



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF SCIENCE AND TECHNOLOGY POLICY  
WASHINGTON, D.C. 20502

March 18, 2021

Enid Zhou  
Electronic Privacy Information Center  
1519 New Hampshire Avenue N.W.  
Washington, D.C. 20036

**Re: OSTP-FOIA-20-058R**

Dear Ms. Zhou:

This letter is in final response to a Freedom of Information Act (henceforth “FOIA”)<sup>1</sup> request originally submitted to the National Security Commission on Artificial Intelligence (hereafter “NSCAI”) on September 11, 2019. During their review, NSCAI determined that some of the records, 83 pages in total, originated from our agency, the Office of Science and Technology Policy (hereinafter “OSTP”).

The original request specifically sought:

- “All records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the National Security Commission on Artificial Intelligence or any subcomponent thereof.

After reviewing the potentially responsive records, OSTP determined that the records should be released, in part, with certain information withheld pursuant to Exemptions Five and Six.<sup>2</sup> The explanations regarding the exemptions are provided below.

**Exemption Five**

Exemption Five of the FOIA permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>3</sup> Accordingly, Exemption Five traditionally incorporates the civil discovery privileges: the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege, among others.<sup>4</sup> In this instance, the information being withheld

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 5 U.S.C. § 552 (b)(5) and (b)(6).

<sup>3</sup> 5 U.S.C. § 552(b)(5).

<sup>4</sup> *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984).



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under Exemption Five is protected from disclosure by the deliberative process and presidential communication privileges.

In order to qualify for the deliberative process privilege, the information must meet three requirements.

First, it must be internal to the executive branch agencies.<sup>5</sup>

Second, the information must be pre-decisional, meaning it was prepared prior to an agency decision.<sup>6</sup>

Third, it must constitute a direct part of the deliberative process by offering recommendations or expressing opinions on legal or policy matters.<sup>7</sup>

Furthermore, while factual information is not usually considered deliberative, when the “facts themselves reflect the agency’s deliberative process” it may also qualify for withholding.<sup>8</sup> Such a situation exists in cases where agency personnel “exercis[e] their judgment” in compiling factual summaries and use discretion to differentiate between significant and non-significant facts.<sup>9</sup>

In this case, OSTP is withholding intra-agency/ inter-agency communications regarding non-final agency actions. The communications contain opinions, suggestions and recommendations on non-final regulatory matters. The requirements of Exemption Five are fully satisfied in this case in that: first, the information was internal to the executive branch.

Second, that the information refers to agency actions that had not yet taken place demonstrates that it was pre-decisional.

Finally, the information is deliberative because it contains recommendations on potential courses of action. Release of this information would chill internal debate and inhibit the free-flow of ideas among Federal employees, thereby violating the interests protected by Exemption Five.<sup>10</sup>

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<sup>5</sup> See 5 U.S.C. § 552(b)(5).

<sup>6</sup> *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Schell v. Health and Human Serv.’s*, 843 F.2d 933, 941 (6th Cir. 1988).

<sup>7</sup> *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991).

<sup>8</sup> *Am. Whitewater Affiliation v. FERC*, 1986 U.S. Dist. LEXIS 17067 (D.D.C. Dec. 1, 1986) (citing *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38-39 (5th Cir. 1992)); see also *Mapother*, 3 F.3d at 1538.

<sup>9</sup> *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 67-68 (D.C. Cir. 1974).

<sup>10</sup> *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).



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## **Exemption Six**

Exemption Six of the FOIA protects the privacy interests of individuals.<sup>11</sup> It permits an agency to protect information within “personal and medical files and similar files” if disclosure “would constitute a clearly unwarranted invasion of personal privacy.”<sup>12</sup>

To determine whether information may be withheld under Exemption Six, an agency must undertake a three-step analysis.

First, the agency must determine whether a protectable privacy interest would be compromised by the disclosure of the record.<sup>13</sup> If no privacy interest is identified, the information may not be withheld pursuant to the exemption.<sup>14</sup>

Second, the agency must determine whether the release of the document would further the public interest by shedding light on the operations and activities of the government.<sup>15</sup> In cases where no public interest exists “even a modest privacy interest,” will outweigh it every time.<sup>16</sup>

Finally, the agency must balance the identified privacy interests against the public interest in disclosure.<sup>17</sup>

In this case, cellular phone numbers, landline phone numbers and email addresses are being withheld. Individuals, including OSTP employees, have a protectable privacy interest in maintaining the confidentiality of their cellular phone numbers, landline phone numbers and email addresses as their release could potentially subject them to undue harassment from members of the public.

Furthermore, release of this information will not shed light on the operations of the Federal government. Accordingly, the privacy interests inherent in the withheld information outweighs the public interest in release and the information may be withheld pursuant to Exemption Six.<sup>18</sup>

Accordingly, this completes the processing of this request. OSTP now considers this request closed.

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<sup>11</sup> *Russell*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

<sup>12</sup> *Id.*

<sup>13</sup> *See Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

<sup>17</sup> *Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994).

<sup>18</sup> *Id.*



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Pursuant to the FOIA and OSTP regulations, a requester may submit a written appeal contesting any adverse determination.<sup>19</sup> Any appeal related to the processing of these requests must either be sent: 1) via e-mail to [OSTPFOIA@ostp.eop.gov](mailto:OSTPFOIA@ostp.eop.gov); or 2) by mail to Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave., N.W., Washington, D.C. 20504.<sup>20</sup> In the appeal letter, please specify OSTP Control No. **20-058R**, “the records requested, and the basis for the appeal.”<sup>21</sup> Any appeal must be sent to one of the above listed addresses no later than ninety (90) calendar days of the date of this letter.<sup>22</sup>

Finally, requesters also have the right to seek dispute resolution services from OSTP’s FOIA Public Liaison or the Office of Government Information Services (hereinafter “OGIS”). To employ these services, please contact Nicholas Wittenberg via telephone at (202) 456-4444 or by way of e-mail at [OSTPFOIA@ostp.eop.gov](mailto:OSTPFOIA@ostp.eop.gov). If you would prefer to contact OGIS, you may do so in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphia Road-OGIS  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Fax: (202) 741-5769  
Toll-free: 1 (877) 684-6448

If you have any questions, please do not hesitate to contact me via telephone or by e-mail.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nicholas Wittenberg". The signature is stylized and fluid.

Nicholas Wittenberg  
Legal Counsel

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<sup>19</sup> 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 32 C.F.R. § 2402.7(a).

<sup>20</sup> 32 C.F.R. § 2402.7(b).

<sup>21</sup> *Id.*

<sup>22</sup> 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).