ENDING EXEMPTION 5 EXPANSION: TOWARD A NARROWER INTERPRETATION OF FOIA'S EXEMPTION FOR INTER- AND INTRA-AGENCY MEMORANDUMS

*Ryan W. Miller**

The Freedom of Information Act (FOIA) creates a judicially enforceable right to access almost any record that a federal agency creates or obtains. Its crafters aimed to strike a careful balance in promoting disclosure of government records to increase transparency while still protecting the confidentiality of certain information. Although any person can request an agency record, FOIA's nine exemptions allow agencies to withhold records if certain conditions are met. 5 U.S.C. § 552(b)(5) ("Exemption 5") permits agencies to withhold "inter-agency or intra-agency memorandums or letters" that would normally be privileged in civil discovery. Through this exemption, Congress sought to prevent FOIA from circumventing discovery and to protect the quality of agency decisions by keeping internal policy discussions confidential. Much of Exemption 5's precedent has focused on the privileges that it incorporates. But, as the U.S. Supreme Court held in U.S. Department of the Interior v. Klamath Water Users Protective Ass'n, *to be properly withheld, a record must still meet the independent, "threshold" requirement of being inter- or intra-agency.*

Although FOIA defines "agency," it does not define what records are "inter-agency or intra-agency," causing diverging interpretations in lower courts. This Note examines that precedent and advocates for a narrower interpretation of inter- or intra-agency than most circuits have adopted. Instead of allowing communications and records from outside consultants or private litigants shared with agencies to qualify for Exemption 5 via judicially created tests, this Note argues that FOIA's text and purpose are better served by generally limiting the exemption to the Executive Branch.

* J.D. Candidate, 2025, Fordham University School of Law; B.A., 2017, Georgetown University. I would like to thank Professor Ron Lazebnik for his keen insights on government transparency and freedom of information law as well as the editors and staff of the *Fordham Law Review* for their invaluable feedback and editing. I also would like to thank my friends and former colleagues in journalism who routinely overcome barriers, governmental or otherwise, to access and publish vital information in the public interest. Finally, thank you to my parents, Bob and Dorothy, and my partner, Anne, for all the love, encouragement, and laughs along the way. I could not have published this Note without their endless support.

Such a result accords with recent Supreme Court FOIA precedent and the existing regime of administrative transparency laws overseeing outside influence on federal agencies.

INTRODUCTION

Consult a dictionary—as is so in vogue for U.S. Supreme Court justices these days[1]—and you will find that "inter-" meant "between" and "intra-" meant "within" at the time that the Freedom of Information Act[2] (FOIA) became law.[3] FOIA mandates that most documents that federal agencies create or obtain be disclosed upon request,[4] but it also exempts some from release, like privileged "inter-agency or intra-agency memorandums or letters."[5] So what records are "inter-agency or intra-agency," given that FOIA does not define the terms?[6] Some federal judges hold that these terms plainly imply that the records are only documents shared between or within federal agencies.[7] Not so fast, other judges caution.[8] What if entities that are not agencies share a report or email back and forth with an agency?[9] Even when self-interested private parties or members of a separate branch of government generate them, such records can at times be inter- or intra-agency, these other judges hold.[10] This broad interpretation of FOIA's text is not the most obvious reading, they admit,[11] but it is the one currently winning the day.[12]

1. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486 (2013).
2. 5 U.S.C. § 552.
3. Georgia v. U.S. Dep't of Just., 657 F. Supp. 3d 1, 8–9 (D.D.C. 2023) (first quoting *Inter*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1176 (1961); then quoting *Intra*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1185 (1961)), *appeal docketed*, No. 23-5083 (D.C. Cir. Apr. 24, 2023).
4. *See* U.S. Dep't of Just. v. Tax Analysts, 492 U.S. 136, 144 (1989).
5. *See* Nat'l Lab. Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 137 n.3, 148–49 (1975); *see also* 5 U.S.C. § 552(b)(5).
6. *See Georgia*, 657 F. Supp. 3d at 8. FOIA does not define "inter-agency" or "intra-agency," but it does define "agency." *See infra* note 91 and accompanying text.
7. *See infra* Part II.C.1.
8. *See infra* Parts II.A–B.
9. *See infra* Parts II.A–B.
10. *See infra* Parts II.A–B.
11. *See, e.g.*, Rojas v. Fed. Aviation Admin., 989 F.3d 666, 672 (9th Cir. 2021) (en banc); U.S. Dep't of Just. v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting).
12. *See infra* Part II.

Since 1967, FOIA has served as a valuable tool to understand the inner workings of government and check potential corruption.[13] FOIA's aims are lofty, seeking to inform the public and "hold the governors accountable to the governed."[14] To this end, FOIA creates a judicially enforceable right to access any federal agency's records unless a record falls within one of nine exemptions to disclosure.[15] The exemptions reflect a careful balancing between governmental interests in keeping some information confidential and a goal of full disclosure to the public.[16] 5 U.S.C. § 552(b)(5) ("Exemption 5") allows agencies to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."[17] It is well settled that the phrase, "would not be available by law to a party other than an agency in litigation with the agency," means that agencies need not disclose, under FOIA, documents that are typically non-discoverable as privileged in litigation.[18] The scope of the first part of the exemption—what records are "inter-agency or intra-agency memorandums or letters"—remains contested.[19]

The Supreme Court issued its most extensive guidance on Exemption 5's inter- or intra-agency requirement in 2001 in *U.S. Department of the Interior v. Klamath Water Users Protective Ass'n*.[20] Still, the holding was narrow.[21] The Court ruled on what types of records *are not* inter- or intra-agency memorandums but merely observed, and reserved judgment on, lower court precedent concerning what records *are* inter- or intra-agency.[22] After *Klamath*, circuits have diverged on the conditions under which a record can be inter- or intra-agency.[23] Today, many circuits allow records and communications from outside experts, private companies, and members of Congress to fall within the meaning of inter- or intra-agency memorandums

13. *See* Isaac A. Krier, Note, *Shining a Light on* Rattley*: The Troublesome Diligent Search Standard Undercutting New York's Freedom of Information Law*, 91 FORDHAM L. REV. 681, 697 (2022).

14. Nat'l Lab. Rel. Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

15. *See* 5 U.S.C. § 552(a)(3), (a)(4)(B), (b). FOIA's nine exemptions allow agencies to withhold (1) classified information kept secret in the interest of national security, (2) internal personnel rules of agencies, (3) information of which another federal law prohibits disclosure, (4) confidential or privileged trade secrets or commercial or financial information, (5) privileged inter- or intra-agency memorandums and letters, (6) information of which disclosure would constitute an invasion of privacy, (7) information compiled for law enforcement purposes, (8) information concerning regulation of financial institutions, and (9) geological information concerning wells. *See id.* § 552(b).

16. *See* Env't Prot. Agency v. Mink, 410 U.S. 73, 80 (1973) (citing S. REP. NO. 89-813, at 3 (1965)).

17. 5 U.S.C. § 552(b)(5).

18. *See* U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (collecting cases).

19. *See infra* Part II.

20. 532 U.S. 1 (2001); *see also infra* note 153 and accompanying text.

21. *See infra* notes 163–65.

22. *See infra* notes 164–67.

23. *See infra* Part II.

or letters.[24] Yet not all courts agree,[25] and even among those expanding Exemption 5, differing tests have created dissonance in FOIA precedent.[26] More than merely a question of how to interpret a statute, the issue of what records count as inter- or intra-agency implicates broader concerns around administrative accountability and the protection of privileged documents.[27] In a sense, the question strikes at the heart of the balance FOIA's framers struck.[28]

This Note explores these disagreements and argues that expansive interpretations allowing entities outside the Executive Branch into Exemption 5's reach not only thwart the plain and most fair reading of FOIA's text but also undermine the act's and exemption's goals. Part I details FOIA's history and place in administrative law as well as early interpretations of Exemption 5, including *Klamath*. Part II explores the conflicting post-*Klamath* case law among federal courts of appeals and the varying rationales that these courts adopt in interpreting Exemption 5. Parts II.A and II.B delve into purpose- and policy-driven tests for determining when outsiders' communications with agencies fall within Exemption 5, whereas Part II.C. presents the textually focused counter. Part III concludes by showing why a narrow interpretation of Exemption 5 is legally correct, practically workable, and normatively favorable. Part III is grounded in an understanding of FOIA as one of the public's tools of accountability in administrative law and demonstrates why Exemption 5 should not shield more records from disclosure.

I. THE BALANCE OF DISCLOSURE AND DELIBERATION FOR FEDERAL AGENCIES UNDER EXEMPTION 5

Originating as a tool to stem agency secrecy, FOIA grants access to government information "long shielded unnecessarily from public view . . . from possibly unwilling official hands."[29] Under FOIA, almost every document a federal agency generates can become publicly available in some form.[30] FOIA requires that information be released either via an agency's affirmative obligation to disclose or a request from any member of the public.[31] The act is often thought of as a tool for journalists.[32] Records obtained through FOIA have recently revealed deadly failings in the United States' use of drone strikes,[33] helped expose the system of family separations

24. *See infra* Parts II.A–B.
25. *See infra* Part II.C.
26. *See infra* Part III.B.
27. *See infra* Part III.
28. *See infra* Part I.
29. *See* Env't Prot. Agency v. Mink, 410 U.S. 73, 80 (1973); *see also* 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 2:2 (2023).
30. Nat'l Lab. Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).
31. 5 U.S.C. § 552(a)(1)–(3).
32. *See* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1369–71 (2016).
33. *See* Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html [https://perma.cc/W6LT-QNYS]; Charlie

at the U.S.-Mexico border,[34] and sparked the resignation of an Environmental Protection Agency Administrator.[35] Born out of the Administrative Procedure Act[36] (APA), FOIA can also be understood as a tool of administrative accountability, enacted to fix the failings of a prior agency disclosure provision.[37]

Congress sought to create a workable balance in FOIA between permitting "the fullest responsible disclosure" and maintaining confidentiality when needed.[38] To that end, Exemption 5 allows agencies to withhold certain privileged records, such as those protected under attorney-client privilege.[39] Among the more frequently invoked exemptions,[40] Exemption 5 has been referred to as the "most abused," largely due to the deliberative process privilege.[41]

To understand the conflict among federal appellate courts on Exemption 5, Part I of this Note explores the history of FOIA and Exemption 5. Part I.A discusses what led to FOIA's enactment and its place as a tool of administrative transparency. Next, Part I.B explains the privileged documents Exemption 5 protects. Finally, Part I.C examines early interpretations of the "threshold" question of Exemption 5 and the impact of the Supreme Court's ruling in *Klamath*.

A. FOIA and the Right to Information in Administrative Law

Although the basic thrust of FOIA—request information and it shall be disclosed—seems simple enough, the act's history as a reform for a broken agency disclosure system highlights the delicate balance that FOIA strikes.[42]

Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June 23, 2014), https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html [https://perma.cc/2XC2-Q78W].

34. *See* Caitlin Dickerson, *"We Need to Take Away Children": The Secret History of the U.S. Government's Family-Separation Policy*, ATLANTIC (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/ [https://perma.cc/2AM6-SS6B].

35. *See Whistleblowing, FOIA, and the Fall of Scott Pruitt*, GOV'T ACCOUNTABILITY PROJECT (July 16, 2018), https://whistleblower.org/uncategorized/whistleblowing-foia-and-the-fall-of-scott-pruitt/ [https://perma.cc/W35F-99TA].

36. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

37. *See* 1 O'REILLY, *supra* note 29, § 2:1; *see also infra* Part I.A.1.

38. *See* Env't Prot. Agency v. Mink, 410 U.S. 73, 80 (1973) (quoting S. REP. NO. 89-813, at 3 (1965)).

39. *See infra* Part I.B.

40. OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2022, at 8 (2023), https://www.justice.gov/media/1289846/dl?inline [https://perma.cc/ZZ2P-FCSP].

41. *See* Nick Schwellenbach & Sean Moulton, *The "Most Abused" Freedom of Information Act Exemption Still Needs to Be Reined In*, PROJECT ON GOV'T OVERSIGHT (Feb. 6, 2020), https://www.pogo.org/analysis/the-most-abused-foia-exemption-still-needs-to-be-reined-in [https://perma.cc/72FC-8782]; *see also infra* Part I.B (defining the deliberative process privilege).

42. *See* S. REP. NO. 89-813, at 3 ("It is not an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which

This section first details the legislative history of FOIA and then discusses where FOIA fits in a larger regime of administrative transparency.

1. FOIA's Birth Reforming Agency Disclosure

FOIA's legacy as a public disclosure statute stands in sharp contrast to its predecessor: Section 3[43] of the APA.[44] Section 3 was rife with loopholes and vague phrases that easily allowed agencies to deny information to the public.[45] For example, § 3 allowed agencies to withhold records of "any function of the United States requiring secrecy in the public interest."[46] Access extended only to "matters of official record," and a requester had to show that they were "properly and directly concerned" to obtain the record.[47] Moreover, the agency could withhold documents as "confidential for good cause found."[48] In turn, the section became more of "a withholding statute than a disclosure statute,"[49] and it enabled a "system of secrecy" in which federal agencies abused the statute.[50] The APA also provided no adequate remedy to force disclosure when a withholding under § 3 was improper.[51]

These failures animated both procedural reformers and journalists.[52] As allies in pushing for change, the groups sought accessibility to precedential materials and rules as well as newsworthy public documents pertaining to agencies' daily activities.[53] In alliance with a coalition of press members, Representative John E. Moss from California spearheaded reforms in the 1950s and '60s.[54] Central to Representative Moss's efforts was a belief in a basic right to obtain information.[55] For years, he sought to advance a public information bill informed by this idea, but he routinely faced opposition.[56] Representative Moss recognized that, to gain support, the bill would need to strike a balance and could not allow for limitless disclosure.[57]

---

encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.").

43. Pub. L. No. 79-404, § 3, 60 Stat. 237, 238 (1946), *amended by* 5 U.S.C. § 552.

44. *See* Env't Prot. Agency v. Mink, 410 U.S. 73, 79 (1973).

45. *See id.*; *see also* S. REP. NO. 89-813, at 3; H.R. REP. NO. 89-1497, at 3–4 (1966).

46. *See Mink*, 410 U.S. at 79.

47. *See* 1 O'REILLY, *supra* note 29, § 2:2. FOIA changed this requirement by allowing "any person" to access a record, regardless of their interest or relationship to it. *See* 5 U.S.C. § 552(a)(3)(A); 1 O'REILLY, *supra* note 29, § 4:32.

48. 1 O'REILLY, *supra* note 29, § 2:2.

49. *Mink*, 410 U.S. at 79 (citing S. REP. NO. 89-813, at 5; H.R. REP. NO. 89-1497, at 5–6).

50. 1 O'REILLY, *supra* note 29, § 2:2.

51. H.R. REP. NO. 89-1497, at 5.

52. *See* 1 O'REILLY, *supra* note 29, § 2:2.

