

Attachment A

Recommendation

We recommend that the Office of Information Policy issue guidance stating that whenever an agency withholds information pursuant to Exemption 5, the agency should identify the corresponding privilege(s) invoked. If the withholding takes the form of a redaction, the identification of a privilege should be made part of the redaction label; if a record is withheld in full, the agency should identify privilege(s) in its determination letter.

Comment

Exemption 5 of the Freedom of Information Act (FOIA) applies to “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,”¹ which has been interpreted to incorporate civil litigation privileges.² (A privilege is a legal rule that protects communications within certain relationships from compelled disclosure in a court proceeding.) The three most common privileges cited in connection with Exemption 5 are the deliberative process privilege, attorney-client privilege, and attorney work-product privilege.³

When redacting records, FOIA generally requires agencies to indicate “the exemption under which the deletion is made . . . at the place in the record where such deletion is made.”⁴ Thus, for an Exemption 6 redaction, agencies will label the redaction “b6” or “(b)(6).” For redactions under Exemption 7, which has six sub-parts (A–F), agencies will also label redactions with the corresponding sub-paragraph (*e.g.*, “(b)(7)(C)”).

Although Exemption 5 incorporates numerous privileges, FOIA does not include subparagraphs for Exemption 5 as it does for Exemption 7. Currently, most agencies will label Exemption 5 redactions simply as “b5” or “(b)(5).” But invoking Exemption 5 without identifying the underlying privilege does not afford a requester the information needed to evaluate a withholding, including for the purposes of an administrative appeal. The legal tests for the various privileges incorporated by Exemption 5 are distinct and fact-specific; knowing what standard applies is a necessary condition for evaluating an Exemption 5 withholding.

There is a simple solution to this issue: wherever an agency identifies the withholding of information pursuant to Exemption 5, the agency should identify the corresponding privilege. If the withholding takes the form of a redaction, the identification of the privilege should be part of

¹ 5 U.S.C. § 552(b)(5).

² See *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975).

³ See *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). Other privileges, less commonly cited, have also been recognized. See, *e.g.*, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984) (recognizing privilege for “[c]onfidential statements made to air crash safety investigators”).

⁴ 5 U.S.C. § 552(b).

the redaction label.⁵ If a record is withheld in full, the agency should identify the privilege in its determination letter.⁶

Because different agencies use different types of software to process and redact records, there may be some variation in the labeling of a privilege. But, no matter how an agency identifies a privilege, the precise basis for the withholding should be made clear to the requester (including, if necessary, explaining the redaction terminology in the determination letter). For the three most common privileges, and a fourth “catch-all” category for any others, examples of labels could be as follows:

- Attorney-client privilege: b5-ACP
- Attorney work-product privilege: b5-AWP
- Deliberative process privilege: b5-DPP
- Other: b5-other

For example:

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, **b5-AWP** has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the

b5-DPP

affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

b5-ACP

For less-commonly cited privileges,⁷ agencies should provide sufficient explanation in the determination letter for the requester to understand which privilege is being invoked under the label “Other.”

⁵ Cf. 5 U.S.C. § 552(b).

⁶ Cf. 5 U.S.C. § 552(a)(6)(A)(i)(I).

⁷ See, e.g., *Weber Aircraft Corp.*, 465 U.S. at 796.