Essay

Disclosure, Eventually: A Proposal to Limit the Indefinite Exemption of Federal Agency Memoranda from Release Under the Freedom of Information Act

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Abstract

On June 30, 2016, President Barack Obama signed into law the FOIA Improvement Act of 2016, which made some headway towards increasing agency compliance and efficiency with Freedom of Information Act ("FOIA") requests. The Act requires, among other things, the creation of a consolidated online FOIA request portal and the online publication of records and documents that have been requested three or more times. But the Act made only a minor incursion into the broad-sweeping and indefinite exemption from disclosure under FOIA—known as Exemption 5—that exists for federal "inter-agency" and "intra-agency" records. This Essay argues that courts have interpreted Exemption 5—in a manner contrary to its plain text—to protect not only records that are absolutely privileged but even those that are subject to a qualified privilege. Courts have also expanded Exemption 5 to protect documents that are not actually "inter-agency" or "intra-agency" records at all, such as memoranda from outside consultants to agencies. The result has been the general failure of agencies to live up to FOIA's original promise of "open government." This Essay proposes reform in the shape of a

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need requirement: in order for an agency to withhold documents under Exemption 5 for more than twelve years from their creation, the agency head would have to issue a written determination that the agency's need for nondisclosure outweighs the public interest in disclosure. Although the 2016 Act takes a step in this direction by imposing a presumptive twenty-five-year expiration date for one of the several Exemption 5 privileges, this Essay argues that meaningful reform requires imposing a shorter (such as a twelve-year) period, and requires doing so across the board rather than only to one category of privileged records.

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INTRODUCTION

On October 10, 2014, the Clinton Presidential Library made public thousands of pages of previously secret Clinton Administration documents—the seventh and final such release of the year.[1] These records include, for example, memoranda penned in anticipation of President Clinton's federal appointments (including the appointment of Hillary Clinton to a health care task force) and confidential advice between President Clinton and his advisors.[2] Presidents Clinton and Obama could have chosen to assert executive privileges against the release of these documents, but they did not.[3] Accordingly, under the Presidential Records Act,[4] the records became subject to public release twelve years after the end of the Clinton administration.[5]

In 1966, when President Lyndon B. Johnson signed the Freedom of Information Act ("FOIA")[6] into law, he professed "a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."[7] The Clinton Administration document releases reflect this modern American value of open government.[8] The stated purpose of FOIA itself was to "protect the right of the public to information" by allowing access to federal agency records.[9] And both President Obama and Attorney General Eric Holder directed federal agencies to "apply a presumption of openness

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1 *Previously Restricted Documents*, WILLIAM J. CLINTON PRESIDENTIAL LIBR., http://clinton.presidentiallibraries.us/collections/show/43 [https://perma.cc/A29X-JGVY] (last visited July 29, 2016).

2 Josh Gerstein, *Clinton Library Sets New Document Release*, POLITICO (Oct. 6, 2014, 11:54 AM), http://www.politico.com/blogs/under-the-radar/2014/10/clinton-library-sets-new-document-release-196637.html; Alan Rappeport, *The Clinton Files: What to Watch*, N.Y. TIMES (Oct. 10, 2014, 11:53 AM), http://www.nytimes.com/politics/first-draft/2014/10/10/the-clinton-files-what-to-watch/.

3 *See* Gerstein, *supra* note 2.

4 Presidential Records Act, 44 U.S.C. §§ 2201–2207 (2012).

5 *Id.* § 2204(a). Records are initially subject to disclosure five years following the end of the Presidency; the President has the option of postponing release of several categories of records for up to twelve years following the end of the Presidency. *Id.* The Clinton Presidential Library began processing records for release in January 2013, twelve years after President Clinton left office. *See* Ken Thomas, *Clinton Library to Release 5,000 Pages of Confidential Records Today*, PBS NEWSHOUR, (Feb. 28, 2014, 9:58 AM), http://www.pbs.org/newshour/rundown/clinton-library-release-5000-pages-confidential-records-today/.

6 Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

7 Statement by the President upon Signing the "Freedom of Information Act," 2 PUB. PAPERS 699 (July 4, 1966).

8 Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government"*, 59 UCLA L. REV. DISC. 178, 185–86 (2012) (chronicling evolution of open government as an American value in decades following World War II).

