[ORAL ARGUMENT NOT SCHEDULED]

Nos. 20-5233, 20-5234

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellee,

v.

DEPARTMENT OF JUSTICE,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-Appellee is the Campaign Legal Center.

Defendant-Appellant is the United States Department of Justice.

No amici curiae participated in the district court.

B. Rulings Under Review

Appellants seek review of (1) the Memorandum Opinion entered on June 1, 2020, by the United States District Court for the District of Columbia (Chutkan, J.), which is available at 2020 WL 2849909; and (2) the Order entered on June 1, 2020, by the United States District Court for the District of Columbia (Chutkan, J).

C. Related Cases

This case has not previously been before this Court. This appeal involves two related cases, *Campaign Legal Center v. Department of Justice*, No. 20-5233 (D.C. Cir.), and *Campaign Legal Center v. Department of Justice*, No. 20-5234 (D.C. Cir.). Both involve the same parties and identical (in relevant respects) orders issued by the district court.

/s/ Gerard Sinzdak
Gerard Sinzdak

GLOSSARY

FOIA	Freedom of Information Act
JA	Joint Appendix

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's subject matter jurisdiction under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and under 28 U.S.C. § 1331. Joint Appendix (JA) 16, 50-51. On June 1, 2020, the district court entered orders requiring the government to produce certain documents to plaintiff. JA 809, 837. The government filed timely notices of appeal on July 31, 2021. JA 838-39. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUE

On December 12, 2017, the Department of Justice sent a letter to the Census Bureau requesting that the Census Bureau add a citizenship question to the 2020 census. The question presented is:

Whether drafts of the letter, which include comments and edits from Department of Justice staff regarding the contents of the letter, are protected by the deliberative process privilege and thus exempt from disclosure under the Freedom of Information Act (FOIA).

PERTINENT STATUTES AND REGULATIONS

FOIA exempts from disclosure "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." 5 U.S.C. § 552(b)(5).

STATEMENT OF THE CASE

A. Statutory Background

FOIA generally mandates disclosure of federal agency records, "unless the documents fall within enumerated exemptions." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see* 5 U.S.C. § 552(b) ("This section does not apply to matters that are" covered by one of the listed exemptions.). FOIA Exemption 5 authorizes an agency 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." 5 U.S.C. § 552(b)(5). One of the most well-established litigation privileges for government agencies is the deliberative process privilege, which protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

B. Factual Background

1. The Citizenship Question

On December 12, 2017, the Department of Justice sent the Director of the Census Bureau a letter requesting that a citizenship question be added to the 2020 census. JA 810-12; *see Department of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019). The letter was signed by the Justice Management Division's General Counsel, Arthur Gary, but was drafted primarily by then-Acting Assistant Attorney General for the Civil Rights Division John Gore. JA 812. The letter stated that the information

collected through the citizenship question would aid the Justice Department's enforcement of the Voting Rights Act. *Department of Commerce*, 139 S. Ct. at 2562. As particularly relevant to this suit, in September 2017, prior to the deliberations involved in the drafting of the letter, the Attorney General had approved the sending of a letter requesting citizenship information. JA 812. In March 2018, Commerce Secretary Wilbur Ross announced that the Census Bureau was adding a citizenship question to the census, citing the Gary letter as the justification for adding the question. *Department of Commerce*, 139 S. Ct. at 2562.

In *Department of Commerce*, the Supreme Court concluded that the Commerce Secretary's decision to add the citizenship question was arbitrary and capricious because the Secretary's stated reason for adding the question—to aid the Department of Justice's Voting Rights Act enforcement efforts—appeared "contrived." 139 S. Ct. at 2575. The Court noted that the record showed that "the Secretary began taking steps to reinstate a citizenship question" long before the Department of Justice's request and with "no hint that he was considering [Voting Rights Act] enforcement in connection" with the decision to reinstate the question. *Id.* Moreover, the Justice Department initially declined the Commerce Department's invitation to request more detailed citizenship information and ultimately requested the information for Voting Rights Act-enforcement purposes only after Commerce staff proposed and developed the idea and the Commerce Secretary contacted the Attorney General directly. *Id.* These and other facts led the Supreme Court to conclude that the Department of