53. *Id.*

54. *See id.*; Michael R. Lemov & Nate Jones, *John Moss and the Roots of the Freedom of Information Act: Worldwide Implications*, 24 SW. J. INT'L L. 1, 2, 7–11 (2018) (describing Moss's "long battle" to enact FOIA).

55. 1 O'REILLY, *supra* note 29, § 2:2; Lemov & Jones, *supra* note 54, at 9, 14.

56. *See* Jelani Cobb, *Celebrating FOIA on Independence Day*, NEW YORKER (July 2, 2014), http://www.newyorker.com/news/daily-comment/celebrating-foia-on-independence-day [https://perma.cc/WD7J-MTFG]; Lemov & Jones, *supra* note 54, at 13–14.

57. Lemov & Jones, *supra* note 54, at 14–15.

Early versions of FOIA had little to no protections for internal agency communications.[58] At congressional hearings, agency witnesses expressed worries over disruptions that would come with the disclosure of internal government materials or those that reflected "staff communications" or "staff advice."[59] Later versions of the bill included drafts of Exemption 5's protections, though its precise wording was contested.[60] House and Senate reports on the bill explained that the rationale for Exemption 5 was to protect internal communications to allow agency staff to exchange ideas.[61] If all internal information were required to be disclosed, agencies would "operate in a fishbowl," harming the efficacy of government decision-making.[62] Reflecting a legislative compromise in the wording, the House report also noted protection for internal memorandums that would be privileged from disclosure in pretrial discovery.[63]

After a long battle, FOIA passed in 1966, unanimously in the House,[64] and became effective in 1967.[65] Since its enactment, the law has been amended and strengthened several times, including the addition of "many of its modern provisions" in the wake of Watergate in 1974[66] and a 2016 tweak to Exemption 5.[67] Yet even as FOIA has changed, it has maintained its deliberate pro-disclosure framework that emerged as a product of the times that spawned it.[68]

---

58. *See* 2 O'REILLY, *supra* note 29, § 15:2.

59. *See Bills to Amend the Administrative Procedure Act, and for Other Purposes: Hearings on S. 1160, S. 1336, S. 1758, S. 1879 Before the Subcomm. on Admin. Prac. & Proc. of the S. Comm. on the Judiciary*, 89th Cong. 192, 205, 366–67, 450 (1965) (statements of Norbert A. Schlei, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., Civil Aeronautics Board, and Federal Communications Commission); H.R. REP. NO. 89-1497, at 10 (1966).

60. *See* 2 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 15:2 (2023). The first draft of Exemption 5 covered inter- and intra-agency memorandums "dealing solely with matters of law or policy." *See id.* (quoting S. REP. NO. 88-1219 (1964)). At least one senator worried that summaries of facts, common in an agency attorney's work product, would be vulnerable under that clause. *See id.* As such, a compromise was reached, and the wording changed. *See id.* The clause now states, "that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

61. *See* S. REP. NO. 89-813, at 9; H.R. REP. NO. 89-1497, at 10.

62. *See* S. REP. NO. 89-813, at 9; H.R. REP. NO. 89-1497, at 10.

63. H.R. REP. NO. 89-1497, at 10; *see also supra* note 60 and accompanying text.

64. Steve Zansberg, *July 4, 1966: Birth of the FOIA—a Look Back*, 32 COMMC'NS LAW. 34, 35 (2016).

65. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552).

66. *See* John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REGUL. 575, 577 & n.11 (2019).

67. The FOIA Improvement Act added a sunset provision for the deliberative process privilege under Exemption 5, limiting the records that can be withheld to those created within twenty-five years of the date on which the records were requested. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 540 (codified as amended at 5 U.S.C. § 552(b)(5)); *see also infra* Part I.B (discussing the deliberative process privilege).

68. *See* Brinkerhoff, *supra* note 66, at 577.

2. Transparency and Administrative Accountability

FOIA is one of the most important and well-known government oversight tools, but other laws exist alongside it to boost agency accountability.[69] The APA, for example, relies on tools of transparency, like public hearings and public comment, to guard against agency overreach and unfairness.[70] Whereas FOIA's model aims to check government corruption via information requests, the APA's notice-and-comment rulemaking relies on formality to boost public accountability.[71] In notice-and-comment rulemaking, agencies crafting regulations must provide public notice of a proposed rule, seek feedback from the public and interested parties, explain how it has considered this feedback, and publish a final rule stating the basis and purpose.[72] Still, the APA is not without its shortcomings,[73] and private parties with an interest in agency actions typically dominate its processes.[74]

Other laws similarly seek to boost agency accountability, such as the Federal Advisory Committee Act[75] (FACA).[76] Like FOIA, FACA reflects concerns about agency capture and advice from outsiders operating in secret.[77] To combat these concerns, FACA imposes stringent disclosure requirements on committees advising agencies.[78] However, the law has largely failed to live up to its goals, and the Supreme Court considerably narrowed what committees are within its reach.[79]

---

69. *See* William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. (SPECIAL EDITION) 171, 183 (2009).

70. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 472–73 (2003); William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 416.

71. *See* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 85–88 (2012).

72. *See* 5 U.S.C. § 553(b)–(c); *see also* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 249–53 (2d Cir. 1977).

73. *See generally* Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873 (2023) (describing the mixed results of the APA, succeeding in rulemaking but falling short in adjudications).

74. Shkabatur, *supra* note 71, at 86.

75. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. §§ 1001–1014).

76. *See* Funk, *supra* note 69, at 172.

77. *See* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REGUL. 451, 462–65 (1997); Funk, *supra* note 69, at 184–85.

78. *See* Croley & Funk, *supra* note 77, at 464–65.

79. Funk, *supra* note 69, at 184–85; *see also* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 462 (1989). FACA only covers groups, meaning regular advice from single industry members are outside its scope whereas collective advice from several industry members would implicate FACA. *See* Funk, *supra* note 69, at 187.

To be sure, FOIA also has its failings.[80] Agency delays, manipulations, and apathy toward disclosure deadlines plague its practical efficacy.[81] Its idealized form as a weapon of the news media has also given way to serving as a tool for private businesses.[82] FOIA's limited reach to agencies, and not federal contractors, has also raised concerns amid the growth of privatized public work and worries about agency capture and regulatory slippage.[83] Private contractors working on behalf of an agency or seeking to influence an agency's actions are not bound by FOIA, although some of their records in theory could become public when in agency hands.[84] Moreover, interpreting FOIA's exemptions has led to a system of de facto deference toward agency withholdings, despite the law's command that judges review such decisions de novo.[85] A study of more than 3,600 FOIA cases from 1990 to 1999 found a roughly 90 percent rate of affirming agency decisions to withhold.[86] The deferential review is even more concerning given the general inaccessibility of discovery in FOIA lawsuits.[87] The lack of discovery harms plaintiffs when questions of how records are created play into whether an exemption's conditions are met.[88]

B. What Exemption 5 Protects

To further FOIA's pro-disclosure goals and counteract its practical shortcomings, an oft-repeated line in FOIA decisions is that its exemptions are to be construed narrowly.[89] Much of Exemption 5's early Supreme Court

80. *See* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099–102 (2017); *see also Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016), https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front [https://perma.cc/CMT3-DD8H].

81. *See* Kwoka, *supra* note 32, at 1374–75; David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1790 (2008); Alan B. Morrison, *Balancing Access to Government-Controlled Information*, 14 J.L. & POL'Y 115, 118 (2006) ("[N]o government official ever received a promotion or a medal for releasing a document to the public.").

82. Kwoka, *supra* note 32, at 1414; Pozen, *supra* note 80, 1131–32, 1132 n.198.

83. *See* Sarah Shik Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENV'T L. 1, 8–22 (2014); *see also infra* note 91 and accompanying text. Agency capture occurs when private parties' undue influence on agencies' processes and actions causes agencies not to act in the public's interest. *See* Lamdan, *supra*, at 8. Regulatory slippage can occur when private contractors' work for agencies is lacking in regulatory compliance, oversight, and quality control. *See id.* at 11.

84. *See* Lamdan, *supra* note 83, at 8–22; *see also infra* notes 93–95 and accompanying text.

85. *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 186–88 (2013). De novo, or "anew," review is a far more exacting, non-deferential standard, rare in administrative law, compared to deferential standards like "arbitrary and capricious" in the APA. *Id.* at 190–93.

86. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713, 719 (2002) ("District courts seem to affirm FOIA cases almost instinctively . . . .").

87. Kwoka, *supra* note 85, at 224–28.

88. *See id.* at 226–27.

89. *See, e.g.*, U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (quoting U.S. Dep't of Just. v. Tax Analysts, 493 U.S. 136, 151 (1989)); Milner v.

precedent focused on the scope of its license to withhold inter- and intra-agency memorandums when they "would not be available by law to a party other than an agency in litigation with the agency."[90] This section addresses this latter half of Exemption 5 and the privileges it allows agencies to invoke to withhold records.

As an initial matter, FOIA's disclosure requirements extend only to agencies, defining "agency" in reference to the APA's definition.[91] FOIA cannot require Congress, the President and their advisors, or private contractors to disclose their records.[92] Yet, records that these non-agencies share with an agency may still be available under FOIA in limited circumstances.[93] To be an "agency record," the record must be one that the agency either created or obtained and that the agency controls—meaning the agency must have come into possession of the record through performing its official duties.[94] Restricting FOIA's disclosure requirements to records created only internally "would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes."[95]

As FOIA's legislative history shows, the primary purpose behind Exemption 5 was to protect internal staff deliberations so that disclosure would not harm the quality of agency decisions.[96] Early interpretations of Exemption 5 also reflect a recognition that FOIA should not become a workaround for pretrial discovery.[97] It would create an anomaly if FOIA allowed someone to obtain information that they would be barred from

---

Dep't of the Navy, 562 U.S. 562, 565 (2011) (quoting Fed. Bureau of Investigation v. Abramson, 456 U.S. 615, 630 (1982)). *But see* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (quoting Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018)) (stating that courts must give FOIA exemptions a fair reading, not necessarily a narrow one).

90. See *Klamath*, 532 U.S. at 8 (quoting 5 U.S.C. § 552(b)(5)).

91. *See* 5 U.S.C. § 552(f)(1) ("'[A]gency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."). The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" and notes that, among other entities, Congress and the courts are not agencies. 5 U.S.C. § 551(1).

92. *See* 1 O'REILLY, *supra* note 29, § 4:5. Although not explicit in FOIA's text, the Supreme Court has held that the President and entities within the Executive Office of the President that solely advise the President are not agencies. *See* Kissinger v. Rep. Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

93. *See* U.S. Dep't of Just. v. Tax Analysts, 492 U.S. 136, 143–46 (1989).

94. *See id.* at 144–45.

95. *Id.* (stating that "agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies" and FOIA's legislative history "abounds" with "references to records *acquired* by an agency" (quoting Forsham v. Harris, 445 U.S. 169, 184 (1980))).

96. *See supra* Part I.A.1.

97. *See* Nat'l Lab. Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Fed. Trade Comm'n v. Grolier Inc., 462 U.S. 19, 26 (1983); *see also supra* notes 60, 63 and accompanying text.

receiving from an agency in discovery during litigation.[98] As a result, Exemption 5 incorporates both common law and statutory pretrial discovery privileges.[99]

The most common privilege justifying an Exemption 5 withholding is the deliberative process privilege.[100] The privilege protects from disclosure documents reflecting advisory opinions, recommendations, and deliberations part of government agencies' decision-making and policy formulation.[101] To properly invoke the privilege, documents must be both pre-decisional and deliberative.[102] Factual information generally must be disclosed, unless those facts are so intertwined with an agency's deliberations they cannot be separated from the policymaking process.[103] Three primary policy goals animate the privilege: encouraging open and frank discussions within an agency, preventing premature disclosure of policy, and protecting against public confusion from the disclosure of rejected policy rationales.[104]

Judicially recognized in the United States in *Kaiser Aluminum Chemical Corp. v. United States*,[105] the privilege first applied narrowly to communications between high-ranking federal executive employees.[106] It remains a qualified privilege but today has broadened to reach lower-level executive officials and communications with private parties.[107] As a qualified privilege, a litigant can overcome the privilege with a showing of need.[108] FOIA requesters, however, have no mechanism to raise their need, effectively making the privilege under Exemption 5 absolute.[109] Some scholars have raised concerns about its potential abuse, allowing the Government to hide embarrassing or incriminating records or enabling "secret law" in which an agency does not disclose policies that affect the

98. *See* United States v. Weber Aircraft Corp., 465 U.S. 792, 801 (1985).

99. Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975).

100. OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 5, at 15 (2023), https://www.justice.gov/d9/pages/attachments/2023/03/13/exemption_5_final.pdf [https://perma.cc/EK8G-2UDN].

101. *See* U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 150).

102. U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 785–86 (2021). Pre-decisional documents are those generated before an agency's final decision, and deliberative documents are those aiding an agency in forming its final position. *Id.* at 786.

103. 81 AM. JUR. 2d *Witnesses* § 488 (2023).

104. OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., *supra* note 100, at 15. The public generally has a lower interest in the policy rationales that an agency rejected or in which it did not ultimately ground its decision, justifying the withholding of these pre-decisional documents. *See Sears, Roebuck & Co.*, 421 U.S. at 151–52.

105. 141 Ct. Cl. 38 (1958).

106. *See* Edward J. Imwinkelried, *The Government's Increasing Reliance on—and Abuse of—the Deliberative Process Evidentiary Privilege: "(T)he Last Will Be First,"* 83 MISS. L.J. 509, 513–17, 524–26 (2014) (noting *Kaiser* mentioned only "intra-office" documents).

107. *See* Imwinkelried, *supra* note 106, at 523, 525–26.

108. *Id.* at 523, 531.

109. *Id.* at 532–533.

public.[110] These risks are amplified given the deference that courts afford to agencies in FOIA lawsuits.[111]

The attorney-client privilege and work-product doctrine are also incorporated into Exemption 5, and Congress clearly intended both protections to fall within the provision.[112] The exemption, however, may not necessarily incorporate every known privilege.[113] Unsettled among federal courts is whether (and by what means) the common interest doctrine is incorporated into Exemption 5.[114] The common interest doctrine refers to the ability to maintain attorney-client and work-product protections while disclosing confidential information to other litigants who share the same interest.[115] It was born out of the doctrine of joint defense, which allowed confidential communications between codefendants in a criminal case to remain privileged.[116] Since the 1940s, however, the doctrine has expanded to civil litigation and pre-litigation settings.[117] Amid its expansion, defining how and when the doctrine applies is uncertain,[118] drawing scholarly criticisms.[119]

C. Early Interpretations of Exemption 5's "Threshold" Question

Although much of the focus before *Klamath* was on Exemption 5's privileges, the Supreme Court occasionally touched on the inter- or intra-agency requirement.[120] When the Court addressed its meaning before *Klamath*, the cases largely pertained to records shared with or from

110. *See id.* at 541; Kwoka, *supra* note 85, at 220.