9 Pub. L. No. 89-487, 80 Stat. 250 (July 4, 1966).

in responding to FOIA requests," rather than withholding information merely because it "technically falls within an exemption."[10]

Despite this "presumption of openness," however, federal agencies have in the past decade regularly invoked FOIA's exemptions—specifically Exemption 5, which protects from disclosure "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."[11] This is a vague but often-cited exemption: according to the Associated Press, federal agencies used Exemption 5 in response to 81,752 FOIA requests in 2013 (accounting for over twelve percent of all FOIA requests that year).[12] The Supreme Court has interpreted Exemption 5 broadly, such that federal agencies may invoke the exemption to prevent disclosure of any inter-agency or intra-agency record that would be subject to any statutory or common-law privilege.[13]

As discussed below, the exemption protects documents that would be subject to the deliberative-process privilege, the attorney work-product privilege, and the attorney-client privilege, among others—regardless of whether the requesting party can demonstrate that the privilege could be overcome by a showing of need.[14]

Federal courts' broad interpretation of Exemption 5 has produced absurd results. For example, in the early 1980s, a now-deceased Central Intelligence Agency ("CIA") historian authored an account of the famous 1961 Bay of Pigs invasion in Cuba.[15] As recently as 2014, the CIA opposed the release of the author's draft of the fifth and final volume of the account, invoking Exemption 5.[16] Despite the decades that had elapsed since the drafting of the mostly factual document, the CIA denied its release, claiming that the history was a "predecisional" intra-agency draft, and that "the release of Volume V

10 U.S. DEP'T JUSTICE, OFFICE OF INFO. POLICY, EFFECTIVE FOIA ADMINISTRATION 3 (2014), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/effective-administration.pdf (last visited May 30, 2015).

11 5 U.S.C. § 552(b)(5) (2012).

12 Ted Bridis & Jack Gillum, *US Cites Security More to Censor, Deny Records*, ASSOCIATED PRESS (Mar. 16, 2014, 7:08 PM), http://bigstory.ap.org/article/us-cites-security-more-censor-deny-records; *see also* Nate Jones, *The Next FOIA Fight: The B(5) "Withhold It Because You Want To" Exemption*, UNREDACTED: THE NAT'L SECURITY ARCHIVE, UNEDITED & UNCENSORED, (Mar. 27, 2014), https://nsarchive.wordpress.com/2014/03/27/the-next-foia-fight-the-b5-withold-it-because-you-want-to-exemption/.

13 U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 357 (2009) [hereinafter GUIDE TO THE FREEDOM OF INFORMATION ACT].

14 *Id.* at 358–59.

15 *See* Brief for Appellant at 3, Nat'l Sec. Archive v. CIA, 752 F.3d 460 (D.C. Cir. 2014) (No. 12-5201), 2013 WL 241775.

16 *See id.* at 12.

would have a chilling effect on internal agency deliberations and confuse the public with inaccurate historical information."[17] The D.C. Circuit affirmed the denial, holding that the agency's deliberative-process privilege had no expiration date, and that the court was powerless to "judicially invent a new time limit" for it.[18]

The problem with the court's explanation is that the expansion of Exemption 5 to include documents like the Bay of Pigs history is itself a judicial invention. The federal appellate courts have expanded the scope of Exemption 5 in two ways: first, by categorically exempting not only documents that are protected by an absolute privilege at trial, but also (as with the Bay of Pigs history) any document in agency possession that could be subject even to a qualified privilege; and second, by expanding the definition of "inter-agency" and "intra-agency" memoranda to include documents received from or sent to nonagency parties.[19] Thus, the D.C. Circuit's professed incapacity to limit the duration of Exemption 5—at least as applied to documents not protected from disclosure by the plain language of the exemption—strikes a hollow chord.

This Essay proposes a solution to the threat to open government posed by the overbroad application of Exemption 5: just as presidential records are subject to release twelve years following the end of a presidency, so should federal agency records be subject to a presumption of disclosure twelve years following their creation, beyond which an agency head would have to issue a written determination that the agency's need for nondisclosure outweighs the public interest in disclosure in order to justify continued exemption. This Essay first distinguishes Exemption 5 from other FOIA exemptions by its wide reach.[20] Then, this Essay addresses two problems: the judicial expansion of Exemption 5's scope, and the lack of a sensible time limit for

17 Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment at 2, Nat'l Sec. Archive v. CIA, 859 F. Supp. 2d 65, (D.D.C. 2012) (No. 11-00724 (GK)), 2011 WL 10677495.

18 Nat'l Sec. Archive v. CIA (*Bay of Pigs*), 752 F.3d 460, 464 (D.C. Cir. 2014). Recent legislation, the FOIA Improvement Act of 2016, has changed the legal framework slightly: now, documents exempt from disclosure under the deliberative-process privilege, such as the *Bay of Pigs* history, are exempt for a maximum of 25 years. *See infra* notes 82–84 and accompanying text. But as this Essay discusses, all other privileged documents remain exempt indefinitely under Exemption 5, and the 2016 Act leaves unresolved the seemingly greater issue of the extent to which the deliberative-process privilege has been overextended in the first place. *See infra* Part III.

19 *See infra* Part II.

