

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5307
(C.A. No. 17-0410)

ELECTRONIC PRIVACY
INFORMATION CENTER,

Appellant,

v.

UNITED STATES DEPARTMENT
OF JUSTICE,

Appellee.

APPELLEE’S REPLY IN SUPPORT OF MOTION
FOR SUMMARY AFFIRMANCE

This action was based on a Freedom of Information Act (“FOIA”) request that the Electronic Privacy Information Center (“EPIC”) submitted to the Department of Justice (“DOJ”) seeking records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. (ECF No. 23-1, Brinkman Decl. ¶ 3) EPIC appears to acknowledge that this appeal is limited to two principal issues: (1) DOJ’s reliance on the presidential communication privilege to withhold in full under Exemption 5 the Predictive Analytics Report that DOJ submitted to the White House Counsel’s office and (2) DOJ’s withholding in full of research and briefing materials related to the Predictive Analytics Report that had

been prepared by DOJ employees and outside consultants.¹ As discussed below, EPIC's arguments in its opposition fail to call into question the District Court's well-reasoned analysis granting judgment in favor of DOJ. Accordingly, the correctness of that judgment is so clear that it should be summarily affirmed.

I. The District Court Applied Established FOIA Law In Upholding DOJ's Invocation Of The Presidential Communication Privilege To The Predictive Analytics Report.

EPIC argues that summary affirmance is inappropriate here based on two procedural arguments that are misplaced in the context of a FOIA action. Specifically, EPIC contends that this Court has not directly addressed whether the presidential communication privilege must be personally invoked by the President and, relatedly, whether the President can invoke the privilege with respect to records from a former administration. Although EPIC characterizes these questions as issues of "first impression," the law is well-settled in the FOIA context that the proper focus is on the nature of the documents at issue, not the manner by which an underlying privilege is invoked. EPIC also advances an overly technical interpretation of existing precedent to contend that privilege does not attach to the

¹ Because the District Court concluded that the presidential communication privilege supported the withholding in full of the Predictive Analytics Report, the District Court properly determined that it was unnecessary to assess the extent to which the deliberative process privilege also applied to that report. (Mem. Op. at 5 n.4) EPIC's contention that the District Court applied the deliberative process privilege to the Report (Opp. at 9) is thus incorrect.

Predictive Analytics Report. As discussed below, none of these arguments has merit.

A. The Application of Exemption 5 Of FOIA Does Not Depend On The Manner In Which The Privileges Underlying The Exemption Are Raised.

EPIC exaggerates the so-called novelty of the procedural issues presented here in the context of FOIA, where it is well settled that the application of Exemption 5 “depends on the factual content and purpose of the requested document,” not on the manner in which it is raised. *See Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990). As the Supreme Court has long recognized, Exemption 5 exempts “those documents . . . normally privileged in the civil discovery context,” *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975), and understands the exemption to be a “categorical rule” to effectuate FOIA’s goal of “expediting disclosure by means of workable rules.” *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Thus, an agency does not invoke a privilege when it asserts Exemption 5 but makes a determination that a document is of a type “normally” protected from disclosure in civil discovery. Consequently, the relevant question is whether the document falls within the scope of a recognized privilege such that it would be protected in discovery if properly invoked in that context.

Accordingly, although this Court has not directly addressed the procedural issues raised by EPIC in the context of civil discovery, the District Court’s analysis

rests on the established principle that Exemption 5 is a categorical rule that focuses on the document at issue rather than the manner in which the privilege is invoked. Because the District Court's decision is based on settled principles in the FOIA context, summary affirmance is appropriate here.

For the same reason, the District Court also properly observed that its determination that DOJ can invoke the privilege in the FOIA context dispenses with EPIC's related argument as to whether a current administration can rely on the privilege for withholding under Exemption 5 records of a prior administration. (Mem. Op. at 7) Accordingly, EPIC's procedural arguments are unavailing.

B. The District Court Properly Applied *In re Sealed Case*

In *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), this Court explained the contours of the presidential communications privilege as follows:

[T]his privilege extends to cover communications which do not themselves directly engage the President, provided the communications are either authored or received in response to a solicitation by presidential advisers in the course of gathering information and preparing recommendations on official matters for presentation to the President. The privilege also extends to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter.

Id. at 757.

Based on this decision, the District Court correctly determined that the summary judgment record supported the application of the privilege to the Predictive

Analytics Report. As the declaration submitted by DOJ established, the Predictive Analytics Report was prepared by DOJ for submission to the White House following a 2014 White House report that tasked President Obama's senior advisers with leading a comprehensive review of the effect of big data technologies, including the use of predictive analytics in law enforcement. (ECF No. 23-1, Brinkman Decl. ¶¶ 10-12) The Predictive Analytics Report was thus prepared at the direction of the White House. (*Id.* ¶ 12) Once the Predictive Analytics Report was finalized, moreover, it was submitted to the White House Counsel's office. (*Id.* ¶ 13)

Based on these undisputed facts, the District Court properly determined that the Predictive Analytics Report fell within the scope of the presidential communications privilege because the White House “solicited and received” the Report from DOJ and, thus, the report was prepared at the direction of the White House and submitted to the White House Counsel's office. (Mem. Op. at 5, citing Brinkmann Decl. ¶¶ 42-43) Accordingly, because the Report was a communication “solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate,” *In re Sealed Case*, 121 F.3d at 752, the District Court properly determined that the privilege applied to this material. (Mem. Op. at 5).

