

THE TENSION BETWEEN ACADEMIC FREEDOM & STATE OPEN GOVERNMENT LAWS

Why the Federal FOIA Does Not Fit the Problem

Michael Kirkpatrick
Public Citizen Litigation Group

I. INTRODUCTION

The problem to be addressed is the tension between state open-records laws and academic freedom, particularly as it relates to state FOIA requests for unpublished research and scholarly communications. Most state FOIA's were enacted after the 1966 federal FOIA and many are modeled on it. Because there are no federal research universities comparable to state universities, there is no federal FOIA precedent directly addressing the problem.

II. BACKGROUND ON FEDERAL FOIA

FOIA reflects the "strong policy" that "the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). Because it was designed "to open agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), FOIA requires agency records to be disclosed unless they are subject to one of the limited exemptions provided in 5 U.S.C. § 552(b). These exemptions are construed narrowly and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). To discharge this burden, "the agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Nat'l Cable Television Ass'n, Inc. v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973). The court gives no deference to the agency's reasoning for withholding the information and must decide *de novo* whether the exception applies. 5 U.S.C. § 552(a)(4)(B); *see also Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[T]he agency's opinions carry no more weight than those of any other litigant in an adversarial contest before a court."). If the government does not "carry its burden of convincing the court that one of the statutory exemptions apply," the requested records must be disclosed. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). Under FOIA, agencies must release "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see Mead*, 566 F.2d at 260 ("[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material.").

III. FOIA Exemption 5 (Inter- and Intra-Agency Memoranda)

FOIA Exemption 5 allows the withholding of “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.” 5 U.S.C. § 552(b)(5). Exemption 5 incorporates common law privileges that would protect records from discovery in litigation. In other words, if an internal government document would be immune from civil discovery, it is similarly protected from mandatory disclosure under FOIA.

The deliberative process privilege provides the best analogy to the academic freedom issue, because the policy underlying the deliberative process privilege is much the same as the policies underlying academic freedom. Deliberative process privilege exists to promote the open and frank exchange of opinions within the government, and recognizes that disclosure of such material would result in a chilling effect. Similarly, confidentiality of scholarly communications based on concepts of academic freedom and publication rights allows faculty to exchange ideas and develop their research without fear of reprisal for controversial findings and without the premature disclosure of their ideas.

The deliberative process privilege encompassed in Exemption 5 applies to records that are both “predecisional” and “deliberative.” *Wolfe v. Dep’t of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). To be exempt under the deliberative process privilege, the records must be “generated before the adoption of an agency policy” and “reflect[] the give-and take of the consultative process.” *Coastal States*, 617 F.2d at 866. If an agency “chooses expressly to adopt or incorporate by reference an intra-agency memorandum” in a final policy, that memorandum loses its Exemption 5 protection. *Sears*, 421 U.S. at 161; *see also Safecard Servs, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (“[I]f, in explaining its collective decision, the Commission expressly adopts or incorporates any element of a Commissioner’s or a staff member’s prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional.”).

Exemption 5 applies only to internal government documents and those produced by outside consultants at the agency’s request for purposes of the agency’s internal decision-making. *Formaldehyde Inst. v. Dep’t of Health & Human Servs.*, 889 F.2d 1118, 1124 (D.C. Cir. 1989) (extending Exemption 5 protection to prepublication reviews by a journal that became part of the agency’s deliberative process). Thus, Exemption 5 would not protect many scholarly email communications, because many of those emails are not internal to the university or even to the state government as a whole.

Further, Exemption 5 does not shield from disclosure “purely factual, investigative matters,” as opposed to “materials reflecting deliberative or policy-making processes.” *Washington Research Project, Inc. v. Dep’t of Health, Ed. & Welfare*, 504 F.2d 238, 249 (D.C. Cir. 1974). However, “in some instances, ‘the disclosure of even purely factual material may so expose the deliberative process within an agency’ that the material is appropriately held privileged.” *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *Mead*, 566 F.2d at 256). Factual

material may also be exempt “if it is inextricable without compromise of the deliberative process ... even though the facts themselves are elsewhere on the public record.” *Washington Research Project, Inc.*, 504 F.2d at 249. A document containing “opinions or recommendations regarding facts” that also reveals “the decision-making process itself” would be protected from disclosure under Exemption 5. *Nat’l Wildlife Federation v. USFS*, 861 F.2d 1114, 1118 (9th Cir.1988) (holding that draft forest plans and draft environmental impact statements were protected from disclosure under Exemption 5).