Justice's "interest was directed more to helping the Commerce Department than to securing the data," and that the Commerce Secretary's "sole stated reason" for reinstating the question was "incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id.*

2. Plaintiff's FOIA Request

In February 2018, plaintiff filed a FOIA request with the Justice Department's Civil Rights Division, the Justice Management Division, and the Office of the Attorney General seeking documents related to the citizenship question. JA 23-30. The Department produced a number of documents in response to the request, while withholding others. JA 813-15. As relevant here, the Department withheld drafts of the Gary letter and emails associated with those drafts. *See* JA 393-95; JA 440-42; JA 608-16; JA 804, 821. The drafts and emails were circulated among staff within the relevant Justice Department components and contain proposed edits to and comments on various iterations of the letter. The Department withheld the documents on the ground that they are protected by the deliberative process privilege and thus exempt from disclosure under FOIA Exemption 5. *See* JA 393-95; JA 440-42; JA 608-16; JA 804, 821.

C. Prior Proceedings

Plaintiff, the Campaign Legal Center, filed two lawsuits against the Department of Justice seeking disclosure of the withheld documents; one suit is directed at the Office of Attorney General, the Justice Management Division, and the Office of

Information Policy (Appeal No. 20-5233), while the other is directed at the Civil Rights Division (Appeal No. 20-5234). There is no pertinent difference between the two lawsuits for purposes of this appeal.

The district court granted plaintiffs' request for summary judgement with respect to the Gary letter drafts and related correspondence and ordered the government to produce those documents. JA 820-25; *see also* JA 803-08. In so doing, the court rejected the government's claim that the documents were protected by the deliberative process privilege. *Id.* The court reasoned that the drafts and emails were not subject to the privilege because they were not "predecisional," as the privilege requires. JA 825. The court acknowledged that the drafts were predecisional in that they "undeniably predated the decision about the final contents of the letter" and also recognized that this Court has on many occasions concluded that drafts are predecisional. JA 822-23. The court concluded, however, that the "relevant decision" in this case was the Attorney General's September 2017 decision to send a letter requesting the addition of a citizenship question. JA 825. Because the drafts and emails post-dated that decision and did not aid the Attorney General in arriving at that decision, the court concluded that they were not predecisional. JA 825.

SUMMARY OF ARGUMENT

The internal Department of Justice drafts of the Gary letter and associated correspondence are quintessentially deliberative materials that are covered by the deliberative process privilege and thus exempt from disclosure under FOIA. The

materials contain the views and editorial judgments of Department of Justice staff regarding the contents of the final letter and reflect the agency's internal debate about its content and phrasing. This Court has long recognized that disclosure of such internal, draft materials is detrimental to the agency decisionmaking process because it discourages agency staff from providing candid and frank advice.

The district court nevertheless mistakenly concluded that the relevant materials were not "predecisional" because they post-dated the Attorney General's decision to send a letter requesting citizenship information. The district court's reasoning fundamentally misconceives the nature of agency decisionmaking. The Attorney General made an internal determination that a request should be made. Like other directives to take action issued by Cabinet officials to their subordinates, the directive triggered a new deliberative process regarding the content and nuances of the proposed action. An agency head must be able to direct action internally without concern that the process of analyzing support for her proposed action will be made public. And the staff tasked with that responsibility must be able to debate and criticize with a similar assurance of confidentiality. It has never been thought that drafts of a final communication do not constitute part of the deliberative process on the ground that an agency head has directed them to undertake the formulation of the agency's views. If that were the case, a range of documents, including draft Federal Register Notices and draft agency opinions, would be subject to disclosure. This Court should decline to adopt that analysis and sanction those results.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision granting summary judgment. *National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014).