20 *See infra* Part I.

the increasingly invoked exemption.[21] Next, this Essay analyzes whether and how the imposition of a presumptive twelve-year expiration date on Exemption 5 would impair the attainment of the policy goals that Exemption 5 is intended to promote.[22] Finally, this Essay proposes an amendment to FOIA to implement a presumptive twelve-year expiration date on Exemption 5 in a manner similar to the twelve-year period under the Presidential Records Act.[23]

I. The Scope and Purpose of Exemption 5

Even before the judicial expansion of Exemption 5's scope, Exemption 5 stood alone among the nine FOIA exemptions as the only one neither aimed at protecting privacy or national security interests nor limited in scope to a specific subject matter. Of the nine FOIA exemptions, four protect information where its release would impair individual privacy or national security:

Exemption 1 protects classified documents;[24] Exemption 4 protects trade secrets or privileged or confidential commercial or financial information obtained from a person;[25] Exemption 6 protects personnel or medical files which, if released, would invade individual privacy;[26] and Exemption 7 protects certain sensitive law enforcement documents.[27]

Four other exemptions are not aimed specifically at personal privacy or national security, but are narrow in scope:

Exemption 2 protects internal personnel rules and practices;[28] Exemption 3 protects documents that are specifically exempt under other statutes;[29] Exemption 8 protects reports concerning financial institutions subject to SEC oversight;[30] and Exemption 9 protects certain documents containing gas- and oil-well information.[31]

Exemption 5 stands apart in its general and unqualified scope: no matter the content or the author of the document, all inter-agency or intra-agency memoranda are exempt from disclosure.

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21 *See infra* Part II.
22 *See infra* Part III.
23 *See infra* Part IV.
24 5 U.S.C. § 552(b)(1) (2012).
25 *Id.* § 552(b)(4).
26 *Id.* § 552(b)(6).
27 *Id.* § 552(b)(7).
28 *Id.* § 552(b)(2).
29 *Id.* § 552(b)(3).
30 *See id.* § 552(b)(8).
31 *See id.* § 552(b)(9).

Exemption 5, as drafted, purports to further the goal of preventing parties in litigation from using FOIA as a means of circumventing the rules of discovery.[32] Specifically, the exemption protects documents subject to the deliberative-process privilege, the attorney work-product privilege, and the attorney-client privilege, so that a party in litigation with an agency cannot use a FOIA request to obtain a document that the party could not obtain through discovery.[33] Nor could such a party act indirectly by having a third party make the FOIA request: under Exemption 5, no one can obtain a document that would be privileged in litigation between the agency and any nonagency party, even if there is no pending or anticipated litigation. As Part II will discuss, however, the operation of Exemption 5 in practice is not merely to prevent parties from sidestepping the rules of discovery; rather, agencies invoke Exemption 5 to shield essentially any document generated in the course of agency decisionmaking.

II. Judicial Reluctance to Limit the Scope or Duration of Exemption 5 Threatens Open Government

Judicial review of agencies' invocations of Exemption 5 has broadly defined the category of documents considered inter-agency or intra-agency memoranda. Although review of FOIA cases is de novo by statute,[34] courts have increasingly departed from this standard of review in deference to asserted agency rationales,[35] causing Exemption 5 to become what some commentators have termed the "withhold it because you want to" exemption.[36]

Flaccid judicial review has expanded the boundaries of Exemption 5 in at least two distinct directions, as the examples in the following subsections reflect. First, courts have routinely upheld exemptions to protect documents not because those documents would be unavailable to a litigant in discovery, but because release of the documents might frustrate a purpose behind a discovery privilege—most frequently, the deliberative-process privilege.[37] Second, courts have up-

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32 *See infra* note 42; *see also* ACUS Recommendation 70-4, Discovery in Agency Adjudication, 38 Fed. Reg. 19,786 (July 23, 1973).

33 *See* Guide to the Freedom of Information Act, *supra* note 13, at 358–59.

34 5 U.S.C. § 552(a)(4)(B) (2012).

35 *See, e.g.*, Meredith Fuchs, *Judging Secrets: The Role That Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 158 (2006) (discussing courts' increasing deference to agency assertions of secrecy in FOIA cases); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. Rev. 185, 186–87 (2013) (observing disproportionately high affirmance rate in FOIA cases despite ostensibly heightened judicial review).

36 *See* Jones, *supra* note 12.

37 Guide to the Freedom of Information Act, *supra* note 13, at 366.

held exemptions to protect documents that are not inter-agency or intra-agency records, but are rather records of communication between an agency and a nonagency party (such as an outside consultant, or Congress).[38]

A. Courts Have Expanded Exemption 5 to Protect Documents that May Be Available in Some Litigation

The plain language of Exemption 5 would protect from disclosure only those documents that "would not be available by law" because of a common-law or statutory privilege—that is, documents that would be subject to an absolute rather than a qualified privilege.[39] This is because documents subject only to a qualified privilege are available in discovery upon the requesting party's showing of need, excluding such documents from the category of documents "not available" in discovery. Under the plain language of Exemption 5,[40] then, documents obtainable in litigation upon a showing of need should be subject to disclosure under FOIA.[41] In practice, this does not happen. While it is true that agency records unavailable through discovery are unavailable through FOIA,[42] the Supreme Court has broadened Exemption 5 so that agencies can withhold not only records that would absolutely "not be available" in litigation but also records that would not "routinely be disclosed"—and the Court has categorically carved out all records subject to a discovery privilege from the definition of documents that are "routinely" disclosed.[43] Thus, even if a party or FOIA requester could overcome a discovery privilege in litigation by showing need, a document obtained by doing so would not "routinely be disclosed," and it would therefore remain protected under Exemption 5.[44] Consequently, the ordinarily "qualified" deliberative-process

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38 *See id.* at 364–65.

