April 13, 2021

The Honorable Dick Durbin
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Carolyn Maloney
Chair
Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable James Comer
Ranking Member
Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: Legislation to Strengthen the Freedom of Information Act and Address Agency Abuse of the Deliberative Process Privilege

Dear Chairman Durbin, Chairwoman Maloney, Ranking Member Grassley and Ranking Member Comer,

On behalf of the millions of members and supporters of the undersigned organizations, we respectfully request reforms to Exemption 5 of the Freedom of Information Act, the "deliberative-process privilege." *See* 5 U.S.C. § 552(b)(5).[1] Federal agencies are abusing this privilege to hide information about human health and the environment from the public. The deliberative process privilege overuse has become so widespread that it has become the "withhold-it-because-you-want-to" exemption.[2] Unless Congress takes swift action, a recent Supreme Court ruling may further institutionalize these practices that undermine the public's right to access information and hold the government accountable.[3]

Congress intended for the deliberative process privilege to promote frank policy discussions, not provide *carte blanche* for agencies to shield information from public scrutiny, including information that might be unfavorable to the government and/or reveal legal wrongdoing by agencies. Yet, Exemption 5's deliberative process privilege is the mechanism that federal agencies use most frequently to shield information from the public. In fiscal year

[1] In January 2021, members of this coalition sent a letter urging members of Congress to reform FOIA to address the government's improper delays for FOIA requests related to conservation, science, and human health.
[2] U.S. House of Representatives Committee on Oversight and Government Reform, "FOIA is Broken: A Report" at 10 (Apr. 12, 2016).
[3] *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021).

2019, federal agencies cited Exemption 5 more than 74,000 times.[4] A 2016 report by the House Committee on Oversight and Reform identified the misapplication of Exemption 5 as a primary area of FOIA malfunction, calling the deliberative process privilege the "withhold-it-because-you-want-to" exemption.[5]

The undersigned groups call on Congress to act now and rein in the executive branch's rampant disregard for transparency by reforming FOIA and the deliberative-process privilege. We respectfully request that Congress take both of the following approaches:

1) *Prohibit application of the deliberative process privilege to factual, scientific, or technical material, internal agency communications and discussions about such materials, or matters concerning human health or the environment; and*

2) *Limit application of the deliberative process privilege to materials for which the agency can show that disclosure of specific information will result in "foreseeable harm" because: (1) the information will expose the deliberations of decision makers concerning policy matters, and (2) the agency reasonably foresees, based on clear and convincing evidence and in consideration of the public interest in disclosure, that disclosure will substantially harm the ability of decision makers to deliberate about policy matters, and (3) such harm will be substantial and irreparable.*

These changes would reestablish Congress's original intent for the deliberative process privilege and clarify the fact-versus-policy distinction drawn by the Supreme Court in *EPA v. Mink*, the seminal FOIA decision in which the Court held that fact-focused documents presenting scientific information do not entail deliberations on any policy matters.[6] These changes would make clear that science- and fact-based inquiries—as in biological opinions analyzing how an agency action affects endangered species and determinations setting pollution thresholds—are not deliberative or privileged. It also would make clear that an agency's collection or synthesis of factual or scientific information does not make that information privileged. Moreover, these changes would strengthen the requirement, set forth in Congress' 2016 FOIA amendments, for agencies to show foreseeable harm when invoking FOIA exemptions. Under the status quo, agencies simply assert that any disclosure, no matter how minor or disconnected from a policy matter, will harm their ability to deliberate in the future rather than showing harm from disclosure of *specific* records. Without a statutory standard to apply, courts are accepting such bald assertions in litigation as sufficient.

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[4] Pamela King and Kevin Bogardus, "Supreme Court records ruling spurs FOIA reform push," E&E News, https://www.eenews.net/greenwire/2021/03/05/stories/1063726791?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Agreenwire (last visited Mar. 5, 2021).