111. *See* Kwoka, *supra* note 85, at 219–20. Some courts, for example, have expressly or impliedly acknowledged their deference to an agency's Exemption 5 withholding simply because the agency is better positioned to know when the release of documents will harm its decision-making. *See id.*

112. *See* Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975). Attorney-client privilege protects confidential communications between a client and lawyer for the purpose of obtaining legal advice. 81 AM. JUR. 2d *Witnesses* § 318 (2023). The work-product doctrine is a qualified discovery protection of materials that a party, its lawyer, or its lawyer's agent prepared in anticipation of litigation. 23 AM. JUR. 2d *Depositions and Discovery* § 44 (2023).

113. *See* United States v. Weber Aircraft Corp., 465 U.S. 792, 801 (1985).

114. *See infra* Part II.

115. *See* Cody Michael Austin, Comment, *Too Little in Common: Addressing the Inconsistency of the Common Interest Privilege*, 90 MISS. L.J. 797, 800–01, 800 n.5 (2021).

116. *See id.* at 802.

117. *See* Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475, 508–11 (2012) (arguing courts' extension of the common interest doctrine has been carried out erroneously and uncritically).

118. *See* Austin, *supra* note 115, at 806; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 422–23 (2000). Points of confusion include the form an agreement should take, the commonality of client interests required, the parties that can be included, and whether the prospect of litigation is required. Giesel, *supra* note 117, at 559–60.

119. *See* Giesel, *supra* note 117, at 560–61; Austin, *supra* note 115, at 836–38.

120. *See, e.g.*, Env't Prot. Agency v. Mink, 410 U.S. 73, 85 (1973); Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 187–88 (1975); United States v. Weber Aircraft Corp., 465 U.S. 792, 798 & n.13 (1984).

non-agencies still within Executive Branch entities, and the Court ruled that such records satisfied the inter- or intra-agency requirement.[121] The Court reserved the question of whether Exemption 5 could include communications from private citizens.[122] Several federal appellate courts, however, addressed that question directly, developing what became known as the consultant corollary.[123] This section discusses that development and *Klamath*'s response.

1. "Inter-" or "Intra-agency" Interpretations Before *Klamath*

Soucie v. David,[124] a case decided shortly after FOIA's enactment, has been credited as the first decision to hold that private non-agencies' communications with an agency could properly fall within Exemption 5.[125] At issue was a FOIA request for a report that an outside expert panel—not an agency—prepared for an agency.[126] For the U.S. Court of Appeals for the District of Columbia Circuit, the report's policy advice and recommendations could nonetheless be protected under Exemption 5.[127] In a footnote, the court grounded its decision in a recognition that agencies "may have a special need" for outside consultants' opinions, and these consultants "should be able to give their judgments freely without fear of publicity."[128]

Soon after, *Soucie*'s rationale for expanding Exemption 5 spread beyond the D.C. Circuit, with several other circuits relying on its footnote to reach the same result.[129] The U.S. Court of Appeals for the Fifth Circuit cited *Soucie* to hold that records from private parties were intra-agency in two separate decisions.[130] The Fifth Circuit explained that expert reports and recommendations can play a key role in agency decisions, and, therefore, should be treated as intra-agency.[131] The U.S. Courts of Appeals for the First Circuit and the Second Circuit adopted similar interpretations, directly

121. *See Mink*, 410 U.S. at 76 & n.3, 85; *Grumman Aircraft*, 421 U.S. at 173 n.6, 187–88; *Weber Aircraft*, 465 U.S. at 798 & n.13.

122. *See Weber Aircraft*, 465 U.S. at 798 n.13.

123. *See infra* Part I.C.1; *see also* Rojas v. Fed. Aviation Admin., 989 F.3d 666, 686 (9th Cir. 2021) (en banc) (Wardlaw, J., concurring in part and dissenting in part) (describing the birth of the consultant corollary).

124. 448 F.2d 1067 (D.C. Cir. 1971).

125. *See* Brinkerhoff, *supra* note 66, at 582–83.

126. *See Soucie*, 448 F.2d at 1070, 1073–75, 1078 n.44. The panel created the report for an entity within the Executive Office of the President that the court deemed was an agency because its function was not solely presidential advice. *See id.* at 1075–76; *see also supra* note 92 and accompanying text. The precedent that Executive Branch entities that solely advise the President are not agencies originated in *Soucie*. *See* Armstrong v. Exec. Off. of President, 1 F.3d 1274, 1295 (D.C. Cir. 1993) (describing this history).

127. *See Soucie*, 448 F.2d at 1078.

128. *Id.* at 1078 n.44.

129. *See* Brinkerhoff, *supra* note 66, at 583.

130. *See* Wu v. Nat'l Endowment for Humans., 460 F.2d 1030, 1032 (5th Cir. 1972) (citing *Soucie*, 448 F.2d at 1078 n.44); Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980) (same).

131. *See Hoover*, 611 F.2d at 1138.

applying the *Soucie* rationale.[132] None of these decisions had their own textual analyses of the exemption, however.[133] An early and influential student note on this trend commented that although such an interpretation was contrary to Exemption 5's text, its policy-based reasoning was desirable.[134]

Back in the D.C. Circuit, the precedent expanded beyond the typical consultant.[135] In *Ryan v. U.S. Department of Justice*,[136] the court ruled that responses to agency questionnaires sent to senators concerning their processes for judicial nominations met the inter- or intra-agency requirement.[137] Rather than viewing this requirement "rigidly," the court adopted a "common sense interpretation" of what Exemption 5 allows the Government not to disclose: records from someone outside an agency that the agency solicits as "part of the deliberative process."[138] Later, in *Public Citizen, Inc. v. U.S. Department of Justice*,[139] communications between former presidents and federal agencies were protected despite the FOIA requester's claims that the former presidents' self-interests should disqualify the records.[140] Former Presidents Ronald Reagan and George H.W. Bush had communicated with the National Archives and Records Administration (NARA) and the U.S. Department of Justice (DOJ) concerning their presidential records.[141] The court acknowledged that the presidents had independent interests given their power to assert rights and privileges over their documents as NARA sought to make the records publicly available.[142] Despite these interests—and the potential for an adversarial relationship—the court held that Exemption 5 still applied.[143]

Although a Supreme Court majority did not address this development until *Klamath*, Justice Antonin Scalia wrote approvingly of the precedent in a dissenting footnote in another Exemption 5 case.[144] The "most natural meaning" of inter-agency memorandums are those "between employees of two different agencies," whereas intra-agency memorandums are those

132. *See* Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 83 (2d Cir. 1979) (citing *Soucie*, 448 F.2d at 1078 n.44; *Wu*, 460 F.2d at 1032); Gov't Land Bank v. Gen. Servs. Admin., 671 F.2d 663, 665 (1st Cir. 1982) (citing *Hoover*, 611 F.2d at 1137–38).

133. *See* Brinkerhoff, *supra* note 66, at 583, 614 & n.295. In the First Circuit case, however, the FOIA requester did not contest whether the outsider records were intra-agency. *See Gov't Land Bank*, 671 F.2d at 665.

134. *See* Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 HARV. L. REV. 1047, 1063–64 (1973).

135. *See* U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 n.4 (2001).

136. 617 F.2d 781 (D.C. Cir. 1980).

137. *Id.* at 790–91.

138. *Id.*

139. 111 F.3d 168 (D.C. Cir. 1997).

140. *Id.* at 171–72.

141. *Id.* at 169.

142. *See id.* at 171.

143. *See id.* at 171–72.

144. *See* U.S. Dep't of Just. v. Julian, 486 U.S. 1, 18 n.1 (Scalia, J., dissenting).

"addressed both to and from employees of a single agency."[145] The problem with this interpretation, as Justice Scalia saw it, was that documents reflecting agency deliberations might still become public.[146] Appealing to the exemption's purpose, Justice Scalia found the circuits' interpretation—allowing records from outsiders "acting in a governmentally conferred capacity other than on behalf of another agency" to be withheld—as both "desirable" and "textually possible."[147]

This pre-*Klamath* expansion, however, was not unlimited, and several circuits addressing FOIA requests for National Labor Relations Board (NLRB) case files took narrower views.[148] The U.S. Court of Appeals for the Ninth Circuit stated that "[E]xemption 5 by its terms applies to internal agency documents" but added that outsiders could create intra-agency memorandums only when they had a "formal relationship with the agency."[149] The U.S. Court of Appeals for the Seventh Circuit stated that Congress intended the exemption to cover only internal documents, not any document that happens to be in an agency's possession.[150] Reading the exemption this way is not only consistent with its plain text but also addresses the concerns that agencies raised during FOIA's drafting, the Seventh Circuit held.[151] Although not addressed in *Klamath*, these cases show how circuits focusing more squarely on Exemption 5's text and legislative history narrowed the records allowed within its reach.[152]

2. *Klamath* and the "Independent Vitality" of the "Inter-" or "Intra-agency" Requirement

In 2001, the Supreme Court provided its most comprehensive decision to date on the meaning of "inter-agency or intra-agency memorandums or letters."[153] At issue in *Klamath* was a FOIA request that a nonprofit filed for communications between the U.S. Department of the Interior and several Native American tribes.[154] The department had previously asked the tribes

145. *Id.*
146. *See id.*
147. *See id.*
148. *See* Van Bourg, Allen, Weinberg & Roger v. Nat'l Labor Rel. Bd., 751 F.2d 982, 985 (9th Cir. 1985); Kilroy v. Nat'l Labor Rel. Bd., 823 F.2d 553 (6th Cir. 1987) (unpublished table decision); Thurner Heat Treating Corp. v. Nat'l Labor Rel. Bd., 839 F.2d 1256, 1259–60 (7th Cir. 1988).
149. *Van Bourg*, 751 F.2d at 985.
150. *Thurner Heat*, 839 F.2d at 1259.
151. *Id.*; *see supra* notes 59, 61.
152. *See Thurner Heat*, 839 F.2d at 1259–60; *Van Bourg*, 751 F.2d at 985. Although the Supreme Court did not address this line of precedent, the Ninth Circuit opinion that the Supreme Court affirmed in *Klamath* did discuss *Van Bourg*. *See* Klamath Water Users Protective Ass'n v. U.S. Dep't of the Interior, 189 F.3d 1034, 1038 (9th Cir. 1999), *aff'd*, 532 U.S. 1 (2001).
153. *See* Georgia v. U.S. Dep't of Just., 657 F. Supp. 3d 1, 9 & n.4 (D.D.C. 2023), *appeal docketed*, No. 23-5083 (D.C. Cir. Apr. 24, 2023) (calling *Klamath* the "leading case in this area" and noting that the Supreme Court has not since revisited the doctrine).
154. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 6 (2001).

to consult with its Bureau of Reclamation as it administered a project concerning water rights in the Klamath River Basin.[155] Around the same time, the department's Bureau of Indian Affairs, as a trustee for administering the tribes' land and water rights, filed claims for one of the tribes in Oregon state court pertaining to water rights.[156] The nonprofit—an association of water users who received their water from the same source and thus had interests adverse to the tribes'—sued to compel release of communications between the tribes and the Government withheld under Exemption 5.[157] The Court unanimously held that the documents should not be afforded Exemption 5 protection.[158] In communicating with the agency, the tribes were necessarily acting as "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone," and that type of interest disqualifies communications from Exemption 5's scope.[159]

Central to *Klamath*'s analysis were two independent conditions that documents must satisfy under Exemption 5: their "source" must be a federal agency, and they must be "within the ambit of a privilege against discovery."[160] *Klamath* rejected the notion that agencies could place a conclusory "intra-agency" label on all documents that it wanted to keep confidential.[161] There is "no textual justification for draining the first condition of independent vitality."[162] When addressing the contours of the first requirement, the Court's holding was notably narrow.[163] Rather than stating what intra-agency memorandums are, the Court explained why the communications at hand were *not* intra-agency.[164] The dispositive point was that when outside parties communicate with agencies with their own interests in mind and seek a benefit at the expense of or in competition with others, the records those communications generate are not intra-agency.[165]

The Court also observed the circuits' precedent developing the "consultant corollary."[166] Reserving judgment and not adopting a view on the doctrine, the Court sketched out what it saw as the typical consultant corollary case.[167] In those cases, Exemption 5 generally extended to communications between agencies and hired nongovernment consultants.[168] The records that outside parties submitted "played essentially the same part in an agency's process of deliberation" as those that agency personnel might have prepared would

155. *Id.* at 5.
156. *Id.*
157. *See id.* at 6.
158. *Id.* at 4–5.
159. *Id.* at 12.
160. *Id.* at 8.
161. *Id.* at 12.
162. *Id.*
163. *See* Brinkerhoff, *supra* note 66, at 601.
164. *See Klamath*, 532 U.S. at 14.
165. *See id.* at 12–15.
166. *See id.* at 9–11.
167. *See id.*
168. *Id.* at 10.

have.[169] The Court emphasized that although these consultants may have had a point of view on the issue on which they consulted, they were not representing their own interest or the interests of another.[170] Their "only obligations" were to "truth and [their] sense of what good judgment calls for," and in that way, the consultants functioned "just as an employee would be expected to do."[171] Although the Court's observations on the doctrine were neutral, it flagged *Ryan* and *Public Citizen* from the D.C. Circuit as "arguably extend[ing] beyond" these typical examples.[172] That the outsiders—former presidents in *Public Citizen* and senators in *Ryan*—communicated with agencies with their own interests or "strong personal views" gave the Court pause, although it did not invalidate the decisions.[173]

At bottom, *Klamath* provided both a two-step inquiry for analyzing Exemption 5 withholdings and an example of when Exemption 5 is not applicable.[174] The unanimous opinion did not fill in the full contours of what is a permissible invocation of Exemption 5 and left open the question of whether third-party consultative communications with an agency could qualify.[175]

II. WHAT QUALIFIES FOR EXEMPTION 5 PROTECTION AFTER *KLAMATH*

Since *Klamath*, the Supreme Court has not revisited Exemption 5's threshold requirement, and the open question about outside parties' communications remains.[176] In the circuits, what has emerged are contrasting tests based on *Klamath*'s description of the consultant corollary to determine if and when communications from private entities or other branches of government can constitute inter- or intra-agency memorandums or letters.[177] Part II of this Note explores this post-*Klamath* case law. Part II.A examines federal appellate courts relying on purpose- and policy-driven understandings of Exemption 5 to determine if a non-agency's self-interest still permits their communications with an agency to be withheld. Part II.B analyzes D.C. Circuit precedent and its focus on the role that communications play in an agency's process. Part II.C. discusses a narrower, text-based reading of Exemption 5 that limits the exemption's reach to outsiders and, in some advocates' views, aligns with analogous Supreme Court precedent.

169. *Id.*
170. *Id.* at 10–11 (stating that, in the typical consultant corollary case, the outside consultant need not necessarily "be devoid of a definite point of view when the agency contracts for its services").
171. *Id.* at 11.
172. *See id.* at 12 n.4.
173. *See id.*
174. *See supra* notes 160, 164–65 and accompanying text.
175. *See* Brinkerhoff, *supra* note 66, at 601.
176. *See supra* note 153 and accompanying text.
177. *See infra* Parts II.A–C.

