Updates
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Supreme Court and Ninth Circuit Limit Reach of Freedom of Information Act

The Freedom of Information Act requires that federal agencies make records available to the public upon request, unless the records fall within one of nine exemptions. "Exemption 5" covers inter-agency or intra-agency communications that would be privileged in civil litigation, including under the attorney-client, work product or deliberative process privilege. 5 U.S.C. § 552(b)(5). In two recent rulings, the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit shored up the grounds for invoking Exemption 5 and for withholding documents from public disclosure under the FOIA statute.

Supreme Court Rules That Draft Biological Opinions Are Protected by the Deliberative Process Privilege

In a 7-2 decision, the Supreme Court ruled that draft biological opinions prepared by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services) pursuant to the Endangered Species Act for a proposed Environmental Protection Agency rulemaking were protected by the deliberative process privilege and thus were exempt from public disclosure. *United States Fish and Wildlife Service v. Sierra Club*, Supreme Court No. 19-547 (Mar. 4, 2021).

Background. The EPA proposed the rule in 2011 to govern the design and operation of cooling water intake structures, which withdraw large volumes of water from various sources to cool industrial equipment. The EPA initiated the Endangered Species Act consultation process with the Services, which prepared draft biological opinions in December 2013 finding that the proposed rule was likely to jeopardize protected species. But the Services did not transmit the draft biological opinions to the EPA. Instead, the Services decided to shelve the drafts and to continue discussions with the EPA over its proposed rule. These discussions led to a new proposed rule in March 2014, which differed significantly from the EPA's prior proposal. The Services then issued a joint final biological opinion finding that the new rule would not jeopardize protected species. That same day, the EPA adopted the final rule.

Sierra Club submitted a series of FOIA requests on the ESA consultation, and it brought a lawsuit to challenge the government's refusal to disclose the two draft biological opinions from 2013. The Ninth Circuit ruled that the drafts were not privileged, as they represented the Services' final opinion on the EPA's initial proposed rule. But the Supreme Court reversed.

The Supreme Court Opinion. In an opinion authored by Justice Barrett, the Court explained that the deliberative process privilege "shields from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." The privilege is rooted in "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." Thus, "[t]o encourage candor, which improves agency decision-making, the privilege blunts the chilling effect that accompanies the prospect of disclosure."

Because this rationale does not apply to documents that embody a final decision after the agency deliberations are done, the privilege distinguishes between (1) pre-decisional, deliberative documents, which are exempt from disclosure, and (2) documents reflecting a final agency decision and the reasons supporting it, which are not. Documents are "pre-decisional" if they were generated before the agency's final decision on the matter, and they are "deliberative" if they were prepared to help the agency formulate its position. The key question is not whether a document "is last in line," but "whether it communicates a policy on which the agency has settled."

Here, the majority concluded that the deliberative process protected the 2013 draft biological opinions, because the drafts reflected "a preliminary view—not a final decision—about the likely effect of EPA's proposed rule on endangered species." While the decision acknowledged that labeling a document as a "draft" is not dispositive, it emphasized that, in the context of the ESA consultation process, the drafts were subject to change before being finalized. And while the drafts here were the last word on the EPA's initial proposed rule, that was because EPA never finalized its proposal and instead issued a new proposal altering several key features of the rule, such that the Services never needed to render a definitive judgment about the original proposal.

The Court rejected the Sierra Club's argument that the drafts were intended to have an "operative effect" on the EPA rule by giving the agency a "sneak peek" at a conclusion the Services already had reached. The Court explained that such an "effects-based test" would "gut the deliberative process privilege," since it could require disclosure of any deliberative document that has the effect of changing the agency's course of action. The Court emphasized that the decision-makers at the Services never approved the drafts nor sent them to the EPA. The opinion thus characterized the drafts "not as draft biological opinions but as drafts of draft biological opinions," which is a "far cry from an agency decision already made."

The Dissent. Justices Breyer and Sotomayor dissented, opining that the draft biological opinions were not "drafts of drafts" but instead were official draft documents that reflected the Services' final decision on the effects that the EPA's initial proposed rule would have caused. The dissent emphasized that a draft biological opinion serves a consequential function under the ESA in explaining the Services' findings and in alerting the federal agency undertaking the proposed action of the impacts on species and the ways to avoid or minimize those impacts as part of the agency's approval of the action. The dissent also emphasized that the Services had a long history of disclosing draft biological opinions to the public, and that disclosure would not chill frank discussions within the Services as staff are aware that such completed drafts may be disclosed. And, the dissent explained that a document is not deliberative merely because it may be subject to change in the future.

The Implications of the Court's Ruling. The implications of the Court's decision could be substantial and far-reaching. In addition to making it more difficult to require disclosure of draft agency documents under FOIA, it may lead to greater claims by the federal government based on the deliberative process privilege to seek to withhold documents in civil litigation, including cases where the government is responsible for compiling the administrative record for a challenged agency action, particularly as the U.S. Department of Justice has advanced the position that deliberative materials should not be included in the record.