[5] *See note 2, supra*; *see also* Ryley Graham, "What is the 'deliberative process' privilege? And why is it used so often to deny FOIA requests?" *Reporters Committee for the Freedom of the Press*, https://www.rcfp.org/foia-deliberative-process/ (last visited Feb. 9, 2021); *see also* Nate Jones, "The Next FOIA Fight: The B(5) 'Withhold It Because You Want To' Exemption," *Unredacted*, https://unredacted.com/2014/03/27/the-next-foia-fight-the-b5-withold-it-because-you-want-to-exemption/ (last visited Feb. 9, 2021).

[6] *EPA v. Mink*, 410 U.S. 73, 89 (1973) ("Exemption 5 . . . requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other.").

These approaches are consistent with interests in government transparency expressed not only by the undersigned organizations, but also by former federal officials and the regulated community.[7] There are other necessary, broader reforms to FOIA that Congress should also be considering, but, without limiting the deliberative process privilege as set forth above, agencies will continue to abuse the privilege to undermine the public's right to information about how their actions impact human health and the environment.[8]

For instance, the U.S. Fish and Wildlife Service ("Service") issued "Guidance" in 2018 for responding to FOIA requests that are handled by the Service's "Ecological Services" office, which administers the Endangered Species Act.[9] Attachment A (U.S. Fish and Wildlife Service, Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records (Sept. 6, 2018)). The Guidance was prompted by a 2017 memorandum from the Environment and Natural Resources Division of the U.S. Department of Justice ("DOJ"), which declared that "agency deliberative documents are not properly considered part of the administrative record" prepared for judicial review under the Administrative Procedure Act, and "therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log." Attachment C (Memorandum from Acting Assistant Attorney General Jeffrey H. Wood to Selected Agency Counsel (Oct. 20, 2017)).

The Service's Guidance extends the DOJ memorandum to FOIA determinations. Specifically, it directs agency staff to use the deliberative process privilege to withhold records from public disclosure—under FOIA—that concern administration of the Endangered Species Act. Staff are urged to work with agency lawyers to "preserve the consistency" between a release of specific records under FOIA and the agency's likely position in court. Attachment D (Letter from Center for Biological Diversity to Acting Assistant Attorney General Jean E. Williams (April 12, 2021)). Staff are even being urged to "include *particular* deliberative documents," *i.e.*, to selectively curate the record by evaluating *which* "deliberative" records to be disclosed under FOIA, so as to eventually depict a more favorable, but not necessarily complete, "record" of the agency's decision for litigation. Meanwhile, the National Marine Fisheries Service has also adopted guidance applying the DOJ AR Memo to that agency's administrative records compiled for judicial review. Attachment F (Letter from John Luce, NOAA General Counsel, to NOAA Administrators and Directors (Jan. 8, 2020)).

Using these policies, the Services are shielding Congressionally-mandated information about how agency actions impact human health and the environment from requesters who, like the undersigned, depend on government transparency to accomplish their public-interest

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[7] *See, e.g.,* Brief for *Amici Curiae* American Forest Resource Council, *et al.*, in Support of Respondent, *FWS v. Sierra Club*, 141 S. Ct. 777; Brief for *Amici Curiae* Andrew Rosenberg, *et al.*, in Support of Respondents, *id.*

[8] The undersigned groups further advocate for including a definitions section in the Freedom of Information Act and an enumerated list of privileges to which Exemption 5 applies (*i.e.* attorney-client privilege, attorney work product privilege, deliberative process privilege, presidential communication privilege, etc.).

[9] The attached letter to the Service explains this significant deviation from FOIA's purpose of transparency. Attachment B (Letter from Center for Biological Diversity to U.S. Fish and Wildlife Service (April 12, 2021).

missions.[10] These polices are antithetical to basic principles of administrative law and government transparency.

