Attachment D

April 12, 2021

Jean E. Williams
Acting Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division
Law & Policy Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
jean.williams@usdoj.gov

cc: Merrick B. Garland
U.S. Attorney General
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
merrick.garland@usdoj.gov

Re: Rescission of U.S. Department of Justice "Skinny AR Memorandum"

Dear Acting Assistant Attorney General Williams:

We request immediate rescission of the 2017 memorandum to "Selected Agency Counsel" from the Environment and Natural Resources Division of the U.S. Department of Justice's ("DOJ"), entitled: Administrative Record Compilation in light of *In re Thomas E. Price*, Ninth Cir. No. 17-71121" ("DOJ Memo").[1] The DOJ Memo advises agencies to liberally apply the deliberative process privilege to exclude unilaterally material that is unfavorable to the government from administrative records prepared for litigation under the Administrative Procedure Act, without even disclosing the existence of the withheld materials to the parties or reviewing court.

This memorandum and any other agency guidance documents that instate this policy must be rescinded. DOJ must clarify that when preparing administrative records for litigation, agencies are expected to search for and compile all materials that were directly or indirectly considered by the agency, even if those records are unfavorable to the government's position, unless the agency justifies a claim of privilege in a privilege log.

The administrative record must provide the complete basis for judicial review of a challenged agency action.[2] As the Supreme Court has explained, meaningful judicial review "is to be based on the full administrative record that was before the Secretary" at the time of the agency's decision.[3] Courts have held that the "full record" includes "all documents and materials directly or indirectly considered by agency decision-makers."[4] This includes "evidence contrary

[1] U.S. Dep't of Justice, Memorandum from Acting Assistant Attorney General Jeffrey H. Wood to Selected Agency Counsel (Oct. 20, 2017) (Attachment A)
[2] 5 U.S.C. § 706.
[3] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).
[4] *Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."); *Ctr. for Biological Diversity v. Bernhardt*, No. 2:19-CV-14243, 2020 U.S.

to the agency's position."[5] No authority supports the DOJ's apparent position here, i.e., that an agency may unilaterally determine the contents of the record. Such an approach would undercut judicial review.

The authority on which the DOJ Memo is based, *In re Thomas E. Price*, is far from settled law or binding precedent. It is not a published, reasoned court opinion or order. It is simply a petition for mandamus filed by DOJ in one Ninth Circuit case. And, many courts take the opposite view.[6] One court has already rejected the reasoning in the DOJ Memo, for two reasons.[7] One, deliberative materials *are* relevant to judicial review under the APA.[8] Two, the interpretation in the DOJ Memo would "transform the deliberative process privilege into a kind of super-privilege."[9]

The deliberative process privilege is intended "to allow agencies to freely explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny."[10] Congress intended for the deliberative process privilege to promote frank policy discussions, not provide *carte blanche* for agencies to shield information—including embarrassing information and information that would reveal legal wrongdoing by the agency—from public scrutiny or judicial review. Courts reviewing cases under the APA cannot meaningfully undertake "a thorough, probing, in-depth review" if an agency's designation of the record omits an entire swath of materials that were directly or indirectly considered by the decisionmaker.[11] If a federal agency's decisions are sound legally and based on the relevant factors, the administrative record will reflect that even if includes material that is contrary to the agency's ultimate position. If the agency wishes to withhold material as deliberative, "the proper

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Dist. LEXIS 92370 (S.D. Fla. May 26, 2020) (quoting *BBX Capital Corp. v. FDIC*, No. 17-cv-62317, 2018 U.S. Dist. LEXIS 228093, 2018 WL 6531601, at *1 (S.D. Fla. Aug. 15, 2018)) ("The administrative record consists of 'all documents and materials that the agency directly or indirectly considered . . . .'").

[5] *Thompson*, *supra* note 3, 885 F.2d at 555 (emphasis added).

[6] *See In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017) (noting the court had "not previously addressed whether assertedly deliberative documents must be logged" but that it was the practice of "many district courts within this circuit"), *vacated on other grounds*, 138 S. Ct. 443 (2017); *Defs. of Wildlife v. U.S. Dep't of the Interior*, No. 18-2090, slip op. at 2 (4th Cir. Feb. 5, 2019) (ordering the agency to "submit a privilege log in the event the Government withholds any documents under guise of the deliberative process privilege"); *In re Nielsen*, No. 17-3345, slip op. at 3 (2d Cir. Dec. 27, 2017) (denying writ of mandamus and stating that "the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded" and "without a privilege log, the District Court would be unable to evaluate the Government's assertions of privilege"); *New York v. Wolf*, Nos. 20-cv-1127, 20-cv-1142, 2020 U.S. Dist. LEXIS 75238, 2020 WL 2049187, at *3 (S.D.N.Y. Apr. 29, 2020) ("[N]either logic nor the law of this Circuit suggests that defendants in APA cases should be immune from the standard requirement in civil litigation to produce a privilege log. . . ."); *Ctr. for Biological Diversity v. Bernhardt*, No. 19-cv-109, 2020 U.S. Dist. LEXIS 40646, 2020 WL 1130365, at *3 (D. Mont. Mar. 9, 2020) ("[D]eliberative documents are not categorically excluded from the administrative record. . . . The agency may protect such documents by asserting the qualified deliberative process privilege but must produce a privilege log to do so.").

[7] *Ctr. for Biological Diversity v. Bernhardt*, *supra* note 3.

[8] *Id.* *15-17.

[9] *Id.* *17-20.

[10] *Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat. R.R. Passenger Corp.*, 376 F.3d 1270, 1277 (11th Cir. 2004).

[11] *Overton Park*, *supra* note 2, 401 U.S. at 415. In determining whether the agency "offered an explanation for its decision that runs counter to the evidence before the agency," the court must be permitted to review all the evidence before the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege."[12]

For these reasons, DOJ must rescind the memorandum and make clear, consistent with the broad consensus of the federal courts, that the administrative record must include all materials "directly or indirectly considered by agency decision-makers."[13]

Sincerely,

Eric A. Bilsky
Assistant General Counsel

Oceana

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

Attachments

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

[12] *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017)
[13] *Thompson*, 885 F.2d at 555.

Attachment A

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.