39 *See id.* at 357–58.

40 5 U.S.C. § 552(b)(5) (2012).

41 A showing of need can overcome the deliberative-process privilege. *See, e.g.*, Redland Soccer Club, Inc. v. U.S. Dep't of Army, 55 F.3d 827, 854 (3d Cir. 1995). A showing that a party "has substantial need . . . and cannot, without undue hardship, obtain [an] equivalent by other means" can overcome the attorney work-product privilege. FED. R. CIV. P. 26(b)(3)(A)(ii).

42 United States v. Weber Aircraft Corp., 465 U.S. 792, 801 (1984) (upholding use of Exemption 5 where denying it would "create an anomaly in that the FOIA could be used to supplement civil discovery"); Martin v. Office of Special Counsel, Merit Sys. Prot. Bd., 819 F.2d 1181, 1186 (D.C. Cir. 1987) ("FOIA should not be read to alter" plaintiff's inability to obtain documents "using normal civil discovery methods.").

43 *Weber*, 465 U.S at 800.

44 *See id.* at 802 n.20.

and work-product privileges have become *absolute* privileges as to FOIA requests.

1. *Expansion of the Deliberative-Process Privilege to All Decision-Related Documents*

This expansion of the discovery privileges as they apply to FOIA requests led in part to the absurd result in the Bay of Pigs litigation mentioned in the Introduction. The D.C. Circuit there accepted the CIA's argument that the requested document (Volume V of a five-volume history of the Bay of Pigs invasion) was "predecisional" and therefore exempt from disclosure under the deliberative-process privilege, even though the requested document was a completed work rather than the precursor to some final CIA history.[45] The court upheld the agency's denial of disclosure on the basis that the requested document had not resulted in agency *action* because "to require release of drafts that never result in final agency action would discourage innovative and candid internal proposals."[46] The court further considered but similarly rejected arguments that the CIA should disclose the volume because it had waived the exemption in disclosing the first four volumes of the history, or because it had not identified a "concrete harm that would result from release of the draft of Volume V."[47] The court identified "harm to the candor of present and future agency decision-making" as the harm that would result from release.[48] Whatever presumption of openness is meant to guide agency record disclosures was evident in neither the CIA's briefing nor the D.C. Circuit's rationale.

The *Bay of Pigs* court went a step further than courts had gone in previous cases, implicitly endorsing the principle that any document generated in the course of an agency decisionmaking process is protected under Exemption 5.[49] Two decades earlier, in *Access Reports v. Department of Justice*,[50] the D.C. Circuit had emphasized the importance of pinpointing the actual process to which the document in question might contribute,[51] but its analysis in *Bay of Pigs* was less searching. Other courts have employed similarly low thresholds for

45 Nat'l Sec. Archive v. CIA (*Bay of Pigs*), 752 F.3d 460, 463 (D.C. Cir. 2014).

46 *Id.*

47 *Id.* at 464.

48 *Id.*

49 *Id.* at 463.

50 Access Reports v. Dep't of Justice, 926 F.2d 1192 (D.C. Cir. 1991).

51 *Id.* at 1196.

identifying the decisionmaking process harmed by a document's potential disclosure.[52]

2. *Expansion of the Deliberative-Process Privilege to Factual Documents*

Courts have also applied the deliberative-process privilege to factual documents, even though purely factual documents are not deliberative documents.[53] In *Brannum v. Dominguez*,[54] for example, the U.S. Air Force used Exemption 5 to withhold vote sheets that determined retirement benefits, even though the actual vote sheets contained only factual information.[55] Similarly, in *Bloomberg v. SEC*,[56] the District Court for the District of Columbia upheld Exemption 5's application to SEC officials' meeting notes, even though factual in nature, because disclosure would undermine the officials' ability to gather such information and deliberate on it in the future.[57] Even scientific reports have been withheld under Exemption 5.[58] Notably, courts have in this context focused on the "chilling effect on the persons still in the process of forming" a scientific conclusion.[59] The Supreme Court has rested the deliberative-process privilege on the notion that candor is impaired when agency officials must be concerned that "each remark is a potential item of discovery and front page news."[60]

This line of reasoning raises two questions. First, is candor in agency decisionmaking the proper consideration in determining whether to expand an exemption to FOIA? Section II.C of this Essay argues that it is not, at least in part because agency officials cannot and do not actually rely on any presumption of nondisclosure in making agency decisions. Second, is any interest in facilitating candid de-

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52 *See, e.g.*, Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1252–53 (10th Cir. 2002).

53 *See, e.g.*, EPA v. Mink, 410 U.S. 73, 91 (1973) (deliberative-process protection does not protect purely factual material even where embedded in legal memorandum).