The relationship between FOIA and federally-funded grantees is governed in part by the Shelby Amendment. This 1999 legislation directed the Office of Management and Budget to amend its Circular A-110 “to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under [FOIA].” Omnibus Consol. & Emergency Supplemental Appropriations Act for the Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998). In response, OMB revised Circular A-110 to provide that in response to a FOIA request “for research data relating to published research findings produced under an award that was used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA.” 2 C.F.R. § 215.36(d)(1). OMB defined “research data” as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues.” *Id.* at § 215.36(d)(2)(i).

IV. RELEVANT CITATIONS

The following decisions applying Exemption 5 may inform the debate regarding academic freedom and disclosure of records under state FOIA laws.

Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 11 (2001) (regardless of whether Exemption 5 applies to documents authored by independent contractors acting as consultants to the agency, Exemption 5 does not protect from disclosure documents that were submitted by Indian tribes at request of Department of Interior in course of administrative and adjudicative proceedings in which the tribes had direct interest).

Enviro Tech Int’l, Inc. v. EPA, 371 F.3d 370, 377 (7th Cir. 2004) (although Exemption 5 might not apply to internal agency discussions wholly beyond the agency’s authority or unrelated to a legitimate governmental purpose, EPA was entitled to invoke the deliberative process privilege as to the consideration of a recommended chemical exposure limit).

Burka v. Dep’t of Health & Human Servs., 87 F.3d 508, 521 (D.C. Cir. 1996) (finding no well-settled practice of protecting research data in the realm of civil discovery on the grounds that disclosure would harm a researcher’s publication prospects; thus, Exemption 5 did not apply).

Washington Research Project, Inc. v. Dep't of Health, Ed. & Welfare, 504 F. 2d 238, 253 (D.C. Cir. 1974) (holding that approved grant applications are not protected from disclosure under FOIA Exemption 4, but site visit reports and summary statements prepared by outside consultants engaged by the agency to evaluate research are exempt under Exemption 5).

Bristol-Meyers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970) (Exemption 5 does not cover “purely factual reports and scientific studies”).

Hooker v. U.S. Dep't of Health & Human Servs., 887 F. Supp. 2d 40, 58 (D.D.C. 2012) (finding that Exemption 5 protected draft manuscript initially rejected for publication in certain journals, and the collaborative dialogue about the manuscript, including discussions and recommendations of CDC employees and consultants about which research findings and data to include).

Heartwood, Inc. v. U.S. Forest Service, 431 F. Supp. 2d 28, 37-38 (D.D.C. 2006) (draft chapters of an ecological assessment developed by scientists on a federal advisory committee were not exempt under FOIA where the drafts contained no recommendations or policy judgments but were treated as purely factual documents).

Natural Resources Defense Council, Inc., v. Nat'l Marine Fisheries Service, 409 F. Supp. 2d 379, 385 (S.D.N.Y. 2006) (holding that an email and document disclosing tentative preliminary factual findings regarding the causes of an incident of mass stranding of whales could not be withheld under Exemption 5 even though it was pre-decisional because agency failed to demonstrate that release of the documents would reveal its decision-making process with regard to policy).

Southwest Center for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 939-40 (D. Ariz. 2000) (Exemption 5 did not protect raw data underlying research studies because the information was purely factual and revealed nothing about the deliberative process of the agency).

Weinstein v. U.S. Dep't of Health & Human Servs., 977 F. Supp. 41, 44-45 (D.D.C. 1997) (holding that Exemption 5 applies to documents that would reveal the opinions expressed in pre-decisional scientific review group reports concerning potential funding of scientific research because disclosure would undermine the deliberative process that characterizes the competitive grant application process).

American Petroleum Institute v. EPA, 846 F. Supp. 83, 89 (D.D.C. 1994) (finding that agency properly invoked Exemption 5 to withhold documents expressing pre-decisional opinions on policy or legal matters regarding the merit of another agency's study regarding the safety of onboard gasoline vapor emissions control systems).

Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1028 (S.D.N.Y. 1980) (documents consisting of reviews performed by pharmacologists, physicians and statisticians concerning a drug application are investigative, scientific reports which depend on the observation and expertise of the author, but they do not reflect the deliberative process of decision or policy-making and are not protected by Exemption 5).