Articles + Publications | January 5, 2024

FOIA Exemption Questions on Redacted HHS Cannabis Letter

WRITTEN BY

Stephen C. Piepgrass | Agustin E. Rodriguez | Jean E. Smith-Gonnell | Cole White

Published in Law360 on January 5, 2024.

The principle of open government is foundational to a healthy democracy, and the availability of government records upon request from the public is one of its chief cornerstones.

In the U.S., the primary mechanism by which the public gains access to government records is the Freedom of Information Act.[1] FOIA serves as a pivotal tool for ensuring governmental transparency by allowing the public to make requests to governmental entities to access specific government records.

Of course, the importance of upholding the public interest in governmental transparency must be carefully balanced against the impact that disclosure may have on the effective operation of government. For this reason, FOIA contains several exemptions which allow federal agencies to withhold information from the public in certain circumstances.

One such exemption, Exemption 5, protects "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."[2]

The U.S. Department of Health and Human Services recently drew the ire of transparency advocates when it heavily redacted a recommendation letter to the head of the U.S. Drug Enforcement Administration concerning the rescheduling of cannabis,[3] citing Exemption 5 as justification.[4]

This decision has prompted questions about the appropriate use of redactions in FOIA requests, as redactions have become a battleground for debates over the balance between necessary secrecy and the public's right to government information.

Based on an analysis of the applicability of Exemption 5 to HHS' rescheduling recommendation letter, it seems probable that we will see successful legal challenges to those redactions in the near future.

Understanding Exemption 5 to FOIA and the Deliberative Process Privilege

Like peering through a keyhole into the operations of power, Exemption 5 of FOIA guards the door to the inner

deliberations of government agencies. Its muddied definition has been interpreted by courts to exempt those documents from public disclosure that would normally be privileged in the context of discovery in a civil trial.[5]

Accordingly, any assertion of privilege allowable in civil discovery, such as the attorney-client privilege, could serve as the basis for nondisclosure under Exemption 5. The role of policy in Exemption 5 is to strike a delicate balance, ensuring that the exemption is not misused to withhold information of public interest unnecessarily. That balance guides the application of the exemption so that only those communications that genuinely require confidentiality to facilitate uninhibited discussion are shielded from disclosure.

With that goal in mind, the first and dispositive issue in making a successful claim for protection under Exemption 5 is proving that the documents in question qualify as either interagency or intra-agency memorandums. For the purposes of FOIA, an agency includes governmental entities like the DEA and HHS, but expressly does not include Congress, any court in the U.S., the governments of territories of the U.S., or the government of Washington, D.C.[6]

In the 1988 case of the *U.S. Department of Justice v. Julian*, the U.S. Supreme Court has interpreted the plain meaning of the term "interagency memorandum" as "a memorandum between employees of two different agencies."[7] Having been drafted by HHS' assistant secretary for health, and addressed to the administrator of the DEA, it seems clear that the letter in question would qualify as an interagency memorandum.

Once a given communication is classified as an interagency or intra-agency memorandum, the agency must prove that a particular privilege applies that protects the communication from disclosure. Again, most courts agree that any permissible assertion of privilege in a civil trial would qualify for the exemption, but the most commonly asserted form of privilege in the context of FOIA is the deliberative process privilege.

This privilege safeguards deliberative discussions within government corridors, protecting the uninhibited exchange of ideas that inform policy decisions.[8] The privilege operates on the fundamental belief that the quality of administrative decision making would be seriously undermined if internal agency deliberations were made public, as officials would shy away from expressing their candid opinions.

The deliberative process privilege is contingent upon satisfying two fundamental requirements. First, the communication must be predecisional, meaning that it was generated before the adoption of an agency policy or decision.[9] Agencies can look to several criteria for determining whether a communication is pre- or post-decisional, including whether the document represents a "final opinion,"[10] the decision-making authority of the author of the communication,[11] and the direction which the communication moved through the chain of command.[12]

When analyzing whether HHS' rescheduling recommendation letter to the DEA is predecisional, it is important to understand the role of HHS in the rescheduling process. The authority to enforce the Controlled Substances Act was delegated by the attorney general to the administrator of the DEA, which means that the DEA is responsible for making the ultimate rescheduling determination.

HHS plays a critical, though often understated, role in the scheduling process — it evaluates scientific and medical data and provides a recommendation as to whether a substance should be controlled, repositioned to a different

schedule, or excluded from scheduling entirely.

The scientific and medical assessment by HHS then informs the DEA's ultimate scheduling decision. Accordingly, the author of the rescheduling recommendation letter, the assistant secretary for health at HHS, could not have had the authority to issue a final opinion on the rescheduling decision.[13]

In addition, as of the publication of this article, the DEA has yet to make a final determination regarding the rescheduling of cannabis, so there has been no adoption of a final policy or decision. Based on these facts, HHS' rescheduling recommendation letter meets the first criteria of the deliberative process privilege as a predecisional communication.