54 Brannum v. Dominguez, 377 F. Supp. 2d 75 (D.D.C. 2005).

55 *Id.* at 83.

56 Bloomberg v. SEC, 357 F. Supp. 2d 156 (D.D.C. 2004).

57 *Id.* at 169.

58 Reliant Energy Power Generation, Inc. v. Fed. Energy Regulatory Comm'n, 520 F. Supp. 2d 194, 205–06 (D.D.C. 2007) (upholding exemption for spreadsheets of "raw data" where agency employees might later use the data in a deliberative process).

59 Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) ("[S]cientists should be able to withhold nascent thoughts where disclosure would discourage the intellectual risk-taking so essential to technical progress.").

60 Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001).

liberation so great as to warrant twenty-five-year, if not indefinite, nondisclosure of agency records? In all the cases mentioned in the preceding paragraph, the government interest in facilitating candor would appear to decrease markedly after the lapse of even a few years: the Air Force retirement benefits would have been long decided, the SEC officials may well have retired, and the scientist will have published his conclusions and subjected them to peer review.[61] Moreover, the routine release of agency documents twelve years after their use in a decisionmaking process would make fewer headlines than the dogged retention of decades-old documents such as the *Bay of Pigs* history.

3. *Adding a Need Requirement Would Curb the Expansion of Exemption 5*

As discussed above,[62] the primary impetus for this judicial expansion of Exemption 5 to include any agency record that might contribute to an agency decision was the Supreme Court's 1984 ruling that only documents routinely disclosed in litigation had to be disclosed.

The problem with using availability in discovery as a means for fielding document exemptions under FOIA is that the possibility of overcoming a discovery privilege by showing need is significant, and eliminating the possibility of disclosure for documents that would otherwise be available in litigation upon a showing of need creates a stark barrier to open government. At the same time, it would be difficult to use need as a basis for overcoming Exemption 5: Whose need would suffice? The FOIA requester's individual need for the record, even though the record once disclosed would become public? Or the public's need, even though demonstrating public need is both difficult and contrary to having a "presumption of openness" prevail in American government? As Parts III and IV of this Essay discuss, the threat to open government posed by an unqualified Exemption 5 can be diminished by implementing a presumptive twelve-year expiration date for the exemption, beyond which the *agency* would have to demonstrate its need to continue withholding requested records. Requiring the agency to show that its need for nondisclosure outweighs the public interest in disclosure would not only comport better with the discovery standard that Exemption 5 appears to espouse but also uphold the presumption of openness in American government.

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61 *See supra* notes 54–60 and accompanying text.

62 *See supra* notes 41–43 and accompanying text.

B. *Courts Have Expanded Exemption 5 to Protect Documents that Are Not Strictly "Inter-Agency" or "Intra-Agency" Records*

Section II.A of this Essay discussed the expansion of Exemption 5 to documents that would not be privileged absolutely from discovery in litigation. This section addresses the second direction in which courts have expanded Exemption 5, which is by disregarding the textual limitation that Exemption 5 applies only to intra-agency and inter-agency records. Although an intra-agency memorandum would, strictly speaking, be "addressed both to and from employees of a single agency," and an inter-agency memorandum would be "between employees of two different agencies," courts have "uniformly rejected" such a strict interpretation of "intra-agency" and "inter-agency" because it would exclude from protection many documents such as agency-requested expert reports, the release of which would again violate the purpose of protecting agencies' deliberative processes.[63] Courts have expanded this allowance for nonagency generated "agency memorandums," however, into what courts themselves call the "consultant corollary"[64] to Exemption 5: where agencies seek outside advice from an expert or consultant, even if from a volunteer, the records thereof are protected from disclosure under FOIA.[65]

The Supreme Court has curtailed the consultant corollary somewhat: in *Department of the Interior v. Klamath Water Users Protective Association*,[66] the Court declined to protect communications between Indian tribes and the Department of the Interior concerning water-allocation planning under the consultant corollary because the Indian tribes (1) had been seeking their own benefit (rather than working to provide advice to an agency) and (2) were competing with others for a government benefit.[67] Lower courts have rolled back the corollary further, declining to protect a document even when only the first of these two conditions obtains,[68] but the scope of records subject to Ex-

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63 U.S. Dep't of Justice v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting).

64 *E.g.*, Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001).

65 *See, e.g.*, Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (upholding use of Exemption 5 to protect a private contractor's documents used to perform an audit for the EPA).

66 Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001).

67 *Id.* at 12.

68 *See, e.g.*, Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative, 237 F. Supp. 2d 17, 26–27 (D.D.C. 2002) (holding documents shared by U.S. Trade Representative with government of Chile are not protected by Exemption 5 on account of Chile's being a consultant when Chile's "self-interest predominate[d] over its interest in informing or assisting the agency").

emption 5 remains far broader than what the text of Exemption 5 prescribes.

