

Supreme Court Protects Drafts Under Deliberative Process Privilege

Alert

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Last week, in Justice Amy Coney Barrett’s first signed opinion, the U.S. Supreme Court expanded the deliberative process privilege under exception 5 of the Freedom of Information Act (FOIA), limiting litigants’ ability to access certain documents while a matter is still under consideration by federal agencies. In *U.S. Fish and Wildlife Service v. Sierra Club*, a 7-2 majority reversed the 9th Circuit, holding that the Sierra Club is not entitled to the FWS’ draft biological opinions under FOIA since they are considered pre-decisional documents that were part of FWS’s deliberative process rather than documents that reflect the FWS’s final decision which need to be disclosed under FOIA.

At issue were draft biological opinions relating to a 2013 version of EPA’s cooling water intake rule. The Sierra Club sought access to the drafts as final documents after denial by the FWS on grounds they were part of the deliberative process, with the lower courts agreeing that the draft biological opinions were not exempt as deliberative documents because they represented a final agency decision on the 2013 rule. The Supreme Court disagreed.

Sierra Club’s position was that these documents, although drafts, represented the position that FWS ultimately adopted, and, therefore, were final. Taking a pragmatic approach to determine finality, the Court explained that lower courts must ask how the agency creating the documents treated them, and “not whether the [documents] provoked a response from [another agency].” According to the Court, the question is “not whether a document is last in line, but whether it communicates a policy on which the agency has settled” and whether the agency “treats the document as its final view.” Ultimately, finality depends upon “the legal, not the practical consequences that flow from an agency’s action.” In applying its approach to the draft biological opinions, the Court held that they were deliberative documents because the FWS did not treat them as final: the drafts were unsigned, subject to change, and were part of an

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ongoing regulatory process.

While the Court's holding does not provide blanket protection for agency drafts under FOIA, this decision undoubtedly strengthens FOIA's deliberative process privilege, giving agencies more freedom to deliberate internally without the "fishbowl" effect, and making it more difficult for litigants to obtain such documents under FOIA. Consequently, we expect that more agencies may use this exemption to shield a broader range of public documents from public disclosure.

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