A. Expanding Exemption 5 Through Purpose and Policy

Given *Klamath*'s command that Exemption 5 excludes self-interested parties seeking a government benefit, several circuits have hinged their post-*Klamath* precedent on the self-interest of the non-agency. These decisions have ranged from the Ninth Circuit's adoption of a narrow consultant corollary for disinterested non-agency communications[178] to the U.S. Court of Appeals for the Fourth Circuit's interpretation of the exemption to cover communications between a private party and an agency when their respective interests converge.[179] This section explores this spectrum of permissible interests under Exemption 5 and the courts' purpose- and policy-driven arguments.

1. Ninth Circuit: Functioning Like an Agency Employee Without Self-Interest

In one of the narrower formulations of Exemption 5 since *Klamath*, the Ninth Circuit in *Rojas v. Federal Aviation Administration*[180] held that records shared between agencies and non-agency entities hired to work in essentially the same capacity as agency employees are intra-agency memorandums.[181] *Rojas* was a sharply divided en banc reversal of a prior Ninth Circuit panel's decision, which had rejected the consultant corollary outright.[182]

At issue were records that a private consulting firm, APTMetrics, generated for the Federal Aviation Administration (FAA) in anticipation of litigation.[183] The firm developed an employment test for the FAA and, at the direction of FAA lawyers, prepared reports on the test's empirical validation.[184] The FOIA requester, Jorge Rojas, was denied an air traffic controller job based on his responses to the test and filed a request for records about it.[185] As a dissenting judge in the first Ninth Circuit panel noted, FAA lawyers had APTMetrics develop the reports because of pending litigation from a class of unsuccessful applicants whom Rojas's lawyer represented.[186]

On rehearing en banc, the majority relied heavily on *Klamath*'s description of the typical consultant corollary case.[187] For records that a non-agency shares with an agency to be inter- or intra-agency, the agency must hire the non-agency to work in a functionally similar capacity as agency

178. *See infra* Part II.A.1.
179. *See infra* Part II.A.4.
180. 989 F.3d 666 (9th Cir. 2021) (en banc).
181. *See id.* at 672–75.
182. *See* Rojas v. Fed. Aviation Admin., 927 F.3d 1046, 1054–58 (9th Cir. 2019) ("In addition to contravening the statutory text, the consultant corollary also undermines the purpose of FOIA."), *aff'd in part, vacated in part, and remanded*, 989 F.3d 666 (9th Cir. 2021) (en banc).
183. *See Rojas*, 989 F.3d at 670–72.
184. *Id.*
185. *Id.* at 670.
186. *See Rojas*, 927 F.3d at 1060–61 (Christen, J., concurring in part and dissenting in part).
187. *See Rojas*, 989 F.3d at 674–75 (quoting U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10–11 (2001)).

employees.[188] To effectively function as an agency employee, the non-agency must not represent its or any other client's interests when advising the agency.[189] Moreover, the analysis turns on the non-agency's relationship to the agency in creating the documents in question, not its relationship to the agency generally.[190]

Applying its functional self-interest test to the APTMetrics documents, the Ninth Circuit concluded that the records were intra-agency under Exemption 5.[191] FAA lawyers, who asked the consultant to create the records, could have just as readily prepared the documents, even if they had less expertise.[192] The firm was not representing its own or a client's interest in creating the documents, and it kept the documents confidential, just as FAA lawyers would have.[193]

Underpinning the decision was an appeal to Exemption 5's purposes of protecting communications to better policymaking and preventing FOIA from circumventing discovery privileges.[194] The documents did not "[a]t first blush" appear to qualify as intra-agency memorandums, the court recognized.[195] However, FOIA "does not tell us who counts as being in-house."[196] The court assumed that outside consultants would have the same hesitancy as agency employees to speak frankly if they knew that their advice could become public.[197] Reading Exemption 5 to exclude non-agency communications assumes that "Congress saddled agencies with a strong disincentive to employ the services of outside experts, even when doing so would be in the agency's best interests."[198] If FOIA were interpreted never to allow non-agency communications or records to be within Exemption 5, then an agency hiring private legal counsel could have those communications disclosed as well.[199] Such a result would conflict with Exemption 5's purpose of shielding privileged records.[200]

Other opinions in the en banc panel, however, took different approaches.[201] One concurring judge wrote that the text of Exemption 5 alone can accommodate the consultant corollary, noting, among other arguments, that the exemption requires only that the *record* be intra-agency, not necessarily its authors.[202] In contrast, an opinion dissenting on the intra-agency issue stated that Exemption 5's requirements plainly mean that

188. *Id.*
189. *Id.* at 675 (quoting *Klamath*, 532 U.S. at 11).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *See id.* at 673.
195. *See id.* at 672 (citing U.S. Dep't of Just. v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)).
196. *Id.* at 673.
197. *Id.*
198. *Id.*
199. *Id.* at 674.
200. *See id.*
201. *See id.* at 669.
202. *See id.* at 679 (Collins, J., concurring).

withheld memorandums must be ones circulated only within an agency, not shared with outsiders.[203] Other FOIA exemptions contemplate information received from outside the agency, whereas Exemption 5 does not, indicating a congressional intent not to allow such records within its reach.[204] The dissent also appealed to FOIA's pro-disclosure purpose and its legislative history in noting that not all privileged documents are protected under Exemption 5, only those that are inter- or intra-agency.[205] Another dissent noted that "[b]y ignoring [Exemption 5's] plain meaning, we subvert any legislative compromise baked into its enacted text."[206]

Despite the disagreement, commentary of the initial Ninth Circuit decision largely sided with the result that the en banc majority would reach.[207] A student note written before the en banc reversal argued that agencies might go without expert advice over concerns about public scrutiny under a narrow reading.[208] Another student note criticizing the initial decision stated that *Rojas* was a "textbook example" of FOIA circumventing discovery privileges.[209] Still, the en banc panel's decision was narrow, permitting a limited consultant corollary when the outsider could be said to function as if they were within the agency because they lacked any self-interest.[210]

2. Tenth Circuit: Functioning Like an Agency Employee with "Deep-Seated" Views

The Ninth Circuit had little trouble adopting its test given that the non-agency in question was not self-interested.[211] However, in *Stewart v. U.S. Department of the Interior*,[212] the U.S. Court of Appeals for the Tenth Circuit addressed the inter- or intra-agency requirement amid a claim that the non-agency had an interest in the matter on which they consulted.

In *Stewart*, the Tenth Circuit held that records shared with an agency from a consultant with "deep-seated views" were still properly withheld under Exemption 5.[213] At issue were reports authored by Karl Hess, a consultant whom the U.S. Department of the Interior hired for policy advice related to

203. *Id.* at 684 (Wardlaw, J., concurring in part and dissenting in part).
204. *Id.* (citing 5 U.S.C. § 552(b)(4), (8)).
205. *See id.* at 687–88; *see also supra* notes 160–62.
206. *See id.* at 696 (Bumatay, J., concurring in part and dissenting in part); *see also supra* notes 60, 63.
207. *See* Zac Losey, Note, *Balancing Broad Disclosure and Candid Consideration: Third-Party Consultants and Intra-agency Exemptions Under the Freedom of Information Act*, 109 KY. L.J. 417, 431 (2021); Ellen Smith Yost, Case Note, *Unfair Disclosure—Adopting a Limited Consultant Corollary for FOIA's Exemption 5 in Attorney Work-Product Cases Preserves Litigation Parity for Agencies Like the FAA*, 85 J. AIR L. & COM. 199, 207 (2020).
208. *See* Losey, *supra* note 207, at 431.
209. *See* Yost, *supra* note 207, at 207.
210. *See supra* notes 187–90.
211. *See supra* Part II.A.1.
212. 554 F.3d 1236 (10th Cir. 2009).
213. *Id.* at 1245.

grazing permits.[214] The agency sought to withhold the documents via the deliberative process privilege.[215] Although Hess was not competing for a grazing permit nor representing an interested party, he had written several articles in which he "advocated extensively" for a market-based approach to retiring grazing permits on public land.[216] The district court held that the records were not properly exempted because Hess communicated "in the interest of his deep-seated views, not as a disinterested expert."[217]

The Tenth Circuit did not challenge whether Hess's work demonstrated "deep-seated views," but it held that "deep-seated views" did not automatically disqualify a non-agency's communications from Exemption 5.[218] The agency hired Hess as a paid consultant, and when performing his analysis, Hess functioned like an agency employee, according to the Tenth Circuit.[219] That a consultant may get intellectual satisfaction from their work and the agency's adoption of their views does not mean that they have an impermissible interest under Exemption 5.[220]

Like the Ninth Circuit, the Tenth Circuit saw its decision as consistent with *Klamath* and the policy rationales behind Exemption 5.[221] The Tenth Circuit understood *Klamath* as having definitively recognized that Exemption 5 extended to government consultants.[222] Although *Klamath* did not go so far,[223] the Tenth Circuit's decision still finds support in *Klamath*'s recognition that typical consultants need not be "devoid of a definite point of view."[224] Barring such communications from Exemption 5 protection would harm an agency's discretion to seek outside advice.[225] Although grounded in the same rationale as the Ninth Circuit's no-self-interest test, the Tenth Circuit's decision to allow Hess's communications to remain confidential represents a step further on the spectrum of permissible self-interest under Exemption 5 after *Klamath*.

3. Fifth Circuit: Not Representing "Necessarily Adverse" Interests

Under *Stewart*, communications informed by deep-seated views need not be automatically disqualified from Exemption 5.[226] The Fifth Circuit in *Jobe*

214. Bd. of Cnty. Comm'rs v. U.S. Dep't of the Interior, No. 06-CV-209, 2007 WL 2156613, at *11 (D. Utah July 26, 2007), *aff'd in part, rev'd in part sub nom.* Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236 (10th Cir. 2009).
215. *Id.*
216. *See id.*
217. *See id.*
218. *Stewart*, 554 F.3d at 1245.
219. *Id.*
220. *Id.*
221. *See id.* at 1244–45.
222. *Id.* at 1244.
223. *See supra* Part I.C.2.
224. *See supra* note 170 and accompanying text.
225. *Stewart*, 554 F.3d at 1245.
226. *See supra* Part II.A.2.

v. National Transportation Safety Board[227] furthered this rationale by emphasizing the need to consider whether non-agency communications are "necessarily adverse" to others, as was dispositive in *Klamath*.[228]

Jobe concerned documents that were part of a National Transportation Safety Board (NTSB) investigation into a deadly helicopter crash.[229] The type of investigation at issue, a fact-finding proceeding to determine cause, not liability, allowed the NTSB to appoint to the investigation for technical support the companies connected to the crash.[230] Those parties, however, needed to sign statements committing themselves not to prepare for litigation or pursue self-interests in their assistance.[231] The companies were allowed to inspect the crash site, take notes, and discuss scenarios with others investigating, among other activities.[232] The FOIA lawsuit centered on documents that the NTSB withheld in response to a request from a lawyer representing families of the crash victims.[233]

Although the FOIA requester claimed and the district court found that the companies had an obvious self-interest given their involvement in the crash,[234] the Fifth Circuit focused on their potential adversity to the other parties.[235] Unlike in *Klamath*, in which the tribes sought a government benefit that others could not obtain, the NTSB investigation involved no adverse parties.[236] The helicopter companies were not making claims nor seeking a benefit at the expense of the families.[237] The NTSB also had control over the companies' actions, the participants disclaimed self-interest, and the main investigator could revoke their status if their actions were prejudicial or disruptive.[238] Underpinning the court's decision was an appeal to its pre-*Klamath* precedent grounded in a policy rationale that temporary consultants' communications should fall within Exemption 5.[239] Although some self-interest could be disqualifying, the Fifth Circuit seized on

227. 1 F.4th 396 (5th Cir. 2021).
228. *See id.* at 405.
229. *Id.* at 400.
230. *Id.* at 400–01 (citing 49 C.F.R. §§ 831.4, 831.8, 831.11(a)(1), 835.2 (2016); 49 U.S.C. § 1131(a)(1)).
231. *Id.* at 401 (citing 49 C.F.R. § 831.11(b)).
232. Jobe v. Nat'l Transp. Safety Bd., 423 F. Supp. 3d 332, 337 (E.D. La. 2019), *rev'd and remanded*, 1 F.4th 396 (5th Cir. 2021).
233. *See Jobe*, 1 F.4th at 401–02.
234. *See Jobe*, 423 F. Supp. 3d at 342–43 (adding that the companies received the benefit of access to the Government's investigation file and could influence the factual report); Brief of the Appellee Tony B. Jobe at 21, Jobe v. Nat'l Transp. Safety Bd., 1 F.4th 396 (5th Cir. 2021) (No. 20-30033) (arguing that the "blatant self-interest is so inherent and evident" that even the agency admitted that its employees needed to "frequently remind the party representatives that their purpose in participating in the accident investigation is not to learn investigative information").
235. *See Jobe*, 1 F.4th at 405.
236. *See id.* (quoting U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 n.4, 14 (2001)).
237. *Id.*
238. *Id.* at 406.
239. *See id.* at 404–05 (citing Wu v. Nat'l Endowment for Humans., 460 F.2d 1030, 1032 (5th Cir. 1972)); *see also supra* notes 130–31.

Klamath's observation that outside experts may have a point of view and held that the threshold of impermissible self-interest had not been reached.[240]

The dissent, however, framed the issue in light of Exemption 5's text and FOIA's purpose.[241] The terms inter- and intra-agency necessarily "exclude government communications with employees of the very entity the government is trying to regulate."[242] Although company representatives participating in the investigation may be bound by regulations to limit the influence of their potential self-interest, that is precisely why their communications are not intra-agency.[243] The NTSB may want these communications to remain confidential, but Exemption 5 plainly does not extend to "interested regulated entities."[244]

The *Jobe* majority's formulation of the consultant corollary is quite broad, one commenter noted.[245] The decision expanded the doctrine from other circuits' stricter views to protect a critical aspect of the agency's functions—NTSB crash investigations.[246] Still, its result allowing the companies' communications to remain confidential evokes a broader concern around agencies relying on regulated entities' knowledge, potentially contributing to agency capture.[247] In this way, *Jobe* represents another step further along the spectrum of permissible self-interest that circuits allow under Exemption 5.