Federal courts have in some cases expanded Exemption 5 to protect records sent from an agency to a nonagency party. Curiously, for example, the D.C. Circuit in *Murphy v. Department of the Army*[69] held that a memorandum from the Assistant Secretary of the Army to the Army's General Counsel, which the General Counsel then forwarded to a Congressman along with other correspondence, was protected under Exemption 5, even though the transmission to the Congressman in no way indicated that the memorandum was confidential, classified, or otherwise protected from the Congressman's subsequent disclosure of its contents to a third party.[70] Rather than deeming the exemption waived by the General Counsel's transmission of the memorandum to a Congressman, the court fell back on the principle that "the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl [without] the full and frank exchange of ideas."[71] In so doing, the court expanded the scope of Exemption 5 to include records disclosed to third parties, again contravening the presumption of openness in government.

C. Agency Reliance on a Presumption of Nondisclosure Is an Inadequate Basis to Protect Agency Records Indefinitely from Disclosure

Reviewing courts have, as mentioned, frequently rested their holdings on the ground that a presumption of nondisclosure is necessary to ensuring candid agency decisionmaking. In the *Bay of Pigs* case, the D.C. Circuit emphasized that the deliberative-process privilege is "intended to facilitate candid communication," and that the "[p]remature release" of protected material would chill agency decisionmaking by depriving officials of the assurance that their communications would be protected.[72] Notably, the D.C. Circuit did not mention that the author of the Bay of Pigs history himself had sought to acquire a copy of his own work under FOIA in 1989 and was denied under Exemption 5.[73] If the sole author of the requested work himself desires the work to be disclosed, then what need is there for the reviewing court to assure him that his work will be protected? It

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69 Murphy v. Dep't of Army, 613 F.2d 1151 (D.C. Cir. 1979).

70 *Id.* at 1158–59.

71 *Id.* at 1154 (quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)) (internal quotation marks omitted).

72 Nat'l Sec. Archive v. CIA (*Bay of Pigs*), 752 F.3d 460, 464 (D.C. Cir. 2014).

73 Pfeiffer v. CIA, 721 F. Supp. 337, 341 (D.D.C. 1989).

may be that in other cases the officials responsible for agency drafts or decisions would prefer nondisclosure, but in any case the current system of categorically exempting *all* agency records that might fall under a discovery privilege goes too far.

In justifying categorical (and, under the law in effect at the time, indefinite) disclosure under Exemption 5, the *Bay of Pigs* court wrote:

> [P]rivileges that are intended to facilitate candid communication, such as the deliberative process privilege, generally do not have an expiration date. That makes sense because such a privilege otherwise would not fully serve its purposes. As we have noted, in order for a privilege to encourage frank and candid debate, the speaker or writer must have some strong assurance at the time of the communication that the communication will remain confidential.[74]

This is a circular specimen of judicial palmistry. The court might just as well have said that an indefinite exemption from disclosure is necessary in order to assure officials an indefinite exemption from disclosure. This line of reasoning is problematic because officials cannot actually rely on a presumption that their drafts and memoranda will never be disclosed: agencies routinely waive FOIA exemptions by voluntarily publishing documents or incorporating them either in part or by reference into other published documents.[75] The *Bay of Pigs* opinion is also notable for its failure to mention the Presidential Records Act, even though the parties had briefed the applicability of its twelve-year expiration date to Exemption 5.[76] In light of the fact that presidential records deal with far more sensitive records than many agency decisions (and certainly far more sensitive records than a thirty-year old historical account of the Bay of Pigs invasion), the D.C. Circuit's policy conclusion seems shortsighted, as does maintaining a longer-than-twelve-year period in which agency records are essentially inaccessible to the public no matter how benign the document nor how great the public need for access may be.

In the absence of narrower language in Exemption 5, courts will likely continue to favor candor in agency deliberations over the presumption of open government. The result of the past several decades of judicial expansion of Exemption 5 is that rather than an exemption

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74 *Bay of Pigs*, 752 F.3d at 464.

75 *See, e.g.*, Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 973 (7th Cir. 1977) (noting presumption exists in favor of disclosing underlying memorandum after a "final agency dispositional document" had "expressly relied" on it).

76 *See* Brief for Appellant at 37–38, Nat'l Sec. Archive v. CIA, 752 F.3d 460 (D.C. Cir. 2014) (No. 12-5201), 2013 WL 241775.

for inter- or intra-agency memoranda that would be subject to an absolute privilege at trial, there is a categorical exemption for essentially any record generated or received by an agency so long as the record contributes in some way to an agency decision, or to the agency's general decisionmaking process. To preserve open government, Congress should therefore amend FOIA to narrow the reach of Exemption 5, either by adopting a presumptive twelve-year expiration date for the exemption, or by requiring that agencies demonstrate a specific need to invoke the exemption, or both.

III. Congress Should Adopt a Presumptive Twelve-Year Time Limit for Exemption 5

This Part presents a simple and easy-to-administer solution to the problem of the current overbroad application of Exemption 5. Congress should adopt a presumptive twelve-year expiration date for Exemption 5 for the same reason that a twelve-year expiration date applies to presidential records: the justification for the privilege "erodes with the passage of time."[77] Part IV sets forth the language of this Essay's proposed example of the kind of presumptive expiration date for Exemption 5 that Congress should adopt.