Without Congressional action, the Supreme Court's recent characterization of the deliberative process privilege in *FWS v. Sierra Club* will only encourage the Service and other agencies to avoid disclosing important information to the public and, thus, interfere with the right of requesters to obtain information about government regulatory activities.[11]

The Court held that the Service properly used the deliberative process privilege to withhold a draft-final biological opinion developed by the Service and the National Marine Fisheries Service under Section 7 of the Endangered Species Act.[12] The biological opinion was a scientific document that assessed the potential effects of specific regulatory activities to endangered species—there, the Environmental Protection Agency's proposed rule regarding structures used to cool industrial equipment, known as "cooling water intake structures," which kill endangered species by trapping them.[13] Finding that the "function" of the draft biological opinion was that of a "draft of a draft" and not a final draft that reflected the agencies' settled decision, the Court held that the Services properly withheld it as "predecisional," even though the document represented the Service's final word on the adverse effects of the EPA's proposed rule and even though, without the document, the public would have no understanding of whether EPA had adequately addressed the concerns of the Service biologists.[14]

This holding underscores the urgent need for legislation to rein-in agency abuse of the deliberative process privilege to withhold information about human health and the environment, such as biological opinions, which must be based solely on the "best scientific and commercial

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[10] For example, the Center for Biological Diversity obtained an unredacted version of a PowerPoint presentation that the Service and EPA withheld under FOIA's deliberative process privilege. The PowerPoint describes conclusions of Service scientists in a draft biological opinion prepared under the Endangered Species Act about the effects of EPA's registration of certain pesticides. The document described the conclusions of Service staff and biologists, including their conclusions that the proposed use of chlorpyrifos would jeopardize the existence of nearly 1,400 endangered species, that the pesticide malathion is jeopardizing nearly 1,300 species, and that the pesticide diazinon is jeopardizing 175 species. This PowerPoint led to an Inspector General investigation of former Interior Secretary David Bernhardt's role in burying scientists' conclusions in the draft biological opinion. After three FOIA lawsuits, the Service still refuses to release the draft biological opinion. *See* Attachment E (U.S. Fish and Wildlife Service, Overview of the National Pesticide Biological Opinions on Chlorpyrifos, Malathion and Diazinon, PowerPoint Presentation (Oct. 6, 2017)).

[11] *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc*., 141 S. Ct. 777 (2021). Indeed, courts have already begun to apply the decision to withhold drafts of biological evaluations and biological opinions, as well as a database list of scientific studies, *see, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 18-0342, 2021 U.S. Dist. LEXIS 62000, at *18 (D.D.C. Mar. 31, 2021), and the DOJ is already relying on the decision to argue for withholding more records as deliberative, including records that are not drafts at all. *See* Def.'s Reply and Opp. to Plt.'s Mot. Summ. J., *Citizens for Responsibility & Ethics in Wash. v. U.S. Postal Serv.*, No. 20-2927, ECF No. 16 (April 5, 2021).

[12] 141 S. Ct. at 788.

[13] *Id.* at 783-84.

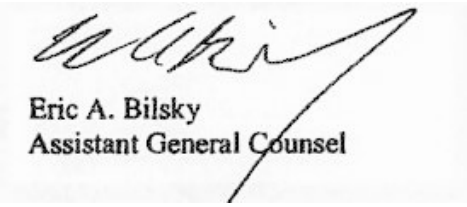
[14] *Id.* at 788. The Court did not directly address the distinction between scientific information and deliberations on policy but did "agree with the parties that the District Court must determine on remand whether any parts of the documents at issue are segregable." *Id.* at 788 n.5.

data available," and which do not contain policy-related deliberations that should be properly withheld under the deliberative process privilege.[15]

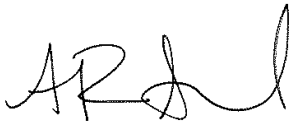
We call on Congress to reform FOIA to curtail the executive branch's growing misuse of the deliberative process privilege to conceal science related to federal activities with consequences for human health and the environment. Legislation to promote government transparency enjoys broad bipartisan support. These issues are important to a large number of diverse interests, including industry groups and former agency officials, as well as the undersigned organizations.[16] Transparency is an integral part of science, and it is the strongest safeguard that the public has to evaluate federal decisions that impact human health and the environment.