4. Fourth Circuit: Converging Public and Private Interests

Much of the precedent expanding Exemption 5 has concerned consultants providing advice to government agencies.[248] In *Hunton & Williams v. U.S. Department of Justice*,[249] the Fourth Circuit addressed the exemption in a different context: a private company litigating against another and seeking to coordinate with the Government on legal strategy.[250] The Fourth Circuit held that, rather than litigation being a disqualifying self-interest, Exemption 5 incorporated the common interest doctrine into the intra-agency requirement when private interests converge with the agency's pursuit of the public interest.[251]

---

240. *Jobe*, 1 F.4th at 407 (quoting *Klamath*, 532 U.S. at 10–11).
241. *Id.* at 410–11 (Ho, J., dissenting).
242. *Id.* at 408.
243. *Id.* at 410 ("[N]othing can change the fact that the employees work for interested companies. And nothing in FOIA directs courts to pretend otherwise.").
244. *Id.*
245. *See* Bernard Bell, *NTSB Accident Investigations and the "Consultant's Corollary,"* YALE J. ON REGUL.: NOTICE & COMMENT BLOG (June 30, 2021), https://www.yalejreg.com/nc/ntsb-accident-investigations-and-the-consultants-corollary/ [https://perma.cc/2LSQ-KNVB].
246. *See id.*
247. *See id.*; *see also supra* notes 83–84 and accompanying text.
248. *See supra* Parts II.A.1–3.
249. 590 F.3d 272 (4th Cir. 2010).
250. *See id.* at 274–75.
251. *See id.* at 277–81.

The FOIA lawsuit centered on communications between the DOJ and the maker of BlackBerry devices—then known as Research in Motion (RIM).[252] RIM was defending against a patent lawsuit, and its opponent's lawyers brought the FOIA action.[253] Amid an appeal in the patent matter, RIM's lawyers contacted DOJ attorneys.[254] Because the federal government was the largest single user of BlackBerry devices, a RIM lawyer told the DOJ that the Government and the company had a mutual interest given how the lawsuit could interfere with government use of the devices.[255] The two sides agreed to keep talking and entered into a common interest agreement to share confidential, privileged documents.[256] After learning of the agreement, Hunton and Williams, the law firm representing RIM's patent opponent, filed a FOIA request for the communications.[257] Among Hunton and Williams's concerns was that the agreement enabled the DOJ to be a "conduit" of information between RIM and the U.S. Patent and Trademark Office (USPTO).[258] RIM had matters before the USPTO, and the record showed that the DOJ forwarded draft pleadings to the office.[259] The FOIA requester did not challenge the district court's finding that the communications qualified for the asserted privilege, so the Fourth Circuit addressed only whether they were inter- or intra-agency.[260]

In holding that the exemption could apply to the documents, the Fourth Circuit emphasized Exemption 5's purpose of preventing FOIA from becoming a discovery workaround.[261] Although the Government should not get favored treatment, it should have "a level playing field."[262] Part of Exemption 5's aim is to ensure that the Government is afforded protections of their work-product and attorney-client communications, just as private litigants are.[263] Reading FOIA to exclude the common interest doctrine would force the Government to litigate in a disadvantaged position compared to private parties.[264]

Klamath does not mandate a different result, the court also held.[265] Unlike in *Klamath*, in which the non-agency sought a government benefit for themselves, the Fourth Circuit saw RIM and the Government as sharing "a unitary interest."[266] Non-agency communications under the consultant corollary are intra-agency records because the non-agency generates

252. *Id.* at 274.
253. *Id.* at 274–75.
254. *Id.*
255. *Id.* at 275.
256. *Id.*
257. *Id.*
258. *Id.* at 286.
259. *Id.*
260. *Id.* at 276.
261. *Id.* at 277.
262. *Id.* at 278.
263. *Id.* (citing Nat'l Lab. Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)).
264. *Id.* at 279.
265. *See id.*
266. *See id.*

documents in collaboration with an agency's pursuit of the public interest.[267] The common interest doctrine similarly requires an agency's determination of the public interest and a non-agency's litigation interest to have converged, allowing documents shared between the two to be considered intra-agency.[268]

Still, the court recognized that litigating with DOJ support is a valuable benefit that comes at the detriment of the litigant's opponent.[269] The court saw *Klamath* as not necessarily barring self-interested parties from communicating in confidence with the Government when their interests align.[270] But an agency must show how those communications are not only self-interested lobbying.[271] Communications from before a common interest agreement has genuinely been reached may therefore be excluded from Exemption 5 because of the risk that pre-agreement communications are merely self-interested lobbying.[272] These concerns were amplified given Hunton and Williams's belief that RIM sought to influence the USPTO through the communications.[273] The Fourth Circuit remanded the case to determine at what point the two sides had reached a clear meeting of the minds on a common interest agreement and, therefore, their interests had converged.[274] Although FOIA does not mandate that the Government disclose confidential communications shared with litigation partners in pursuit of the public interest, the court held, it does require skepticism about whether and when such a partnership genuinely exists.[275]

Although the Fourth Circuit saw its decision as consistent with *Klamath*, the dissent stated that the court's reasoning was the same reasoning that the Supreme Court had rejected.[276] "Self-interested communications from outsiders" are what FOIA was enacted to expose, and the majority missed that a private litigant still has a self-interest in mind even after a common interest agreement is reached, the dissent stated.[277] One commenter considering Exemption 5 precedent noted that the *Hunton & Williams* decision was akin to an exception to the exception that circuits were already making for government consultants.[278] Whereas other circuits limited this Exemption 5 exception when self-interests at the expense of others were

267. *See id.* at 279–80.
268. *Id.* at 280.
269. *Id.* at 284.
270. *See id.* at 279, 284.
271. *Id.* at 284.
272. *See id.* at 284–85.
273. *Id.* at 286.
274. *See id.* at 285–87, 288. The two sides did not formalize their agreement in writing until months after communications began, and some early communications appeared to exchange information to share assessments—not execute a joint legal strategy. *See id.* at 285–86.
275. *See id.* at 287.
276. *See id.* at 290–91 (Michael, J., dissenting) (arguing that the majority held the common interest doctrine itself was sufficient to invoke Exemption 5, rather than providing an independent analysis of the intra-agency requirement).
277. *Id.* at 291–92.
278. *See* Brinkerhoff, *supra* note 66, at 583.

involved, the Fourth Circuit now permitted these self-interested communications when the Government shared such an interest.[279] In doing so, the Fourth Circuit landed the furthest along the spectrum of permissible interest under Exemption 5, explicitly allowing a self-interested party gaining a limited government benefit within its scope.

B. The D.C. Circuit's Conflicted Exemption 5 Precedent

Whereas other circuits interpreting Exemption 5 have had only a few occasions to weigh in, the D.C. Circuit has had numerous—with more pending.[280] After the Supreme Court, the D.C. Circuit is often seen as the most influential authority on FOIA given its heavy FOIA caseload.[281] Still, the circuit's FOIA precedent is often the target of Supreme Court criticism, as *Klamath*'s comments on *Ryan* and *Public Citizen* showcase.[282] Despite the callout in *Klamath*, the D.C. Circuit has upheld its pre-*Klamath* precedent and expanded further on the exemption's permissible scope.[283] This section examines D.C. Circuit precedent on its own, given its influential role, and shows how its post-*Klamath* decisions have wrestled with—and left unresolved—its precedent's tension with *Klamath*.

1. D.C. Circuit: Aiding in an Agency's Deliberative Process

Only a few years after *Klamath*, the D.C. Circuit had the opportunity to review Exemption 5 in *Judicial Watch, Inc. v. U.S. Department of Energy*,[284] and, despite *Klamath*'s admonishment, the court reaffirmed its prior reasoning.[285] The documents in *Judicial Watch* were shared between agencies and an advisory body within the Executive Office of the President, which did not meet the definition of an agency.[286] The court relied on Supreme Court precedent that ruled that records shared between Executive Branch entities, even when some are not agencies under FOIA, can still get Exemption 5 status.[287]

---

279. *See id.*

280. *See* Am. Oversight, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 17-827, 2022 WL 1719001, at *13 (D.D.C. May 27, 2022) (describing various lines of D.C. Circuit precedent), *argued*, No. 22-5281 (D.C. Cir. Sept. 29, 2023).

281. *See* 1 O'REILLY, *supra* note 29, § 3:6 (calling the D.C. Circuit "the most active FOIA precedent-setter"); Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 261 (2011) (noting that D.C.'s district courts accounted for 38 percent of all FOIA cases in the country from 1979 to 2008 even though their dockets made up only 1.3 percent of all district court litigation).

282. *See supra* notes 172–73; *see also* 1 O'REILLY, *supra* note 29, § 3:6 (noting that the Supreme Court often restrains D.C. Circuit FOIA decisions).

283. *See infra* Part II.B.1.

284. 412 F.3d 125 (D.C. Cir. 2005).

285. *See id.* at 130–31 (citing *Soucie* and *Ryan* favorably).

286. *See id.* at 127, 129; *see also supra* notes 91–92.

287. *See Judicial Watch*, 412 F.3d at 129–30 (citing Env't Prot. Agency v. Mink, 410 U.S. 73, 85 (1973)); *see also supra* notes 121–22.

However, the court went further, turning to its pre-*Klamath* precedent that focused on the role that documents played in the agency's deliberations.[288] In *Ryan*, it mattered whether the documents that a consultant shared were "part of the deliberative process" of the agency and solicited by the agency.[289] The court in *Judicial Watch* held that the dispositive question for Exemption 5 was whether releasing the document would expose "pre-decisional and deliberative processes of the Executive Branch," regardless of whether an agency initiated a consultation.[290]

Several years later, the D.C. Circuit again reexamined its pre-*Klamath* precedent and again upheld its validity in *National Institute of Military Justice v. U.S. Department of Defense*.[291] The court saw *Klamath*'s charge for an independent inquiry into whether documents are inter- or intra-agency, separate from whether documents are privileged, as consistent with its test focusing on whether a consultant's communication was solicited for and part of the agency's deliberative process.[292] The court cited *Ryan* and *Public Citizen* favorably and stated that *Ryan*'s "common sense" interpretation of Exemption 5 remained after *Klamath*.[293] The court then added two more factors to consider for Exemption 5: whether communications between the agency and outsider are expected to remain confidential and whether there is "some indicia of a consultant relationship" between them.[294]

Still, the court in *Military Justice* acknowledged *Klamath*'s criticism of its precedent.[295] To the extent that *Klamath* called *Ryan* and *Public Citizen* into question, it did so on the issue of whether non-agencies could communicate with their own independent interests in mind.[296] The disputed records in *Military Justice* were communications between the U.S. Department of Defense and former Cabinet-level political appointees and law professors.[297] Neither side claimed that these consultants were pursuing their own interest, so the court reserved the question of whether *Ryan* and *Public Citizen* went too far in allowing self-interested communications.[298] Still, that the

288. *See Judicial Watch*, 412 F.3d at 130–31.

289. *See id.* at 130 (quoting Ryan v. U.S. Dep't of Just., 617 F.2d 781, 790 (D.C. Cir. 1980)).

290. *See id.* at 131.

291. 512 F.3d 677 (D.C. Cir. 2008).

292. *See id.* at 684–85. The Second Circuit in *Tigue v. U.S. Department of Justice* effectively adopted the same test as the D.C. Circuit and relied on D.C. Circuit and its own pre-*Klamath* precedent in doing so. *See* 312 F.3d 70, 77–79 (2d Cir. 2002). The court noted that *Klamath* does not allow conclusory applications of "intra-agency" but said that the *Klamath* rule in the case at issue was not violated because neither side claimed the outsiders in question were self-interested. *Id.* at 77, 78 n.2. Given the similarities between the Second and D.C. Circuits' holdings and the lack of a discussion on self-interest, this Note does not discuss Second Circuit precedent in detail. It is notable, though, that then-Judge Sonia Sotomayor wrote the opinion. *See id.* at 73.

293. *See Military Justice*, 512 F.3d at 680–81, 685.

294. *Id.* at 685–86.

295. *Id.* at 685.

296. *See id.*

297. *Id.* at 683 n.8. The consultants were providing the U.S. Department of Defense with legal advice on post-9/11 military commissions. *Id.* at 678–79.

298. *Id.* at 685.

non-agencies have experiences on the issues for which they consult is a reason for an agency to seek them out, not to disqualify them from Exemption 5, the court observed.[299]

The dissent, however, found the court's rationale incompatible with *Klamath* by "redefin[ing] 'intra-agency' rather than giving the term 'independent vitality.'"[300] The dispositive point in determining whether records are inter- or intra-agency in the D.C. Circuit's pre-*Klamath* precedent was whether they played a role in the agency's deliberative process, regardless of their source, the dissent noted.[301] *Klamath* rejected that reasoning by requiring a two-step inquiry for Exemption 5,[302] yet the majority continued to adhere to its test despite a conflict with the statute's text and *Klamath*'s charge.[303] As a result, the majority's rationale would allow records from anyone to qualify as intra-agency so long as an agency solicited them, the dissent stated.[304]

Since *Military Justice*, two D.C. Circuit decisions discussed the open self-interest question, but neither definitively resolved it. In *McKinley v. Board of Governors of Federal Reserve System*,[305] the court held that communications from a non-agency to an agency were intra-agency because the non-agency was not self-interested.[306] It also noted that the agency solicited the records, as *Military Justice* suggested was indicative of an intra-agency memorandum.[307] Three years later in *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary & Water Commission*,[308] then-Judge Brett Kavanaugh surveyed the court's precedent but did not reach a decision on whether the records at issue qualified for Exemption 5.[309] When discussing the circuit's Exemption 5 precedent, the court stated that its decisions "go beyond the text" to include non-agency entities if those records are solicited by an agency as part of its deliberative process.[310] The court saw its precedent after *Klamath*, however, as permitting the consultant corollary only when the outside consultant had no self-interest in mind.[311]

299. *See id.* at 683.
300. *See id.* at 689–95 (Tatel, J., dissenting).
301. *See id.* at 689–92.
302. *Id.* at 690–91; *see also* U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–12 (2001).
303. *See Military Justice*, 512 F.3d at 691–95.
304. *Id.* at 692.
305. 647 F.3d 331 (D.C. Cir. 2011).
306. *See id.* at 337 (citing U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11, 14 (2001)).
307. *Id.* at 338 (quoting *Military Justice*, 512 F.3d at 681).
308. 740 F.3d 195 (D.C. Cir. 2014).
309. *See id.* at 198, 201–02 (remanding to resolve a narrow factual question).
310. *Id.* at 201 (stating that the ordinary meanings of intra-agency and inter-agency refers "only to documents created by officers or employees within the U.S. Government").
311. *See id.* at 201–02.

2. Applying D.C. Circuit Precedent in Its District Courts

Public Employees has so far been the D.C. Circuit's "last word on the matter,"[312] but in the wake of *Klamath*, judges in D.C.'s district courts have struggled to apply its conflicted precedent.[313] Some read *Klamath* as requiring an analysis of both the non-agency's self-interest and potential pursuit of a government benefit when communicating with the agency, whereas others simply look to self-interest.[314] What level of solicitation is necessary, if any at all, from the agency to the non-agency is also uncertain.[315]

The level of self-interest that a non-agency can possess when communicating with an agency and still qualify for Exemption 5 remains among the "hotly debated" questions.[316] Some courts, relying on *Public Employees*, have suggested that consultants must be neutral parties.[317] Others have noted that consultants fostering self-interest can fall within Exemption 5's scope so long as they share a common goal with the agency and their actions can be "construed" as aiding an agency's deliberative process.[318] In *Competitive Enterprise Institute v. Office of Science & Technology Policy*,[319] one district court observed that whether a party is self-interested under Exemption 5 is not a clear-cut, binary question.[320]

The issue has also come up in recent cases related to communications between agencies and members of Congress and their staff.[321] The D.C. Circuit's pre-*Klamath* precedent allowed such communications to fall within Exemption 5,[322] but district courts have since reached diverging conclusions.[323] The D.C. Circuit is currently considering an appeal from a

312. Reply Brief for Appellant Am. Oversight at 9, Am. Oversight, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 22-5281 (D.C. Cir. Apr. 5, 2023).