Second, to be protected by the deliberative process privilege, as noted in *Coastal States Gas Corp. v. Department of Energy*, filed in 1980 in the U.S. Court of Appeals for the District of Columbia Circuit, communication must be deliberative, in that it "reflects the give-and-take of the consultative process."[14]

Accordingly, entirely factual matters, or factual portions of deliberative documents, would not be protected under the privilege,[15] but courts have allowed agencies to withhold factual material in otherwise deliberative documents in two types of circumstances: first, when the author of the document makes deliberative decisions in selecting specific facts out of a larger group of facts;[16] and second, when factual information is so connected to the deliberative material that its disclosure would expose or harm the agency's deliberations.[17]

The burden of proving that the communication satisfies both requirements rests with the agency asserting the privilege.

In this case, it is difficult to determine how much of the letter is deliberative and how much is factual because the majority of the content of the letter has been redacted. While possible, it seems unlikely that the entirety of the redacted content is deliberative.

However, the total length of HHS' recommendation letter is less than one page — three paragraphs — and the redacted material only appears in the first two paragraphs.

HHS could argue that the brevity of the letter means that disclosure of any factual material in the redacted content would necessarily expose the agency's internal deliberations regarding the rescheduling of cannabis. In addition, cannabis legalization continues to be a controversial topic in the U.S., especially at the federal level, and HHS could argue that release of the factual content in the letter would produce additional external pressure on decision-makers, thereby affecting the agency's decision-making process.

Zorn v. HHS

In late September, a lawsuit was filed against HHS in the U.S. District Court for the District of Columbia, *Matthew Zorn v. U.S. Health and Human Services*, challenging HHS' redactions to the recommendation letter.[18] The lawsuit claims that HHS failed to provide the rescheduling letter in response to a FOIA request and failed to make timely determinations regarding the request itself as well as a request for expedited treatment.[19]

The attorney bringing the suit, Matthew Zorn of Yetter Coleman LLP, has pointed out that although the content of the letter has not yet been disclosed, lawmakers are already taking action, on both sides of the spectrum, based on the reported contents of the letter.[20] The enhanced public interest in the rescheduling decision, Zorn argues, warrants disclosure of the recommendation.

Zorn has also pointed to a 2022 attorney general memorandum, written by Attorney General Merrick Garland, which focused on FOIA guidelines. In that memo, Garland emphasized that government transparency is a priority of the Biden administration and further stated that:

Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate.[21]

Reports indicate that Zorn filed a motion for summary judgment on Nov. 14, 2023, and that the DOJ requested an extension of the response deadline to Dec. 12.

If the court finds that HHS' application of Exemption 5 to the rescheduling letter is warranted, it will have to provide an explanation of why the exemption applies. In cases where courts have found that an agency has over-redacted in violation of FOIA, courts will analyze which portions of the document are purely factual and order the agency to release those segregable portions if possible.[22]

Should the court deem HHS' redactions in the rescheduling letter as justified, it would set a precedent for broader governmental discretion in withholding information, potentially limiting access to crucial regulatory insights that shape legal and business strategies.

Conversely, a ruling against HHS could usher in great transparency, offering legal professionals and entrepreneurs more detailed guidance on navigating the evolving cannabis regulatory landscape. This outcome would not only affect how attorneys advise clients on compliance and risk management but also influence investment and operational decisions for business owners.

Ultimately, the court's ruling will either reinforce the veil of administrative deliberations or peel back layers, significantly affecting how the legal community interprets and responds to shifts in federal policy and enforcement.

Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains an illegal controlled substance under federal law.

---

[1] 5 U.S.C.A. § 552 et seq.

[2] 5 U.S.C.A. § 552(b)(5).

[3] Department of Health and Human Services Letter to Administrator of the DEA Regarding Marijuana Rescheduling, Department of Health and Human Services (Aug. 29, 2023), available at https://s3.documentcloud.org/documents/24084026/hhs-dea-letter-marijuana.pdf.

[4] See Jaeger, Top Federal Health Agency Releases Highly Redacted Marijuana Scheduling Recommendation Letter to DEA, Marijuana Moment (Oct. 25, 2023), available at https://www.marijuanamoment.net/top-federal-health-agency-releases-highly-redacted-marijuana-scheduling-recommendation-letter-to-dea/.

[5] *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (hereinafter "Sears"); see also *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

[6] 5 USCA § 551(1).

[7] *United States Dep't of Justice v. Julian*, 486 U.S. 1, 18 n.1 (1988) (hereinafter "Julian") ("the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency — as opposed to an 'inter-agency memorandum,' which would be a memorandum between employees of two different agencies").