ARGUMENT

THE DRAFT GARY LETTERS AND RELATED CORRESPONDENCE ARE DELIBERATIVE MATERIALS EXEMPT FROM DISCLOSURE

1. FOIA Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters that would not be available" in litigation with an agency. 5 U.S.C. § 552(b)(5). In enacting that exemption, Congress had the deliberative process privilege "specifically in mind." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). That privilege, which applies to documents that are both pre-decisional and deliberative, "protect[s] the decision making processes of government agencies" by withholding "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* "A 'predecisional' document is one prepared in order to assist an agency decisionmaker in arriving at his decision, . . . and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). To qualify as deliberative, the communication must be "intended to

facilitate or assist development of the agency's final position on the relevant issue." *National Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014); *see also National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002) ("Material is deliberative if it reflects the give-and-take of the consultative process."). Ultimately, the "key question" as to whether the privilege applies is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Formaldehyde Inst.*, 889 F.2d at 1123 (quoting *Dudman Commc'ns Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

As this Court has frequently noted, protecting internal agency deliberations from disclosure "encourage[s] the candid and frank exchange of ideas in the agency's decisionmaking process," which, in turn, improves "the quality of administrative decisions." *National Sec. Archive*, 752 F.3d at 462; *see also Sears*, 421 U.S. at 150-51. The withholding of deliberative materials also "protect[s] against confusing the issues and misleading the public" by preventing the release of documents containing "rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The exemption and underlying privilege thereby ensure that agency officials are "judged by what they decided, not for matters they considered before making up their minds." *National Sec. Archive*, 752 F.3d at 462.

The agency documents at issue in this case are non-final drafts (and related emails) of a letter that the Department of Justice sent to the Commerce Department requesting that a citizenship question be added to the census. The documents include editorial comments and suggestions from Department of Justice staff concerning the contents of the letter and the rationale supporting the request. They thus "reflect[] . . . recommendations and deliberations comprising part of a process by which" the Department "formulated" the final letter. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). They are precisely the type of documents the deliberative process privilege is designed to protect. This Court and other courts have routinely concluded that a "*draft*" of an agency document "is pre-decisional and deliberative, and thus protected under the deliberative process privilege." *National Sec. Archive*, 752 F.3d at 463; *see also Dudman Commc'ns Corp.*, 815 F.2d at 1568-69; *Russell v. Department of the Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982); *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 183-84 (3d Cir. 2007) (per curiam); *City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992).

Requiring the Department to disclose the materials at issue would raise the very concerns that the deliberative process privilege is designed to safeguard. *See National Sec. Archive*, 752 F.3d at 462-63. Disclosure of the drafts and editorial commentary would make the personal views of agency staff available to the public, thus discouraging those and other employees from sharing "candid and frank" remarks in

the future. *See id.* at 462. Releasing drafts of the letter could also mislead or confuse the public by presenting "rationales for a course of action which were not in fact the ultimate reasons for the agency's action," and by providing "the personal opinions" of agency staff that were not adopted by the agency. *Coastal States Gas Corp.*, 617 F.2d at 866.

2. The district court nevertheless concluded that the drafts and associated emails were not "pre-decisional" because the process of creating the letter followed the Attorney General's conclusion that the Department should ask the Census Bureau to reinstate a citizenship question. The court erred in concluding that the process of creating a final, public agency position falls outside the deliberative process privilege because a Cabinet official has instructed other officials to develop and articulate the agency's position. The Attorney General's decision to request reinstatement of the question did not pretermit the deliberative process. After that initial decision, Department officials then undertook deliberations as to which arguments to make in support of the request and about how best to communicate that request in a manner that would withstand scrutiny from the Commerce Department, Congress, the public, and courts.

Indeed, this Court has long held that an official's "editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis"—qualify as deliberative material subject to the privilege. *Formaldehyde Inst.*, 889 F.2d at 1123; *Russell*, 682 F.2d at 1049 ("The policies embodied in [the

deliberative process privilege] are as applicable to the [agency's] editorial review process as they are to other agency deliberations that precede agency decisions."). That these judgments follow a decision about a bottom-line position or relevant content does not alter their deliberative status.