313. *See* Brief of Amicus Curiae the Reps. Comm. for Freedom of the Press in Support of Plaintiff-Appellant Seeking Reversal at 10, 14, Am. Oversight, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 22-5281 (D.C. Cir. Feb. 21, 2023) (arguing that the consultant corollary has caused "confusion and inconsistent caselaw").

314. *See* COMPTEL v. Fed. Commc'ns Comm'n, 910 F. Supp. 2d 100, 118 n.12 (D.D.C. 2012) (collecting cases).

315. *See* Brief of Amicus Curiae the Reporters Comm., *supra* note 313, at 13–14 (collecting cases).

316. *See* Am. Oversight, Inc. v. U.S. Dep't of Health & Hum Servs., No. 17-827, 2022 WL 1719001, at *13 (D.D.C. May 27, 2022), *argued*, No. 22-5281 (D.C. Cir. Sept. 29, 2023).

317. *See* Am. Oversight v. U.S. Dep't of Health & Hum. Servs., 380 F. Supp. 3d 45, 54 (D.D.C. 2019); Georgia v. U.S. Dep't of Just., 657 F. Supp. 3d 1, 12 (D.D.C. 2023), *appeal docketed*, No. 23-5083 (D.C. Cir. Apr. 24, 2023).

318. *See* Jud. Watch, Inc. v. U.S. Dep't of State, 306 F. Supp. 3d 97, 111–12 (D.D.C. 2018); Am. Oversight v. U.S. Dep't of the Treasury, 474 F. Supp. 3d 251, 263, 265, 267–68 (D.D.C. 2020); Am. Oversight v. U.S. Dep't of Transp., No. 18-1272, 2022 WL 103306, at *4 (D.D.C. Jan. 11, 2022).

319. 161 F. Supp. 3d 120 (D.D.C. 2016).

320. *See id.* at 133.

321. *See, e.g.*, *Am. Oversight*, 2022 WL 1719001, at *12–15; *Am. Oversight*, 2022 WL 103306, at *2–6.

322. *See* Ryan v. Dep't of Just., 617 F.2d 781, 789–90 (D.C. Cir. 1980).

323. *Compare* Am. Oversight v. U.S. Dep't of Health & Hum. Servs., 380 F. Supp. 3d 45, 54–55 (D.D.C. 2019), *with Am. Oversight*, 474 F. Supp. 3d at 262–68.

decision that held that such communications were within Exemption 5.[324] The lower court ruled that although members of Congress may have political motivations and advocate for constituents when communicating with agencies, they did so in the case at hand with the common goal of passing legislation, thereby aiding agency processes.[325] In its appeal, the FOIA requester argued that Congressmembers and their staff should "generally fall beyond the outer limits" of Exemption 5 because they represent different interests from Executive Branch officials.[326]

Another pending case before the D.C. Circuit could determine whether the court agrees with the Fourth Circuit on the common interest doctrine's applicability to Exemption 5.[327] The case centers on communications between the DOJ and private parties suing the state of Georgia over alleged violations of federal voting rights protections.[328] The DOJ filed its own challenge to the Georgia law and collaborated with private plaintiffs suing.[329] The plaintiffs and DOJ, although pursing different litigation strategies, entered into a formal common interest agreement.[330]

The district court appeared to criticize the D.C. Circuit's consultant corollary as going beyond the text of Exemption 5 and adopted a narrow view of what self-interest is permissible.[331] Given that private litigants had "skin in the game" by challenging the Georgia law, they were not neutral agency consultants.[332] Moreover, the district court found the Fourth Circuit's reasoning in *Hunton & Williams* to erroneously "bootstrap[]" the common interest doctrine into Exemption 5's threshold requirement.[333] It saw the Fourth Circuit's policy-based argument as misguided given the "unmatched resources and staggering power" that agencies have in assisting private parties in litigation.[334] Thus, if FOIA limits the ability of private parties and

---

324. *See* Am. Oversight, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 22-5281 (D.C. Cir. argued Sept. 29, 2023).

325. *See Am. Oversight*, 2022 WL 1719001, at *12–15 ("[M]embers of Congress may be solicited for advice by agencies *precisely because* they will advocate for their constituencies . . . . [T]he adoption [of healthcare policies] is not a zero-sum game of the sort at play in the water allocation rights in *Klamath*.").

326. Brief for Appellant Am. Oversight at 16, Am. Oversight, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 22-5281 (D.C. Cir. Feb. 13, 2023).

327. *See* Georgia v. U.S. Dep't of Just., No. 23-5083 (D.C. Cir. *appeal docketed* Apr. 24, 2023); *see also supra* Part II.A.4.

328. *See* Georgia v. U.S. Dep't of Just., 657 F. Supp. 3d 1, 5–7 (D.D.C. 2023), *appeal docketed*, No. 23-5083 (D.C. Cir. Apr. 24, 2023).

329. *See id.* at 6–7.

330. *Id.*

331. *See id.* at 8–12. The court relied on dictionaries for plain meaning and noted that other exemptions, namely 5 U.S.C. § 552(b)(4) ("Exemption 4") and 5 U.S.C. § 552(b)(8) ("Exemption 8"), expressly permit withholding information from outside parties. *Id.* at 8–9. Such an express reference to outside parties is absent from Exemption 5, which is evidence of congressional intent to allow outside communications within those exemptions and not allow them within Exemption 5. *See id.* at 9.

332. *Id.* at 11–12.

333. *Id.* at 16.

334. *Id.* at 16–17.

agencies to litigate together without disclosure, then "this is a feature, not a bug" of FOIA, the court held.[335]

C. Narrowing Exemption 5 Through Its Text

Despite the wave of post-*Klamath* Exemption 5 expansion, not all circuits have been so willing to adopt a broad interpretation.[336] Whereas other circuits have permitted expansive interpretations to further perceived purpose- and policy-based rationales, the U.S. Court of Appeals for the Sixth Circuit appealed to the text of the exemption to restrict its reach to non-agencies.[337] This section explores the Sixth Circuit precedent, one of the few restrictions of Exemption 5 after *Klamath*, and discusses how proponents of a narrow Exemption 5 have relied on Supreme Court precedent from other FOIA exemption contexts for guidance on Exemption 5.

1. Sixth Circuit: Using Dictionaries to Reject the Common Interest Doctrine

In *Lucaj v. Federal Bureau of Investigation*,[338] the Sixth Circuit considered Exemption 5's application to documents shared between the DOJ and foreign governments.[339] In its interpretation of the exemption, the court recognized that although there may be policy reasons to withhold these and similar documents, FOIA's text simply does not permit such a reading.[340]

The FOIA requester, Doda Lucaj, sought documents related to a Federal Bureau of Investigation (FBI) investigation against him on suspicion of an alleged connection to attacks made to influence elections in Montenegro.[341] Among the documents that the DOJ and the FBI claimed were exempt were requests for assistance that the DOJ sent to the Central Authority of Austria and an unnamed foreign government.[342] The U.S. Government argued that Exemption 5 permitted non-disclosure of these records through the common interest doctrine.[343]

The Sixth Circuit was not persuaded.[344] Initially considering *Klamath*'s mandate that the "source" of a record must be an agency to satisfy Exemption 5, the court determined that simply because a record is generated within an agency does not make it inter- or intra-agency.[345] Both the document's source and its destination must be an agency under *Klamath* and Exemption

335. *Id.* at 17.
336. *See* Lucaj v. Fed. Bureau of Investigation, 852 F.3d 541, 545–49 (6th Cir. 2017).
337. *See id.*
338. 852 F.3d 541 (6th Cir. 2017).
339. *See id.* at 544.
340. *See id.* at 549.
341. *Id.* at 543.
342. *Id.* at 544. The documents contained, among other things, legal theories and evidence in the investigation against Lucaj. *Id.*
343. *Id.* at 545.
344. *Id.*
345. *See id.* at 546.

5.[346] Moreover, relying on dictionaries to evince plain meaning, the court held that letters sent from the FBI to the foreign governments could not be inter- or intra-agency.[347] "Intra-" is defined as "within," yet "the very purpose" of the documents was to be sent outside the agency.[348] "Inter-" means "between" or "among," so to be inter-agency, the documents must be shared between two agencies.[349] Two foreign governments, however, are "undoubtedly" not federal agencies, the court noted.[350]

Despite the Government's arguments, the court stated that the common interest doctrine did not apply to keep the records within Exemption 5's scope.[351] The court took note of the Fourth Circuit's precedent incorporating the common interest doctrine into Exemption 5 as well as the consultant corollary precedent in other circuits.[352] Although the Sixth Circuit "appreciate[d] the concern of our sister circuits," it repeated *Klamath*'s command that Exemption 5's threshold condition has its own independent inquiry and is not conclusory.[353] Even if agencies have a legitimate interest in keeping communications with non-agencies private, "Congress chose to limit the exemption's reach to 'inter-agency or intra-agency memorandums or letters,' not to 'memorandums or letters among agencies, independent contractors, and entities that share a common interest with agencies.'"[354] No matter how important the conversations with non-agencies are or how common their interests may be, these entities are not agencies, as Congress defined the term, so records shared with them do not qualify as inter- or intra-agency, the court held.[355]

Although unequivocally rejecting an application of Exemption 5 to the records in question, the exact reach of *Lucaj* is unclear. One reading of the holding could be that it ruled only on the application of the common interest doctrine to Exemption 5, splitting with the Fourth Circuit on that doctrine alone.[356] Some argue that it also splits with other circuits that have adopted the consultant corollary.[357] The en banc Ninth Circuit panel in *Rojas*

346. *See id.*
347. *See id.* at 546–47.
348. *Id.* (relying on *Merriam-Webster's Dictionary*'s and *Black's Law Dictionary*'s definitions of "intra-").
349. *Id.* (same for "inter-").
350. *Id.* at 547.
351. *See id.* at 547–49.
352. *See id.* at 548.
353. *See id.* at 548–49 (quoting U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001)).
354. *Id.* at 549 (citation omitted).
355. *See id.*
356. *See* Rojas v. Fed. Aviation Admin., 989 F.3d 666, 682 n.8 (9th Cir. 2021) (en banc) (Collins, J., concurring).
357. *See* Petition for Writ of Certiorari at 16–17, Rojas v. Fed. Aviation Admin., 142 S. Ct. 753 (2022) (No. 21-133), *denying cert. to* 989 F.3d 666 (9th Cir. 2021); *see also* Am. Oversight v. U.S. Dep't of Transp., No. 18-1272, 2022 WL 103306, at *3 (D.D.C. Jan. 11, 2022). *But see* Jobe v. Nat'l Transp. Safety Bd., 1 F.4th 396, 404 n.8 (5th Cir. 2021) (describing *Lucaj*'s holding as casting doubt on but not rejecting the consultant corollary).

similarly could not agree on *Lucaj*'s takeaway.[358] At least one commenter has noted that *Lucaj* is the sole decision from an appellate court to limit Exemption 5 to government agencies after *Klamath*.[359]

2. Advocates Relying on Interpretations of Exemptions 2 and 4 to Narrow Exemption 5

Although *Lucaj*'s interpretation of Exemption 5 generally stands alone, the Supreme Court has recently taken a similar approach, focusing on plain meaning, rather than judicially created tests, in interpreting other FOIA exemptions.[360] These precedents—*Milner v. Department of the Navy*,[361] examining 5 U.S.C. § 552(b)(2) ("Exemption 2"), and *Food Marketing Institute v. Argus Leader Media*,[362] examining 5 U.S.C. § 552(b)(4) ("Exemption 4")—have since animated pro-disclosure advocates in pushing for a narrower Exemption 5.[363]

Exemption 2 covers records "related solely to the internal personnel rules and practices of an agency,"[364] but, before *Milner*, the D.C. Circuit expanded its reach to include "any 'predominately internal' materials whose disclosure would 'significantly ris[k] circumvention of agency regulations or statutes.'"[365] Motivating the D.C. Circuit's interpretation was a "common sense" approach to FOIA, and several other circuits followed its lead.[366] What emerged was a "Low 2" versus "High 2" test, with a "Low 2" exemption covering materials related to human resources and employee relations and a "High 2" exemption covering records whose disclosure risked circumvention of the law.[367] The Supreme Court rejected this distinction and ruled that the exemption covered only what its plain meaning allowed:

---

358. *Compare Rojas*, 989 F.3d at 674 n.2 (stating that *Lucaj* "question[ed] the validity of the consultant corollary"), *and id.* at 686 (Wardlaw, J., concurring in part and dissenting in part) (stating that *Lucaj* refused to read the common interest doctrine into Exemption 5's plain text and "cast serious doubt on" the consultant corollary under the same rationale), *with id.* at 682 n.8 (Collins, J., concurring) (stating that *Lucaj* targeted only the common interest doctrine and rejected conclusory uses of "intra-agency," not the consultant corollary).

359. Brinkerhoff, *supra* note 66, at 601.

360. *See* Milner v. Dep't of the Navy, 562 U.S. 562, 569 (2011) ("Judicial decisions since FOIA's enactment have analyzed and reanalyzed the meaning of the exemption. But comparatively little attention has focused on the provision's [twelve] simple words . . . ."); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) ("[J]ust as we cannot properly *expand* [a FOIA exemption] beyond what its terms permit, we cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms." (citation omitted)).

361. 562 U.S. 562 (2011).

362. 139 S. Ct. 2356 (2019).

363. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 357, at 1–2; Petition for Writ of Certiorari at 18–20, Jobe v. Nat'l Transp. Safety Bd., 142 S. Ct. 757 (2022) (No. 21-469), *denying cert. to* 1 F.4th 396 (5th Cir. 2021); Brief of Amicus Curiae the Reporters Comm., *supra* note 313, at 3.

364. 5 U.S.C. § 552(b)(2).

365. *See Milner*, 562 U.S. at 566 (citations omitted) (quoting Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056–57, 1074 (D.C. Cir. 1981) (en banc)).

366. *See id.* at 566–67; *cf. supra* Part I.C.1 (detailing Exemption 5's expansion from a "common sense" D.C. Circuit test that spread to other circuits).