A. Recent Measures Fall Short of Meaningful Reform

Various recent measures have aimed to reform FOIA. In February 2014, the House passed a bipartisan bill (H.R. 1211) unanimously seeking to codify a "presumption of disclosure" into FOIA, among other measures, but falling short of requiring an expiration date for Exemption 5.[78]

In June 2014, Senators Patrick Leahy (D-Vt.) and John Cornyn (R-Tex.) introduced legislation to curtail Exemption 5 severely. The Leahy-Cornyn bill as drafted would have, among other measures, required disclosure when "a public interest in disclosure" outweighs "the agency interest in protecting the records or information" under the deliberative-process or attorney work-product privilege, and would even mandate disclosure so as to overcome the attorney-client privilege where "a compelling public interest in disclosure" outweighs

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77 Nixon v. Freeman, 670 F.2d 346, 356 (D.C. Cir. 1982).

78 Nate Jones, *House FOIA Bill a Good First Step; FOIA Reform Now in Hands of Senate*, Unredacted: The Nat'l Security Archive, Unedited & Uncensored (Feb. 25, 2014), https://nsarchive.wordpress.com/2014/02/25/house-foia-bill-a-good-first-step-foia-reform-now-in-hands-of-senate/.

the agency's interest in asserting the privilege.[79] The bill further prescribed a blanket twenty-five-year expiration for Exemption 5 from the date that the requested record or information was created.[80] In the version of the bill ("Senate Bill 2520") that passed the Senate on December 8, 2014, however, only the twenty-five-year expiration date remained, such that all documents currently within the broad reach of Exemption 5 would remain there for twenty-five years.[81]

In February 2015, each house of the 114th Congress quickly reintroduced similar measures. Senator Cornyn introduced a measure ("Senate Bill 337") that was similar in substance to the previous Senate Bill, but which again lacked substantive changes to the exemption scheme, carving out an exception to the presumption of openness and allowing nondisclosure where an "agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or is prohibited by law."[82] The House measure ("H.R. 653") goes a step further than Senate Bill 337, requiring disclosure unless the agency foresees "identifiable harm" to an exemption-protected interest.[83]

Ultimately, Senate Bill 337 passed the Senate and the House as the FOIA Improvement Act of 2016 and was signed into law by President Obama to take effect on June 30, 2016. To be sure, the law accomplishes several worthy, if uncontroversial, goals: it implements a consolidated online FOIA request portal to launch in 2017, it requires public online release of any records that have been released in three or more FOIA requests, and it establishes initiatives to increase transparency and compliance with FOIA's requirements, among other things.[84] But its two provisions relevant to the subject matter of this Essay both miss the mark. First, although it remains to be seen how courts interpret the 2016 Act, the Act's simple requirement that agencies reasonably foresee harm to "an interest protected by an exemption" in order to justify nondisclosure seems to offer little if any improvement: after all, in the *Bay of Pigs* case, the court cited general "harm to the candor of present and future agency decision-making" sufficient to justify nondisclosure, and there is no reason to think such "harm" would fail to satisfy the new requirement for nondisclosure

79 FOIA Improvement Act of 2014, S. 2520, 113th Cong. § 5(A)–(B) (as introduced by Sen. Leahy and Sen. Cornyn, June 24, 2014).

80 *Id.* § 5(C).

81 FOIA Improvement Act of 2014, S. 2520, 113th Cong. § 5(c).

82 FOIA Improvement Act of 2016, S. 337, 114th Cong. § 2(8)(A) (enacted).

83 FOIA Oversight and Implementation Act of 2016, H.R. 653, 114th Cong. § 2(b)(1) (as received in the Senate on Jan. 12, 2016).

84 FOIA Improvement Act of 2016, S. 337, 114th Cong. § 2 (enacted).

under the 2016 Act. Second, the Act's twenty-five-year expiration date is very limited: it only applies to documents protected under the deliberative-process privilege, meaning that agency memoranda exempt under other privileges remain exempt indefinitely. There is no compelling reason for agency records to be exempt from disclosure longer than presidential records—let alone more than twice as long. Further, whenever there is a case where an agency has a need to protect records from disclosure more than twelve years after the records' creation, a provision like subsection (b) of this Essay's proposed FOIA Improvement Act of 2017 would protect that need. Subsection (b) of the proposed statute would require an agency head—rather than a FOIA compliance officer—to certify that (1) the agency's need for nondisclosure outweighs the public interest in disclosure, and (2) some specific litigation, publication, or decision would be impaired by the release of the requested documents.[85]

B. A Presumptive Twelve-Year Expiration Date for Exemption 5 Makes Sense in Light of the Twelve-Year Expiration Date in the Presidential Records Act

The Clinton Administration's records mentioned in the Introduction of this Essay include documents that would clearly be predecisional—and thus exempt from disclosure—by the standards that courts have applied to agency records. The Clinton records concern, for example, the debate that surrounded Supreme Court nominee Richard Arnold, whom President Clinton declined to nominate in part because of his short life expectancy.[86] The records also document the creation of the "Don't Ask, Don't Tell" policy against open homosexuality in the military and the beginnings of national health care reform.[87] The Presidential Records Act, however, does not exempt records reflecting the views of even the President's closest aides from disclosure.[88]

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85 *See infra* Part IV.

