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U.S. Supreme Court Issues Decision Clarifying Boundaries of FOIA's Deliberative Process Privilege

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On March 4, 2021, the U.S. Supreme Court issued a decision in *United States Fish & Wildlife Service v. Sierra Club*, holding that the Freedom of Information Act ("FOIA") "deliberative process privilege" exemption, protects from public disclosure federal agencies' draft biological opinions prepared pursuant to the Endangered Species Act ("ESA") that are "predecisional and deliberative," regardless of whether such drafts reflect the agency's last views regarding a proposal. Though the case specifically addressed draft biological opinions prepared pursuant to the ESA, this case may be used to limit the public's right to access a much broader range of documents where the documents are created prior to an agency's final decision.

FOIA

FOIA provides the public with a right to access federal records, unless the documents fall within certain enumerated exceptions. The deliberative process privilege exemption, part of FOIA Exemption 5, protects from disclosure documents that are both "predecisional" and "deliberative" to ensure that federal agencies are able to engage in frank and open discussions in their decision-making processes. A document is predecisional if the document was created before an agency's final decision; a document is "deliberative" if the document helped the agency formulate its position on a matter.

The Supreme Court's Opinion

This case arose out of an Environmental Protection Agency ("EPA") rulemaking effort relating to cooling water intake structures at power plants and manufacturing facilities that started in 2011. In 2012, the EPA began consultation with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") on the effects of the proposed rule under the ESA, leading EPA to revise its proposed rule in 2013. The Services prepared draft biological opinions for the revised proposed rule, which concluded that the rule was likely to jeopardize threatened and endangered species, although these drafts were not finally approved or forwarded to the EPA. After further consultation, EPA again revised its proposed rule in 2014, whereupon the Services issued final "no jeopardy" biological opinions, concluding that the revised rule was not likely to jeopardize threatened and endangered species.

The Sierra Club submitted FOIA requests relating to the ESA consultation. In response, the Services invoked the deliberative process privilege exemption and withheld the draft biological opinions on the 2013 proposed rule.

Writing for the majority in the 7-to-2 decision (in her first written opinion), Justice Amy Coney Barrett concluded that these draft biological opinions were protected from disclosure by the deliberative process privilege. Although the Court acknowledged that the draft biological opinions were the "last word" by the Services on the revised proposed rule, it determined that the draft biological opinions were "predecisional" and thus covered by the deliberative process privilege because they "died on the vine." The Services' draft biological opinions encouraged the EPA to change the proposal, and therefore the Services were never in a position to render a final judgment on the ESA consultation. According to the Court, the consultation process worked the way it should have: "The Services and the EPA consulted about how the rule would affect aquatic wildlife until the EPA settled on an approach that would not jeopardize any protected species."

One issue raised by Sierra Club was whether this approach would allow the agencies to mark every document as a "draft" document, thereby exempting it from FOIA disclosure. The Court dismissed this concern, explaining that the inquiry as to whether something is final for purposes of the deliberative

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process privilege is based on function, rather than form. "If the evidence establishes that an agency has hidden a functionally final decision in draft form, the deliberative process privilege will not apply." What matters for determining whether a document represents an agency's final decision, the Court stated, is not that a document might be last in line, but whether it "communicates a policy on which an agency has settled." A document is not deliberative, and must be disclosed absent another exemption, when it is the agency's final view on the matter, even if it is labeled as a draft.

Implications

This opinion has potentially significant implications for federal agencies' responses to FOIA requests, including beyond the ESA context. As noted by the dissent, the opinion effectively allows federal agencies to hold back not just a "draft of a draft"—*i.e.*, documents that reflect the unfiltered internal views of the agency and its staff—but also "draft" documents that represent the agency's crystallized thinking at a given point in time, as long as those documents do not reflect the final decision of the agency on the issue.

Agencies may also consider the Court's interpretation of the deliberative process privilege when developing administrative records in litigation over agency decision-making, as other courts have previously found that agencies may exclude documents from the administrative record based on the deliberative process privilege. The Court's interpretation of the deliberative process privilege may therefore serve to limit a litigant's ability to point out inconsistencies in the agency's position over time in arguing that the agency's action was arbitrary, capricious, or unlawful.

The Court's functional approach and consideration of the administrative context when evaluating documents protected under the deliberative process privilege call for a fact-intensive inquiry. Therefore, issues relating to an agency's potentially inadequate response to a FOIA request or incomplete administrative record due to the agency's invocation of the deliberative process privilege will continue to be an issue for consideration by the courts.

For More Information

If you would like more information about the U.S. Supreme Court's decision and its potential implications, please contact Jonathan Simon or Jenna Mandell-Rice.

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