Thank you for taking the time to review our concerns and for considering our suggestions for reforming the deliberative process privilege in FOIA. We would appreciate the opportunity to speak with you about these issues further.

Sincerely,



Eric A. Bilsky
Assistant General Counsel
Oceana



Amy R. Atwood (she/her/hers)
Endangered Species Legal Director
Center for Biological Diversity

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[15] Endangered Species Act of 1973, 16 U.S.C. § 1533(3)(A). Before the Court's decision in *FWS v. Sierra Club*, the Service had already attempted (unsuccessfully) to use the deliberative process privilege to withhold fact- and science-based—and final—assessments of the status of endangered and threatened species and the potential consequences of federal agency activities to those species. *See*, *e.g*., *Sierra Club v. U.S. Fish & Wildlife Serv.,* No. 19-2315, 2021 U.S. Dist. LEXIS 36060 (D.D.C. Feb. 26, 2021) (rejecting attempt by the Service to withhold final "species status assessment" for Florida key deer using deliberative process privilege and ordering assessment's disclosure); *Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency*, 369 F. Supp. 3d 1 (D.D.C. 2019) (ordering disclosure of records withheld as deliberative pertaining to Endangered Species Act consultation process for pesticide approval); *Ctr. for Biological Diversity v. U.S. Marine Corps*, No. 00-2387, 2005 U.S. Dist. LEXIS 50151 (D.D.C. Sep. 15, 2005) (rejecting agency attempt to withhold final biological assessment from disclosure using deliberative process privilege and ordering disclosure); *see also Greenpeace v. Nat'l Marine Fisheries Serv*., 198 F.R.D. 540, 544 (W.D. Wash. 2000) (observing that "[a] determination of jeopardy and adverse modification under the [Endangered Species Act] requires the agency to collect scientific facts and data, and to reach expert scientific conclusions based on these facts" and "the fact that scientific expertise is brought to bear does not transform interpretations of facts into communications protected by the deliberative process privilege") (internal quotation omitted); *EPA v*. Mink, supra note 6, at 89 ("Exemption 5 . . . requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other.").

[16] *See, e.g.,* Brief for *Amici Curiae* American Forest Resource Council, *et al.*, in Support of Respondent, *FWS v. Sierra Club*, 141 S. Ct. 777; Brief for *Amici Curiae* Andrew Rosenberg, *et al.*, in Support of Respondents, *id.*

American Bird Conservancy
Animal Welfare Institute
Buffalo Field Campaign
Cascadia Wildlands
Citizens for Responsibility and Ethics in Washington (CREW)
Coastal Plains Institute
Conservation Northwest
Electronic Frontier Foundation
Endangered Habitats League
Endangered Small Animal Conservation Fund
Endangered Species Coalition
Environmental Protection Information Center (EPIC)
Food & Water Watch
Friends of Blackwater
Friends of the Earth
Greater Hells Canyon Council
Heartwood
Humane Society Legislative Fund
Howling For Wolves
International Marine Mammal Project of Earth Island Institute
Klamath Forest Alliance
Los Padres ForestWatch
National Security Counselors
Northwest Environmental Advocates
OVEC – Ohio Valley Environmental Council
Performing Animal Welfare Society (PAWS)
Project On Government Oversight
Public Employees for Environmental Responsibility (PEER)
Rabbi Douglas E. Krantz, Armonk, New York
Resource Renewal Institute
Sea Turtle Conservancy
Sorenson Law Office, Eugene, Oregon
Southern Utah Wilderness Alliance
The Humane Society of the United States
Turtle Island Restoration Network
Union of Concerned Scientists
Western Watersheds Project
WildEarth Guardians
Wyoming Untrapped

Attachments

Attachment A (U.S. Fish and Wildlife Service, Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records (Sept. 6, 2018))

Attachment B (Letter from Center for Biological Diversity to U.S. Fish and Wildlife Service (April 12, 2021))

Attachment C (Memorandum from Acting Assistant Attorney General Jeffrey H. Wood to Selected Agency Counsel (Oct. 20, 2017))

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