86 Frank Rich, Op-Ed, *A Justice Denied*, N.Y. TIMES (May 19, 1994), http://www.nytimes.com/1994/05/19/opinion/a-justice-denied.html; *see also* Letter from Bruce R. Lindsey, Assistant to the President & Senior Advisor, to Stephen P. Williams & Robert M. Lyford, Ark. Elec. Coop. Corp. (May 17, 1994), *in 2006-0188-F - Judge Richard Arnold*, CLINTON DIGITAL LIBRARY, http://clinton.presidentiallibraries.us/items/show/14743 (last visited July 29, 2016).

87 Josh Gerstein, *Secrets of the Clinton Library*, POLITICO (August 25, 2014, 5:01 AM), http://www.politico.com/story/2014/08/secrets-of-the-clinton-library-110289.html.

88 From November 1, 2001 to January 21, 2009, the Presidential Records Act actually did exempt from disclosure records "reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors." Exec. Order No. 13,233, 3 C.F.R. § 815 (2002). President

If presidential records can be disclosed twelve years after a presidency without risking an unjustifiable chilling effect on presidential decisionmaking, then one is hard pressed to imagine why agency deliberations deserve greater protection. A presumption of disclosure twelve years after the date of a document's drafting would balance the interest of protecting agency deliberations against the statutory promise of open government.

The twelve-year expiration date for Exemption 5 might even be made subject to limited exceptions, as modeled in the proposed FOIA Improvement Act of 2017 in Part IV of this Essay. If, for example, a FOIA requester were seeking a document more than twelve years after its drafting, but the agency in question had not yet issued a final decision based on that document, the agency could withhold the requested document, but only if it identified an actual decision in progress rather than claiming the document to be sensitive for decisionmaking generally as in *Casad v. U.S. Department of Health and Human Services*.[89]

Implementing a presumptive twelve-year expiration date would have the added benefit of encouraging voluntary disclosure: if agency officials know that their records will be disclosed at the end of the twelve-year period, then perhaps they will be more likely either to release them voluntarily or to release them upon receiving a FOIA request rather than choosing to litigate.

In sum, Congress should implement a presumptive twelve-year expiration date from the date of a requested record's creation, beyond which agencies cannot invoke Exemption 5 unless they demonstrate their own need for nondisclosure with some specificity. Part IV presents the proposed text of such an amendment to FOIA.

IV. Proposal: The FOIA Improvement Act of 2017

This Essay proposes a "FOIA Improvement Act of 2017," which would amend the enumerated FOIA exemptions in 5 U.S.C. § 552 to read as follows (proposed new language is underlined):

(b) This section does not apply to matters that are—

[. . .]

George W. Bush issued Executive Order 13,233, staying the release of Reagan Administration records. *Id.* President Obama revoked the Order immediately upon his inauguration in 2009. Exec. Order No. 13,489, 3 C.F.R. § 191 (2010).

89 Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1252–53 (10th Cir. 2002).

(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency, *if*—

the requested memorandum or letter was created less than 12 years before the date on which the request was made; or

the head of the agency issues a written determination that the agency's need for nondisclosure outweighs the public interest in disclosure and that the memorandum or letter—

(i) is relevant to anticipated or pending litigation; or

(ii) is a draft of a specified agency decision or publication that has not yet been released or published; or

(iii) would, if disclosed, impair the agency's deliberative decisionmaking process with regard to a specified agency decision in progress.

This Essay does not propose a further limitation of the scope of Exemption 5, but Congress might, for example, consider adding to § 552(f) a narrower definition of "inter-agency" and "intra-agency" for the purpose of limiting the scope of Exemption 5 to actual agency records rather than allowing Exemption 5 to apply to records submitted by experts, consultants, or volunteers.

As a meaningful step towards preserving openness in government, however, Congress should, at a minimum, implement a presumptive twelve-year expiration date to Exemption 5, applicable to all documents for which an agency seeks to justify nondisclosure under Exemption 5, beyond which only upon the agency head's determination that disclosure would be deleterious would agency records continue to be exempt from disclosure.

Conclusion

From President Johnson to President Obama, American presidents have professed open government as an American value. FOIA itself requires it. The FOIA Improvement Act of 2016 was right-minded step in this direction, but leave more meaningful reform wanting. Congress should amend FOIA to curtail the agency-driven and judicially endorsed expansion of Exemption 5. By adopting a twelve-year expiration date for Exemption 5, and a need requirement to justify nondisclosure thereafter, Congress would strike the right balance between protecting agency needs and upholding openness in government, rather than allowing courts to prefer the protection of candid agency decisionmaking over the public's interest in disclosure.