, Tab C-27.

DISCUSSION

The deliberative process privilege should not apply to proceedings, including reduction in force proceedings, where the intent of the decisionmaker for the underlying personnel action is in dispute. The privilege "covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated." *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The central purpose of this common law privilege is "to foster government decision-making by protecting it from the chill of potential disclosure." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422,

1424 (D.C. Cir. 1998) (citing *NLRB v. Sears Roebuck & Co*., 421 U.S. 132, 150 (1975)). However, "[i]f Congress creates a cause of action that deliberately exposes government decision-making to the light, the privilege's raison d'etre evaporates." *Id*.

The D.C. Circuit held in *In re Subpoena Duces Tecum* that,

> If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination . . . . if either the Constitution or a statute makes the nature of government officials' deliberations the issue, the privilege is a *nonsequitur*.

Id. (citations omitted). Other courts have followed suit.

In *Waters v. United States Capitol Police Board*, 216 F.R.D. 153 (D.D.C. 2003), the court held, in a discrimination complaint brought under the Congressional Accountability Act, that a memorandum discussing an investigation as to whether the plaintiff, a probationary police officer, cheated on an examination was directly relevant to the plaintiff's claim that the investigator discriminated against him during the course of the investigation on the basis of race. The court explained that to immunize the memorandum from discovery would be "to engage in the very *non sequitur* the Court of Appeals condemned in [*In Re Subpoena Duces Tecum*]." 216 F.R.D. at 163.

In *Qamhiyah v. Iowa State University of Science & Technology*, 245 F.R.D. 393 (S.D. Iowa 2007), the court held, in a discrimination complaint brought under Title VII and the Iowa Civil Rights Act, that the deliberative process privilege did not apply to draft reports, notes, and emails pertaining to a professor's administrative appeal of the denial of her application for tenure at a state university when the professor's claims put defendants' intent in making their decision at issue. The court explained that "[C]learly, applying the deliberative process privilege to an

allegedly discriminatory employment decision would impair enforcement of Title VII by shielding probative evidence of motivation from view." 245 F.R.D. at 397.

In *Rosales v. Los Angeles County*, 2024 U.S. Dist. LEXIS 148057 (C.D. Cal. 2024), the court held, in a non-selection case, that the deliberative process privilege did not protect from disclosure documents concerning the testing, evaluation, and decision-making processes through which plaintiff public defender was rejected for promotion to head deputy. The court explained that the deliberative process privilege "simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue." *Id*. at 148057 *4 (citation omitted). *See also*, *Scott v. Bd. of Educ. of E. Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004) (Plaintiff who attacked the integrity of the decision to terminate him was allowed access to the employer's pre-decisional mental impressions and discussions because they were necessary to challenge the purported reason for the termination); *Grossman v. Schwartz*, 125 F.R.D. 376, 381 (S.D.N.Y. 1989) ("In a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws.")

The principle that the deliberative process privilege does not apply when the motives of the decisionmakers are at stake applies no less to reductions in force where the existence of a *bona fide* reason for the reduction is called into question and the legality of the RIF hinges on whether there was such a *bona fide* reason. *See*, *Losure v. ICC*, 2 M.S.P.R. 195, 200–202 (1980) (If the Board finds that the Deputy Administrator did not have the legal authority or a *bona fide* reason to conduct the RIF, the entire RIF is illegal). *See also*, *Fitzgerald v. Hampton*, 467 F.2d 755, 758-59 (D.C. Cir. 1972) (In an ostensible reduction-in-force, to protect the procedural rights to which a preference eligible is entitled, the court must be able to look "further than the stated

reason for an employee's separation.") Just as in a Title VII or whistleblower retaliation claim, the motives of the decision maker may be central to the analysis of the legality of a RIF. Just as in a Title VII or whistleblower retaliation claim, the Agency cannot shield its decision from scrutiny by invoking the deliberative process privilege if its motives are at issue.

The Board may adjudicate the issue of whether the deliberative process privilege can and does apply. The Board is an independent, executive branch agency that "was created to ensure that all Federal government agencies follow Federal merit systems practices," 5 C.F.R. § 1200.1, and "to promote an effective Federal workforce free of Prohibited Personnel Practices." 2025 Board Annual Report, at 3.[1]

Among the prohibited personnel practices that the Board is charged to protect against are discrimination against employees and applicants for employment on the bases of race, color, religion, sex, national origin, age, handicapping condition, marital status, and political affiliation. 5 U.S.C. § 2302(b)(1). Other prohibited personnel practices that the Board works to protect against are personnel actions motivated by reprisal for whistleblowing activities (5 U.S.C. § 2302(b)(8)) or reprisal for the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation. 5 U.S.C. § 2302(b)(9). The Board mainly carries out this mission through adjudication of federal employee appeals of adverse actions. 5 U.S.C. § 1204(a)(1); 5 C.F.R. § 1200.1.

In order to carry out this important mission via the adjudication of federal employee appeals of adverse actions, the Board must allow appellants access to agency deliberative process information that reveals the true motives behind agency employment actions. With that

[1] https://www.mspb.gov/about/annual_reports/MSPB_FY_2025_Annual_Report.pdf

information, the Board is able to make fully informed decisions as to the merits of the agency's actions and the strength of the appellant's affirmative defenses. Without that information, the appellant is forced to do what is virtually impossible; demonstrate that the agency committed a prohibited personnel practice without the agency's evidence that would reveal whether or not there was intent constituting a prohibited personnel practice. Allowing agencies to use the deliberative process privilege as a shield against producing this information and against accountability would not only be unfair to appellants but also would result in Board decisions uninformed by highly relevant information.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day of October 5, 2026, the Amicus Brief of the Metropolitan Washington Employment Lawyers Association was served via Federal Express on:

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