In a footnote, the majority decision explained that while the case was focused on the two draft biological opinions, "the logic applied to these drafts also applies to other draft documents." On the other hand, the decision emphasized that the judicial inquiry is "functional rather than formal," stating: "If the evidence establishes that an agency has hidden a functionally final decision in draft form, the deliberative process privilege will not apply." Future lower court decisions will need to grapple with how to define more particularly the functional vs. formal distinction on a case-by-case basis.

Ninth Circuit Adopts "Consultant Corollary" Protecting Privileged Agency Consultant Documents Under FOIA Exemption 5

In a split *en banc* decision issued on March 2, 2021, the U.S. Court of Appeals for the Ninth Circuit ruled that a document that is otherwise privileged under Exemption 5 does not lose its privileged status merely because it was prepared by a private consultant retained by the government. *Rojas v. Federal Aviation Administration,* Ninth Circuit No. 17-55036 (Mar. 2, 2021).

Background. In *Rojas*, the FAA rejected the plaintiff's application for a position as an air traffic controller. The plaintiff made a FOIA request for production of certain documents pertaining to the evaluation process and he then sued the FAA over its refusal to produce three responsive documents that were prepared by the FAA's private consultant. The FAA claimed that the documents were protected from disclosure by the work product privilege, which covers documents prepared by the federal government, or by its representative acting on its behalf, in anticipation of litigation. In a 2-1 decision, a three-judge panel of the Ninth Circuit ruled in April 2019 that Exemption 5 did not apply as a threshold matter, on the grounds that a document prepared by an outside private consultant is not an "intra-agency" record covered by the text of the exemption. The Ninth Circuit then granted the FAA's petition for rehearing *en banc*.

The Ninth Circuit Opinion. The key question in the case was whether the reference in Exemption 5 to "intra-agency" communications covers only those records that are sent by employees of a governmental agency to other employees of that same agency, or whether the exemption also protects documents created by a private consultant working for the agency. The *en banc* court adopted the broader view— referred to as the "consultant corollary"—concluding that it is a plausible interpretation of the statutory language to protect documents created by "outside consultants whom the agency has hired to work in a capacity functionally equivalent to that of an agency employee." The court was guided by the purpose of Exemption 5, which is to protect documents from disclosure where "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public." The court cautioned that a contrary ruling "would require us to assume that Congress saddled agencies with a strong disincentive to employ the services of outside experts, even when doing so would be in the agency's best interests. We see no evidence to support that assumption in FOIA's text or its legislative history."

The Ninth Circuit therefore joined six other circuit courts that have recognized some version of the consultant corollary to Exemption 5. The decision emphasized that, for this corollary to apply, the consultant "must be hired by the agency to perform work in a capacity similar to that of an employee of the agency, such that the consultant functions just as an employee would be expected to do." Further, the corollary must be examined "on a document-by-document basis" to ensure it is being correctly applied in each specific instance. Here, the court found that the corollary applied to all three of the documents, as the private consultant "functioned no differently from agency employees who, although possessing less expertise, could have been tasked by the FAA's lawyers with preparing the same summaries."

Having resolved this threshold issue, the court then decided that two of the three documents were rightfully excluded from disclosure under Exemption 5 pursuant to the work product privilege, but it remanded to the district court for further fact finding on whether the third document was covered by the privilege. The court also concluded that the FAA did not conduct a sufficiently thorough search for documents that might be responsive to the plaintiff's FOIA request.

The *en banc* decision contains a number of concurring and dissenting opinions. One of these opinions, authored by Judge Wardlaw, complained that the majority ignored FOIA's broad policies of disclosure and transparency and effectively rewrote Exemption 5. As FOIA does not provide a definition, Judge Wardlaw's opinion relied on the ordinary meaning of the term "intra-agency," which refers to records that "are circulated within—and only within—an agency." The opinion also pointed to other FOIA exemptions, which unlike Exemption 5 expressly refer to communications from those outside the federal agency. Lastly, the opinion cast doubt on the line of cases on which the majority based its decision to adopt the consultant corollary, concluding: "Like so many other courts of appeals, today our court disregards the plain text of Exemption 5 and continues a long history of judicial deference to Executive secrecy."

The Implications of the Court's Ruling. While the *Rojas* case involved an FAA employment issue, the ruling could have substantial implications in the environmental arena. Federal agencies routinely retain private consultants to prepare a wide variety of environmental studies and assessments, including to fulfill their obligations under the National Environmental Policy Act and numerous other federal environmental statutes. If all documents generated by non-governmental consultants were held to be subject to disclosure under FOIA, that could dramatically affect how agencies conduct their environmental reviews and analyses, and how the administrative records in environmental cases are compiled. The importance of the Ninth Circuit's ruling may thus extend well beyond its specific factual context.

Takeaways

FOIA advances broad goals of governmental transparency and disclosure. But it also seeks to protect the frank discussions and deliberations that lead up to a final governmental decision. The rulings in these two cases strengthen the grounds for the federal government to invoke Exemption 5 to withhold various draft and consultant documents from disclosure. As both decisions call for a careful case-by-case approach, future courts will need to further refine the standards that govern FOIA disclosure in specific factual situations.

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