367. *See Milner*, 562 U.S. at 567.

internal agency rules and practices (essentially records that deal with employee relations or human resources).[368] The D.C. Circuit test splitting the types of materials afforded Exemption 2 protection "suffer[ed] from a patent flaw" in that it had no basis in FOIA's text.[369] Even though the interpretation survived for some thirty years among circuits, the Court refused to "flout all usual rules of statutory interpretation."[370]

The Court undertook a similar analysis of Exemption 4 in *Argus Leader*, only this time *expanding* the exemption's scope by focusing on its plain meaning.[371] Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[372] Similarly to how it had read Exemption 2, the D.C. Circuit years prior had adopted a test not grounded in the exemption's text to determine what records were confidential.[373] And again, several circuits adopted variations on this non-textual test.[374] The Supreme Court, however, saw the D.C. Circuit's requirement of "substantial competitive harm" for the exemption to be invoked as "a casual disregard of the rules of statutory interpretation."[375] Instead of following the D.C. Circuit, the Supreme Court ruled that Exemption 4 applied simply to commercial or financial information that is customarily and actually treated as private by its owner and given to the Government with the assurance of privacy.[376] Although expanding the exemption's reach, the Court said it could not "arbitrarily" limit a FOIA exemption without a textual basis.[377] The Court had previously stated that FOIA exemptions should be narrowly construed[378] but, in *Argus Leader*, said that it could not give FOIA exemptions "anything but a fair reading" given the interests the exemptions serve.[379]

Before the Court decided *Argus Leader*, commenters saw *Milner* as a potential bellwether for how the Supreme Court would rule.[380] Indeed, in

368. *See id.* at 570.
369. *See id.* at 573.
370. *See id.* at 575–77.
371. *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).
372. 5 U.S.C. § 552(b)(4).
373. *See Argus Leader*, 139 S. Ct. at 2364. Under the D.C. Circuit test, a court had to find disclosure "is likely . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained" for a record to be "confidential" under Exemption 4. *Id.* (quoting Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974)).
374. *See id.*; *cf. supra* Part I.C.1.
375. *See Argus Leader*, 139 S. Ct. at 2364.
376. *See id.* at 2366.
377. *See id.*
378. *See supra* note 89.
379. *See Argus Leader*, 139 S. Ct. at 2366.
380. *See* Mark Fenster, *Argument Analysis: Justices Appear Likely to Endorse Broader Reading of FOIA Exemption for "Confidential" Commercial Information*, SCOTUSBLOG (Apr. 23, 2019), https://www.scotusblog.com/2019/04/argument-analysis-justices-appear-likely-to-endorse-broader-reading-of-foia-exemption-for-confidential-commercial-information/ [https://perma.cc/DG5G-ZCWK]; Bernard Bell, *Oh SNAP!: The Battle Over "Food Stamp" Redemption Data That May Radically Reshape FOIA Exemption 4 (Part III-A)*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Sept. 23, 2018), https://www.yalejreg.com/nc/oh-

Argus Leader, Justice Gorsuch cited Justice Kagan's *Milner* opinion favorably, and Justice Kagan joined the *Argus Leader* majority.[381] In both cases, the Court took the approach of starting and ending with the text of FOIA.[382] As advocates pushing for changes to Exemption 5 precedent have noted, the Court did not shy away from overturning long-standing D.C. Circuit precedent, which had been recognized in other circuits, when those interpretations were the product of judicial creation rather than statutory language.[383] In petitioning for the Supreme Court to review their cases, the FOIA requesters in *Rojas* and *Jobe* analogized atextual Exemption 5 expansions to the prior Exemptions 2 and 4 interpretations.[384] The Court, however, declined the opportunity to consider these cases in 2021.[385] In one of the pending D.C. Circuit cases, the Reporters Committee for the Freedom of the Press in an amicus brief argued the consultant corollary was akin to the D.C. Circuit's Exemptions 2 and 4 tests that the Supreme Court overturned.[386] Although the sole circuit limiting Exemption 5, the Sixth Circuit in *Lucaj* did not consider *Milner*'s approach, and the case was decided before *Argus Leader*.[387] This analogy to Exemptions 2 and 4 has not featured in binding circuit precedent, but several dissenting judges in *Rojas* found the analogy persuasive.[388]

III. THE CASE FOR NARROWING EXEMPTION 5

Against the backdrop of post-*Klamath* expansion, Part III of this Note advocates for a narrower reading of Exemption 5 by limiting the scope of the threshold requirement no further than where the Supreme Court has already taken it—the Executive Branch.[389] Not only does a narrower Exemption 5 easily draw support from FOIA's text, but focusing on FOIA's history and purpose also furthers a narrower reading despite many circuits appealing to purpose-driven arguments to expand Exemption 5.[390] The current tests for Exemption 5's threshold requirement that allow outsiders within its reach

snap-the-battle-over-food-stamp-redemption-data-that-may-radically-reshape-foia-exemption-4-part-iii-a/ [https://perma.cc/C5JL-UVQ6].

381. *See Argus Leader*, 139 S. Ct. at 2364, 2366.

382. *See* Mark Fenster, *Opinion Analysis: Court Gives Broad Meaning to "Confidential" in FOIA Exemption for Commercial and Financial Information*, SCOTUSBLOG (June 24, 2019), https://www.scotusblog.com/2019/06/opinion-analysis-court-gives-broad-meaning-to-confidential-in-foia-exemption-for-commercial-and-financial-information/ [https://perma.cc/P4VV-EC46].

383. Brief of Amicus Curiae the Reporters Comm., *supra* note 313, at 3, 5.

384. *See* Petition for Writ of Certiorari, *supra* note 357, at 1–2; Petition for Writ of Certiorari, *supra* note 363, at 18–20.

385. *See* Rojas v. Fed. Aviation Admin., 142 S. Ct. 753 (2022) (No. 21-133), *denying cert. to* 989 F.3d 666 (9th Cir. 2021); Jobe v. Nat'l Transp. Safety Bd., 142 S. Ct. 757 (2022) (No. 21-469), *denying cert. to* 1 F.4th 396 (5th Cir. 2021).

386. Brief of Amicus Curiae the Reporters Comm., *supra* note 313, at 5.

387. *See* Lucaj v. Fed. Bureau of Investigation, 852 F.3d 541, 543–49 (6th Cir. 2017).

388. *See* Rojas v. Fed. Aviation Admin., 989 F.3d 666, 686 (9th Cir. 2021) (en banc) (Wardlaw, J., concurring in part and dissenting in part).

389. *See supra* notes 121–22, 175 and accompanying text.

390. *See infra* Part III.A.

have created inconsistent and incompatible precedent.[391] An Exemption 5 that limits the inter- or intra-agency requirement to the Executive Branch will lead to more consistent results across FOIA and administrative law and will better serve the public.[392]

A. Why a Narrow Exemption 5 Is Legally Correct

Both the text and purpose of Exemption 5 support an interpretation that limits its availability to private consultants and common-interest litigants. This section shows why FOIA's plain meaning and structure necessitate a narrow Exemption 5. It also demonstrates why, contrary to many circuits' purpose- and policy-driven arguments for expansion, FOIA's balance and the exemption's purposes support a narrow Exemption 5 instead.

1. The Text-Based Argument

Both the plain meaning of Exemption 5 and the structure of FOIA support limiting its reach. As Justice Scalia observed, the plain and most natural meaning of inter- or intra-agency memorandums are those shared to and from agency employees.[393] At the time FOIA was enacted, the common meanings of "inter-agency" and "intra-agency" records would not include those generated by private consultants or litigants.[394] Because FOIA does not define inter- or intra-agency, their plain meanings should control.[395] FOIA's structure also supports this interpretation. Congress knew how to write FOIA exemptions that permit communications with outsiders, as Exemptions 4 and 8 contemplate, yet excluded such a reference in Exemption 5.[396] Courts should give meaning to this distinction between the exemptions, and outsiders should not be within Exemption 5's reach. Moreover, broad interpretations of Exemption 5 also collapse any distinction between an agency record and an inter- or intra-agency memorandum.[397] FOIA's disclosure requirements apply to agency records, which are records in an agency's possession acquired through its official duties, even if their source or author are not agencies or their employees.[398] Exemption 5's exception to this disclosure requirement, however, is plainly limited to agency records that are inter- or intra-agency.[399] Not giving a proper meaning to this

391. *See infra* Part III.B.
392. *See infra* Part III.C.
393. *See supra* note 145 and accompanying text.
394. *See supra* notes 3, 348–49 and accompanying text.
395. *Cf.* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019) ("FOIA nowhere defines the term 'confidential.' So, as usual, we ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted FOIA in 1966." (first quoting 5 U.S.C. § 552(b)(4); then quoting Perrin v. United States, 444 U.S. 37, 42 (1979))).
396. *See supra* notes 204, 331, 354 and accompanying text.
397. *See* Rojas v. Fed. Aviation Admin., 989 F.3d 666, 694 n.5 (9th Cir. 2021) (en banc) (Bumatay, J., concurring in part and dissenting in part).
398. *See supra* notes 94–95.
399. *See* U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9 (2001) (calling Exemption 5's first condition "no less important than the second" and noting "the apparent plainness" of the first condition's text); *see also supra* note 205.

distinction between all agency records and inter- or intra-agency ones makes Exemption 5's threshold requirement purely conclusory, which *Klamath* forbids.[400]

That the text of FOIA is clear and consistent should be the end of the discussion.[401] To the extent that another "textually possible" interpretation of Exemption 5 exists, as Justice Scalia noted, this interpretation is openly grounded in purpose- and policy-driven rationales, not FOIA's text.[402] Rather than relying on his trademarked tools of textual interpretation, Justice Scalia merely saw a new reading as a more "desirable" outcome.[403] Other judges who have supported the consultant corollary have attempted text-based arguments.[404] The problem with these readings, however, is that they import ambiguity into the statute with a policy outcome in mind, rather than starting and ending with the text when it is clear.[405] To the extent that two interpretations could exist, the Supreme Court has long held that courts should favor narrow interpretations of FOIA's exemptions to serve its broader goal of disclosure.[406] A narrow interpretation also creates consistency with *Milner*'s and *Argus Leader*'s approach by rejecting "text-light"[407] D.C. Circuit tests that are "relic[s] from a 'bygone era of statutory construction.'"[408]

400. *See supra* notes 161–62.

401. *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("Where, as here, that examination yields a clear answer, judges must stop.").

402. *See* U.S. Dep't of Just. v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting) (stating that the second interpretation is one "in accord with *the purpose*" of Exemption 5 (emphasis added)).

403. *See id.*; *see also* Rojas v. Fed. Aviation Admin., 989 F.3d 666, 698 (9th Cir. 2021) (en banc) (Bumatay, J., concurring in part and dissenting in part) (suggesting that Justice Scalia's reading of Exemption 5 departed from his text-based principles). Justice Scalia was a critic of FOIA, once dubbing it "the Taj Mahal of the Doctrine of Unanticipated Consequences" in a scathing essay. *See* Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14, 15; *see also* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 111–12 (2009). In his essay, Justice Scalia argued that FOIA was not worth the costs that it imposed on agencies to search for records. *See* Scalia, *supra*, at 16–17. However, he also alluded to Exemption 5 and seemingly acknowledged that it provided no protection "for the internal communications of private organizations that come into the government's hands." *See id.* at 18. Only "internal consultation and advice within the government itself is exempted from disclosure," Justice Scalia admitted. *Id.*

404. *See supra* notes 196, 202.

405. *Cf. Argus Leader*, 139 S. Ct. at 2364.

406. *See supra* note 89 and accompanying text.

407. Milner v. Dep't of the Navy, 562 U.S. 562, 573 (2011).

408. *See Argus Leader*, 139 S. Ct. at 2364; *see also supra* Part II.C.2. As a dissent in *Rojas* noted, a mere piece of "untethered dicta"—the D.C. Circuit's *Soucie* footnote—spawned Exemption 5 expansion. *See Rojas*, 989 F.3d at 685 (Wardlaw, J., concurring in part and dissenting in part).

2. The Purpose-Based Argument

A narrow Exemption 5 not only finds support in its text, but it also serves FOIA's disclosure goals and the exemption's underlying purposes—protecting agency decision-making and preventing discovery workarounds.

One reason Congress enacted Exemption 5 was to protect the quality of agency decisions by preserving *internal* discussions and preventing disclosure's potential chilling effect.[409] Limiting Exemption 5's reach only to internal discussions furthers the underlying balance that its crafters sought to protect.[410] Stopping at the Executive Branch ensures that the exemption is limited "as narrowly as consistent with efficient [g]overnment operation" by keeping documents internal to the Executive Branch confidential.[411] Although not all Executive Branch entities are agencies, like presidential advisers, this limit would provide a clear and narrow stopping point for Exemption 5, consistent with its goals and Supreme Court precedent.[412] The chilling effect rationale, moreover, is weaker when extended to private parties or Congress. First, it has little empirical basis even applied to internal agency communications.[413] Second, it ignores the potential "warming effect," whereby some speakers would welcome the release of their communications for the publicity and disclosure of their views.[414] If members of Congress, for example, are communicating with agencies to represent their constituents' views, there should be little concern about not being able to speak freely given their representative duties.[415] If Congressmembers and staff, however, are representing outside interests—or if interested parties themselves are speaking to agencies—then FOIA exists precisely to reveal such communications.[416]

A narrow Exemption 5 is also consistent with its aim not to allow FOIA to skirt the protections of privileges in pretrial discovery. To be sure, this Note does not advocate for a reading of Exemption 5 that enables disclosure of privileged records that an agency maintains when hiring a private attorney for legal advice.[417] Exemption 5 seeks to ensure that the Government is not

---

409. *See supra* notes 58–63 and accompanying text.

410. *See supra* notes 57–63, 151–52 and accompanying text.

411. *See* S. REP. NO. 89-813, at 9 (1965).

412. *See supra* notes 59, 92, 121 and accompanying texts. The D.C. Circuit in *Judicial Watch* correctly noted that it would be "inconceivable" for Congress to intend Exemption 5 to protect the decision-making of agencies, which the President oversees, but not allow for the same protection when those agencies and the President communicate on policy. 412 F.3d 125, 130 (D.C. Cir. 2005). It is not obvious from that rationale that the same can be said of private consultants providing outside views on what the Government should do.

413. *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 886–87 (1990).

414. *See* Robert L. Saloschin, *When to Assert the Deliberative Privilege Under FOIA Exemption 5*, 38 FED. BAR J. 148, 152 (1979).

415. *Cf. supra* note 325 and accompanying text.

416. *Cf. supra* notes 242–44 and accompanying text.