[8] See FOIA Update: Policy Guidance: When to Assert the Deliberative Privilege Under FOIA Exemption Five, United States Department of Justice Office of Information Policy, available at https://www.justice.gov/oip/blog/foia-update-policy-guidance-when-assert-deliberative-privilege-under-foia-exemption-five.

[9] See *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184, 95 S.Ct. 1491, 1500 (1975) (hereinafter "Grumman Aircraft") ("… and both Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not.")

[10] 5 U.S.C.A § 552(a)(2)(A); See also Sears, 421 U.S. at 153-54 ("We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. s 552(a)(2); and with respect at least to 'final opinions,' which not only invariably explain agency action already taken or an agency decision already made, but also constitute 'final dispositions' of matters by an agency, (internal citation omitted), we hold that Exemption 5 can never apply.")

[11] See *Pfeiffer v. C.I.A.*, 721 F. Supp. 337, 340 (D.D.C. 1989) ("What matters is that the person who issues the document has authority to speak finally and officially for the agency." citing Grumman Aircraft, 421 U.S. at 175; *Bureau of National Affairs, Inc. v. Department of Justice*,742 F.2d 1484, 1497 (D.C.Cir.1984) (hereinafter "National Affairs"); see also *Tax Analysts v. I.R.S.*, 97 F. Supp.2d 13 (D.D.C. 2000) ("Because the drafters lack ultimate [decision-making] authority, their views are necessarily predecisional.")

[12] See *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (hereinafter "Coastal States") ("The identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.")

[13] One could argue that the issuance of the rescheduling recommendation letter to DEA itself constitutes an internal "final opinion" of HHS, in which case the document itself could not be "predecisional." However, see National Affairs, 742 F.2d at 1497, where the court found that a budget recommendation submitted to the Office of

Management and Budget by the Environmental Protection Agency (EPA) was not a final decision by the EPA. The court stated that "[t]he [district] court misconceives what constitutes a "final decision" in the context of Exemption 5. EPA's final decision here was a decision to make a particular recommendation to another agency of the government that has ultimate authority for developing the President's budget proposals." (Emphasis Added); See also Grumman Aircraft, 421 U.S. at 187-88, where the Court held that recommendations submitted by one agency to another agency which has the final decision-making authority are predecisional and exempt from disclosure under FOIA.

[14] Id. at 866.

[15] See *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 836 (1973) (superseded by legislation on other grounds) ("Thus, in the absence of a claim that disclosure would jeopardize state secrets, (internal citation omitted), memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.")

[16] See e.g. *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 68, 71, 160 U.S.App.D.C. 270, 275, 278 (D.C. Cir. 1974).

[17] See *Tarullo v. U.S. Dept. of Defense*, 170 F.Supp.2d 271, 278 (D. Conn. 2001) (hereinafter "Tarullo") ("Although the document does summarize relevant facts, that summary is so intertwined with … recommendations and opinions as to the course of future conduct such that production of a redacted version would be incomprehensible, and the very selection of facts could also reveal the nature of those recommendations and opinions.")

[18] See *Zorn v. United States Health & Human Services*, 1:23CV02894 (D.D.C. filed Sept. 2023).

[19] See Simakis, Federal Government Continues to Withhold Key Cannabis Scheduling Recommendation Letter Despite FOIA Requests, Lawsuit, Cannabis Business Times (Nov. 22, 2023), available at https://www.cannabisbusinesstimes.com/news/cannabis-rescheduling-letter-government-withhold-schedule-iii/.

[20] See e.g. Schiller, US Sen. Kirsten Gillibrand Calls on DEA to Reclassify Cannabis as Schedule III, Cannabis Business Times (Nov. 21, 2023), available at https://www.cannabisbusinesstimes.com/news/us-senator-kirsten-gillibrand-calls-on-dea-to-reclassify-cannabis-schedule-iii/; see also Jaeger, Congress Considers Opposing Amendments To Protect Legal Marijuana States And Block Biden From Rescheduling Cannabis, Marijuana Moment (Nov. 6, 2023), available at https://www.marijuanamoment.net/congress-considers-opposing-amendments-to-protect-legal-marijuana-states-and-block-biden-from-rescheduling-cannabis/.

[21] Memorandum for Heads of Executive Departments and Agencies – Freedom of Information Act Guidelines, Office of the Attorney General of the United States (Mar. 15, 2022), available at https://www.justice.gov/media/1212566/dl?inline.

[22] See e.g. *United We Stand America, Inc. v. I.R.S.*, 359 F.3d 595, 605, 360 U.S.App.D.C. 243, 253 (D.D.C. 2004)

RELATED INDUSTRIES + PRACTICES

- Cannabis