EPIC's opposition rests on an overly technical reading of *In re Sealed Case* that is unsupported by case authority. EPIC argues that, because the report was transmitted to a staff member within the White House Counsel's office (i.e., an Associate White House Counsel), the privilege cannot apply without a separate showing as to whether the particular staff member had "broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate." (Opp. at 7)

The District Court properly rejected that argument because "[w]hether or not an Associate White House Counsel is 'an immediate White House adviser,' she is a member of the staff of the White House Counsel, who is certainly himself an immediate White House adviser." (*Id.*) And, as the District Court properly determined, the privilege applies to communications involving "members of an immediate White House adviser's staff." *In re Sealed Case*, 121 F.3d at 752; *see also Judicial Watch v. DOJ*, 365 F.3d 1108, 1117 (D.C. Cir. 2004) (reading *In re Sealed Case* as applying the privilege to "[t]he few documents authored by a legal extern in the White House Counsel's Office and the few that had no author . . . because they 'were clearly created at the request of the two associate White House Counsel with broad and significant responsibility' for the White House Counsel's investigation of the Secretary of Agriculture").

EPIC's other arguments likewise have no support in the record. EPIC contends that the District Court "did not address the purpose of the Report or explain how the Report could possibly have been 'generated in the course of advising the President in the exercise' of a 'quintessential and nondelegable Presidential power.'" (Opp. at 8) To the contrary, the District Court discussed in detail the purpose of the Predictive Analytics Report and how it had been solicited by the White House and ultimately delivered to the White House Counsel's office. (Mem. Op. at 5) EPIC's speculation that the report was "not used" for the purpose identified by the District Court (Opp. at 8) has no basis in the record.

II. The District Court Properly Determined That Exemption 5 Applied To The Remaining Withholdings Challenged By EPIC.

The process of preparing the Predictive Analytics Report entailed both conducting internal research (including coordination with other Executive Branch stakeholders and seeking advice from expert consultants outside of DOJ), leading discussions about the progress of the research that had been undertaken, and drafting various iterations of the Predictive Analytics Report that compiled, distilled, presented and analyzed the research that DOJ conducted. (ECF No. 23-1, Brinkman Decl. ¶ 12) EPIC challenges DOJ's withholding in full under Exemption 5 of research and related briefing materials based on the deliberative process privilege. (Opp. at 9)

EPIC's arguments challenging these withholdings are unavailing. DOJ addressed in detail each of these arguments in its motion for summary affirmance and, in opposition, EPIC simply makes conclusory assertions without any discussion of the record on which the District Court relied.

EPIC first argues that the District Court "wrongly determined" that the research and briefing material were covered by the deliberative process privilege based on the conclusory assertion that "these records consist solely of factual material." (Opp. at 9)² In making this bare assertion, EPIC fails to acknowledge the District Court's analysis of the record (Mem. Op. at 9-11, citing Brinkmann Decl. ¶¶ 26-35) and citation to case authority applying the privilege to a compilation of factual material "assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action." (Mem. Op. at 10-11, citing *Mapother v. DOJ*, 3 F.3d 1533, 1539 (D.C. Cir. 1993))

EPIC also asserts, without any basis in the record, that the District Court "improperly determined that the DOJ complied with its obligation to disclose

² Contrary to EPIC's assertion (Opp. at 9), the District Court did not address DOJ's withholding of the Predictive Analytics Report under Exemption 5. *Supra* note 1. Moreover, EPIC also confirmed below that it was not challenging DOJ's withholding in full under Exemption 5 of drafts of the report. (ECF No. 25-1 at 8 n.6)

reasonably segregable material” based on “sweeping” generalizations. (Opp. at 10) To the contrary, the District Court properly recognized that “agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material,” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007), explained how DOJ had satisfied that presumption, and determined that EPIC had failed to adduce evidence to rebut that presumption. (Mem. Op. at 14) EPIC fails in its opposition even to argue that the District Court erred in that determination. (Opp. at 10)

Finally, EPIC contends that the District Court “incorrectly allowed the DOJ to invoke the consultant corollary” based on an “extraordinarily generic” showing as to the nature of the consultants’ interests. (Opp. at 11) However, as the District Court correctly recognized, the record established that the consultants “were not advocating for a government benefit at the expense of others; rather they were simply responding to and cooperating with [the Office of Legal Policy’s] request for assistance.” (Mem. Op. at 13, citing Brinkmann Decl. ¶ 19) Because EPIC failed to provide any evidence to rebut this showing by DOJ, the District Court properly determined that the withheld consultant records were protected by the deliberative process privilege. (Mem. Op. at 13-14)

CONCLUSION

For the foregoing reasons, and those set forth in its motion for summary affirmance, Appellee respectfully requests that the Court summarily affirm the judgment of the District Court.

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**APPELLEE’S CERTIFICATE OF COMPLIANCE
REGARDING REPLY IN SUPPORT OF MOTION FOR SUMMARY
AFFIRMANCE**

I hereby certify that Appellee’s Reply in Support of Motion for Summary Affirmance complies with Fed. R. App. P. 27(d)(2)(C), in that it contains 2,049 words.

/s/ Jeremy S. Simon

JEREMY S. SIMON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2019, the foregoing Reply in Support of Motion for Summary Affirmance has been served on Appellant’s counsel through the Court’s ECF system.

/s/ Jeremy S. Simon

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