417. *Cf. supra* note 199 (flagging this possibility as a policy rationale not to adopt a narrower Exemption 5).

disadvantaged in litigation compared to private parties.[418] As such, the intra-agency requirement of Exemption 5 should be read to include communications with private attorneys representing the Government. Holding otherwise "would 'compel an odd result'" contrary to the exemption's clear purpose.[419] When a result "is difficult to fathom or where it seems inconsistent with Congress' intention," it is permissible for courts to look beyond "the naked text."[420] To the extent that a narrow Exemption 5 could reveal agency communications with their hired outside attorneys, such a result would be a candidate for a limited override of FOIA's text, extending the intra-agency requirement to hired private attorneys representing the Government.[421] However, revealing outside information that shapes agency decisions, like communications with private consultants or litigants, is not "difficult to fathom"—it is what FOIA aims to reveal.[422]

Moreover, private parties in a lawsuit have no ability to claim a deliberative privilege for their own internal discussions or for communications with outside consultants or experts.[423] Reading Exemption 5 to allow the Government to invoke such a privilege does not put agencies on a level playing field in litigation—it grants them a protection that private parties do not have.[424] The deliberative process privilege as applied to internal communications is arguably a necessary way to protect the quality of agency decision-making.[425] But to the extent that the privilege has expanded to outside experts, the inter- or intra-agency requirement of Exemption 5 reflects Congress's intent to depart from this expansion under FOIA.[426] Relatedly, a necessary implication of *Klamath*'s two requirements for Exemption 5 is that some privileged records can be released under FOIA, a result Congress wanted.[427] In this way, excluding the consultant corollary

418. *See supra* notes 262–63 and accompanying text.

419. *See* Pub. Citizen Inc., v. U.S. Dep't of Just., 491 U.S. 440, 454 (1989) (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989)); *see also supra* note 112 and accompanying text.

420. *Pub. Citizen*, 491 U.S. at 455.

421. *See* Rojas v. Fed. Aviation Admin., 989 F.3d 666, 697 (9th Cir. 2021) (en banc) (Bumatay, J., concurring in part and dissenting in part).

422. *See supra* notes 95, 277, 335 and accompanying text.

423. *See* United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). A client's communications to a third-party consultant, like an accountant, remain privileged only after a lawyer has directed the client to seek out the consultant as a necessary part of the lawyer's representation. *See id.* No privilege exists if all the client seeks is the consultant's services. *See id.* Thus, the documents in *Rojas* might remain confidential, albeit on a different understanding of Exemption 5 than the majority's, if the work product doctrine were to properly apply. *See supra* note 186 and accompanying text.

424. *Cf. supra* note 334. Another reason to limit the privilege in Exemption 5 is that litigants suing an agency can overcome a claim of the deliberative process privilege whereas FOIA requesters have no such ability. *See supra* notes 108–09 and accompanying text.

425. *See supra* note 104.

426. Brinkerhoff, *supra* note 66, at 584 ("Congress did not transfer this privilege to FOIA unscathed.").

427. *See supra* notes 160–62; U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 16 (2001) ("Congress had to realize that not every secret under the old law would be secret under the new."); *see also supra* notes 113, 205.

and the common interest doctrine's incorporation into Exemption 5 through the threshold requirement remains consistent with FOIA's drafters' measured approach to its exemptions.[428] This Note does not argue that the Government cannot or should not employ private consultants or enter common interest agreements, but rather that Exemption 5 does not protect from disclosure communications shared with these parties when an agency receives a FOIA request.

B. Why the Current State of Exemption 5 Precedent Is Unworkable

This Note has shown why a narrow reading of Exemption 5 is consistent with FOIA's text and purpose.[429] Even if courts remain convinced of the merits of a broader exemption, the Supreme Court must resolve irreconcilable differences in existing precedent and answer the difficult question of what constitutes a disqualifying self-interest. This section will show why existing precedent cannot coexist and the interest question may be impossible to manage.

Certain circuits' interpretations of Exemption 5 violate *Klamath*'s clear mandates in two ways. First, *Klamath* explicitly bars self-interested communications seeking a government benefit not available to others from Exemption 5.[430] The Fourth Circuit in *Hunton & Williams*, however, acknowledged that it was allowing just that within the exemption.[431] As the court stated, litigating with the Government is a valuable benefit that comes at the expense of litigation opponents.[432] That a common interest agreement is reached or that an agency identifies a common goal does not change that a non-agency communicates with its own interests in mind, violating *Klamath*'s charge.[433] Second, *Klamath* requires an independent inquiry into the two requirements of Exemption 5—the document's source and the privilege invoked.[434] The D.C. Circuit test, however, asks whether a record aids an agency's deliberative process to answer whether it is intra-agency.[435] In doing so, the D.C. Circuit collapses the exemption's requirements and allows an agency's claim of privilege to transform self-interested communications into intra-agency records.[436]

---

428. The uncertainties around the contours of the common interest doctrine should also give courts pause before reading Exemption 5 to incorporate it, as the Supreme Court has noted that the exemption does not necessarily include every discovery privilege. *See supra* notes 113, 117–19. Moreover, if certain sensitive information were shared within such an agreement, other exemptions, like Exemption 4, could theoretically protect the communications. *See* Hunton & Williams v. U.S. Dep't of Just., 590 F.3d 272, 284 (4th Cir. 2010).

429. *See supra* Part III.A.

430. *See supra* note 165 and accompanying text.

431. *See supra* notes 265–70 and accompanying text.

432. *See supra* note 269.

433. *See supra* note 277 and accompanying text.

434. *See supra* notes 160–62.

435. *See supra* notes 289–90, 292, 301–02.

436. *See supra* notes 304, 318, 325 and accompanying text.

The circuits' current interpretations of Exemption 5 also conflict with themselves. Although the scope of the Sixth Circuit's holding in *Lucaj* has been debated, it appears incompatible with at least the Fourth Circuit's *Hunton & Williams* decision, creating a split on whether inter- or intra-agency documents can include those generated pursuant to a common interest agreement.[437] The Fourth Circuit also sits in tension with the Ninth Circuit because *Rojas*, like *Klamath*, stated that self-interested communications fall outside Exemption 5.[438] The Ninth Circuit's rationale for this observation—that such communications could not be deemed to be functionally equivalent to agency staff's work—creates a conflict with the D.C. Circuit as well.[439] Under the D.C. Circuit's test, communications from members of separate branches of government can fall within Exemption 5.[440] Members of Congress, however, can never do their work in a functionally equivalent way to an agency employee, thus conflicting with the Ninth Circuit's view of the consultant corollary.[441]

Underpinning much of this tension is the amorphous concept of self-interest, as the U.S. District Court for the District of Columbia observed in *Competitive Enterprise*.[442] When compared with *Stewart* in the Tenth Circuit, the *Competitive Enterprise* decision demonstrates the challenges of administering existing self-interest tests. *Competitive Enterprise* concerned communications to an agency from a climate scientist who was considered the leading expert on a particular view.[443] The court ruled that her communications were not intra-agency because she had a "professional and reputational stake" on the line when the agency was considering correcting statements its officials made based on her research.[444] *Stewart*, however, held that communications from experts with deep-seated views who get intellectual satisfaction from an agency adopting their views can be intra-agency.[445] To the extent that these decisions are distinguishable, a court would have to sift through whether an expert is *a* leading voice in a field consulted because of that expertise, rather than *the* leading expert consulted because they first proposed a theory. Limiting Exemption 5 to internal Executive Branch discussions is a much more effective application of Exemption 5. Moreover, the debate within D.C.'s district courts, struggling

437. *See supra* notes 356–59 and accompanying text.
438. *See supra* notes 187–90.
439. *See supra* notes 188–89, 192.
440. *See supra* notes 321–22.
441. *See* Brief of Amicus Curiae the Reporters Comm., *supra* note 313, at 20. Not only are they not functionally equivalent, but they are also "opposite and rival" political branches with an "ongoing institution relationship." *See id.* (quoting Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2033–34 (2020)).
442. *See supra* note 320.
443. Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y, 161 F. Supp. 3d 120, 134 (D.D.C. 2016).
444. *Id.* at 133–35.
445. *See supra* notes 213, 218–20.

to apply one circuit's precedent, is evidence of the unworkability of a test that hinges on the self-interest of an outsider.[446]

C. Why Exemption 5 Ought to Be Interpreted Narrowly

In addition to its consistency with FOIA's text and purpose and the inconsistency of existing Exemption 5 precedent, a narrow Exemption 5 is a normatively desirable result. This section demonstrates why narrowing Exemption 5 benefits the public, effectuates the right to reveal how outside parties influence agency decisions, bolsters existing agency transparency laws, and creates a judicially manageable solution.

When enacted, FOIA struck a delicate balance between the benefits of disclosure and the need to withhold.[447] Extending Exemption 5 to external discussions with private consultants and litigants, however, represents a different balance of interests than the one initially imagined in the provision—preventing government from being a "fishbowl."[448] If Exemption 5 allows agencies to withhold pre-decisional, deliberative documents because of the public's low interest in interim *internal* discussions balanced against an agency's need for confidentiality, that balance changes when outsiders inform how government officials act.[449] In other regulatory contexts, there are limits on how outside, interested parties influence an agency's power to regulate.[450] Given that Exemption 5 expansion has allowed regulated industry players to fall within its reach,[451] it is a modest step to keep their communications in the public view under FOIA.

The Ninth Circuit's approach may seem like a balanced counter to a narrower Exemption 5. By limiting the exemption's reach only to disinterested outsiders, it resists the potential for improper influence on agencies to go unseen while facilitating agencies' use of such advice to better outcomes by preventing disclosure's chilling effect. The issue, however, is how easily a court can shift along the self-interest spectrum.[452] The circuits upholding outsider communications as properly within Exemption 5 have all seen their decisions as consistent with *Klamath*.[453] By hinging the analysis on whether the outsider is self-interested, the outsider's interests can be manipulated—casting even regulated industry players as uninterested consultants.[454] On the one hand, a truly uninterested outsider may be dissuaded from giving expert advice due to the fear of disclosure, under this

446. *See supra* Part II.B.2.
447. *See supra* notes 38, 42, 57 and accompanying text.
448. *See supra* notes 59–63 and accompanying text.
449. *Cf. supra* note 104 and accompanying text.
450. *See* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 896 F.3d 539, 543–46 (D.C. Cir. 2018) (stating that an economically self-interested entity competing with other regulated entities cannot directly regulate those competitors).
451. *See supra* notes 242–44.
452. *See supra* notes 279, 320, 442.
453. *See supra* notes 187, 221, 240, 265, 292.
454. *See supra* notes 242–43 and accompanying text.

Note's proposal.[455] On the other hand, communications from interested private companies have been smuggled into the intra-agency requirement and, thus, shielded from disclosure because that private interest can be cast as aligned with the public's interest or as below a permissible threshold.[456] Given FOIA's history, purpose, and text, the former is certainly the more desirable tradeoff.

Limiting Exemption 5 expansion also creates cohesion within existing administrative transparency laws. During notice-and-comment rulemaking, for example, comments are public and on the record, and an agency must account for the comments it followed and those it did not.[457] Ex parte communications that provide the basis for a final decision would also need to be disclosed.[458] A broad Exemption 5, however, allows agencies to pick their desired outside expert for less formal decisions, then not disclose their influence if the agency ultimately grounds its decision on a different rationale.[459] Inconsistent results also emerge with FACA and Exemption 5's interaction. Although FACA's reach was not intended to cover all outside consultations or one-off communications between agencies and non-agencies,[460] reading Exemption 5 to allow for non-disclosure of non-agency consultations with agencies creates a void in the law. Non-agency consultative groups that agencies formally establish have affirmative transparency requirements.[461] By contrast, informal back-and-forths between an agency and a private consultant would not only lack an affirmative disclosure requirement under FACA but also remain exempt from FOIA disclosure under a broad Exemption 5.[462] Moreover, an agency could rely on advice from a committee within FACA's reach and claim those communications as protected under Exemption 5, but the committee would have an affirmative disclosure obligation under FACA.[463] The APA's and FACA's mandates on transparency and disclosure, when considered with Exemption 5's history and FOIA's goals, reflect a commitment in administrative law to govern internal agency deliberations differently from those that involve outsiders.[464] Outsider views certainly improve agency decisions, and many cannot practically go through the procedural channels of notice-and-comment rulemaking or formal advisory bodies. However, FOIA was meant to reveal the information agencies use to

455. *See supra* notes 197–98.

456. *See supra* notes 240, 268–69, 318 and accompanying text.

457. *See supra* note 72.

458. *See* ESA L. SFERRA-BONISTALLI, ADMIN. CONF. OF THE U.S., *EX PARTE* COMMUNICATIONS IN INFORMAL RULEMAKING 5, 75–77 (2014), https://www.acus.gov/sites/default/files/documents/2014-4%20Report.pdf [https://perma.cc/N3S3-LYEM].

459. *See supra* note 104 and accompanying text.

460. *See* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 453 (1989).

461. *See supra* note 78 and accompanying text.

462. *See supra* Parts II.A–B.

463. *See* Memorandum from John O. McGinnis, Deputy Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to Assistant Att'y Gen., Off. of Legal Pol'y, U.S. Dep't of Just., *Disclosure of Advisory Committee Deliberative Materials* 82 n.28 (Apr. 29, 1988), https://www.justice.gov/file/24061/download [https://perma.cc/K37K-J7TH].

464. *See supra* Part I.A.

reach a decision, not withhold it.[465] Given that FOIA already cannot reach congressional or private records on their own,[466] further concealing outsider communications harms the public's ability to provide agency oversight and sits in tension with basic principles.

Beyond promoting the public's interest in disclosure and accountability in administrative law, a narrow interpretation of Exemption 5 would create a more desirable outcome for judicial management of FOIA. As Part III.B illustrates, current Exemption 5 precedent is unworkable and conflicted.[467] Limiting the threshold requirement to communications within the Executive Branch would eliminate inconsistencies in the precedent.[468] Given judicial deference toward agency withholdings, expansive interpretations of Exemption 5 also effectively leave it up to agencies to determine when the outsiders that they consult with have a permissible level of self-interest for their communications to be deemed intra-agency.[469] A bright-line rule for the exemption would limit the possibility for this discretion and keep Exemption 5 within the bounds of what the Supreme Court has thus far approved.[470]

CONCLUSION

For more than fifty years, FOIA has provided a way for the public to hold federal agencies accountable. The law is not perfect, but it serves a valuable role in promoting transparency and good governance. In considering how to interpret FOIA's exemptions, courts should not forget its history and purpose in replacing a broken disclosure law. Although its balance in Exemption 5—seeking to preserve the quality of agency action—should be honored, so too should the Act's general mandate of disclosure. Against a backdrop of agencies' potential abuse and judges' potential deference in FOIA matters, the proposal of this Note is modest: honor both FOIA's text and its purpose, not judge-made doctrines that enable government secrecy. That agencies may be uncomfortable with the narrowing of a FOIA exemption should be evidence that the law is better serving its goals.

This Note has shown how FOIA can facilitate agency transparency and how its framers struck a delicate balance. The Supreme Court's limited instructions on Exemption 5 have given some circuits apparent license to tip that balance toward withholding, not disclosure. Limiting Exemption 5's scope to records generated within the Executive Branch is a commonsense approach to the provision, and one that tips FOIA's scales back toward their original equilibrium.

---

465. *See supra* note 95.
466. *See supra* note 92.
467. *See supra* Part III.B.
468. *See supra* Part III.B.
469. *See supra* notes 85–88, 110–11 and accompanying text.
470. *See supra* notes 121–22 and accompanying text.