The error in the district court's analysis is underscored by the potential breadth of its holding. It is frequently the case that an initial internal directive sets in motion an extended process of deliberation involving a discussion of relevant considerations and the rationales for various determinations. For example, an agency may draft several iterations of a Federal Register Notice setting forth a new proposed rule before settling on the final version of the Notice, even though the agency head determined that the proposed rule should be promulgated at the outset of the process. Similarly, after an agency adjudicator (such as an Administrative Law Judge) has reached an initial bottom-line conclusion, the adjudicator and agency staff will often create and exchange multiple drafts of a memorandum or adjudicative order before settling on the contents of the final memorandum or order. The Solicitor General's decision to authorize an agency to appeal an adverse decision and to take a particular position on appeal likewise kickstarts agency deliberations (including the exchange of draft briefs) about how best to present the agency's position to the appellate court. These deliberative processes all require the candid exchange of ideas among agency personnel to function effectively.

The district court's approach would also embroil courts in the difficult task of determining when an agency's internal decision had become sufficiently final that any drafts of documents related to that decision were no longer subject to the deliberative process privilege. Under such an approach, agency personnel could not be certain that their comments on any such drafts would be protected, undermining the decisionmaking process. For "in order for a privilege to encourage frank and candid debate, the speaker or writer must have some strong assurance at the time of the communication that the communication will remain confidential." *National Sec. Archive*, 752 F.3d at 464. Moreover, a Cabinet Secretary "may change his mind" even after the Secretary has stated an initial position and directed staff to develop that position. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 190 (1975). As the Supreme Court has observed, that possibility exists even though, "human nature being what it is," the Cabinet Secretary is unlikely to do so. *Id.* Where, as here, an agency issues a final document stating its official position and supporting rationale, *that* document is the relevant final decision for purposes of the deliberative process privilege. Neither law nor logic supports treating some earlier, internal decision as the agency's final action.

3. The district court's analysis was flawed even if the Attorney General's decision was the relevant decision (which it was not). Even when an agency issues a final policy position, a later-drafted document may be pre-decisional if it relates to a subsidiary or follow-on issue. In *Access Reports v. Department of Justice*, 926 F.2d 1192,

1194 (D.C. Cir. 1991), for example, this Court rejected an argument that a memorandum addressing Congress's anticipated reaction to a proposed statutory amendment was not pre-decisional because the agency had already submitted the proposed amendment to the legislature. The court reasoned that the memo supported the agency's subsequent decisions regarding "how to shepherd the [relevant] bill through Congress." *Id.* at 1196; *see also id.* (stating that "a staffer's preparation of 'talking points' for an agency chief" regarding a previously made decision would qualify as predecisional). Similarly, in *Krikorian v. Department of State*, 984 F.2d 461, 466 (D.C. Cir. 1993), the court concluded that the privilege covered drafts of agency responses to public inquiries about an article the agency had previously decided to publish.

At a minimum, the drafts of the Gary letter and related emails reflect the Department's deliberations about how best to communicate the Attorney General's decision to the Census Bureau and others. Thus, even if the Attorney General's conclusion that a request should be made is considered a final agency decision for purposes relevant here (and, to be clear, it should not be), the materials would nonetheless qualify as pre-decisional.

Finally, the district court was quite wrong to state that that the government "concede[d] that the withheld materials are not messaging documents." JA 824 n.5. The court based that statement on a misreading of a footnote in the government's reply memorandum, which pointed out that, contrary to plaintiff's contention, this

Court had previously held that "'messaging' documents may be protected by the deliberative process privilege." Dkt. No. 25 at 13 n.8. The footnote further observed that this Court's "messaging cases" do not bear on the analysis here because the relevant drafts and emails are properly viewed as part of the deliberative process that culminated in the final letter. *See id.* The government did not concede that the documents would not qualify as messaging documents if the court concluded that the Attorney General's decision, not the final version of the letter, was the relevant final agency action.

CONCLUSION

For the foregoing reasons, the district court's orders requiring the government to produce the documents at issue here should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,261 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Gerard Sinzdak
Gerard Sinzdak

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Gerard Sinzdak
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