

# Judge Ketanji Brown Jackson's FOIA Record

## WRITTEN BY

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On February 25, President Biden nominated Judge Ketanji Brown Jackson of the Court of Appeals for the District of Columbia to fill the vacancy on the Supreme Court created by Justice Stephen Breyer's retirement. Judge Jackson's resume includes almost 10 years of service on the bench — she was first nominated by President Obama to the District Court for the District of Columbia in 2012 and served as a federal trial judge until her appointment to the Circuit Court in 2021. Sitting as a judge in the nation's capital, her docket included an extensive number of cases involving the federal Freedom of Information Act (FOIA), as individuals and business challenged federal agencies' withholding of requested documents sought under the federal statute. Judge Jackson's rulings in many of these cases provides insight into where she stands with respect to important FOIA issues. If she is confirmed to the highest court, Judge Jackson's stance and views on these issues could affect the privacy interests, intellectual property rights, and business interests of all individuals and business who contract and correspond with government agencies.

## I. The Freedom of Information Act

The federal Freedom of Information Act (FOIA) is a law that generally provides any person or entity the right, enforceable in court, to obtain access to federal agency records. FOIA creates a statutory right of public access to federal executive branch information. All 50 states have enacted their own analogues to the statute, providing similar rights to citizens and businesses seeking production of documents from state agencies.

Both state statutes and the federal FOIA include exemptions that protect certain types of information from disclosure. For example, under the federal FOIA, an agency may redact or withhold certain documents if the agency believes that the information contained in those documents falls within one of nine statutory exemptions.<sup>[1]</sup> Different types of exemptions include information that is classified to protect national security; information related solely to the internal personnel rules and practices of an agency; trade secrets or commercial or financial information that is confidential or privileged; and information that, if disclosed, would invade another individual's personal privacy.<sup>[2]</sup> Agencies may claim these exemptions on their own behalf, or other parties who are affected by the disclosure may choose to challenge an agency's release of certain documents through a "reverse FOIA" suit.<sup>[3]</sup>

## II. Judge Jackson's Record of Agency Deference

A review of Judge Jackson's FOIA decisions reveals that she has demonstrated a deference to agency exemption claims. In fact, Judge Jackson was only reversed by the D.C. Circuit 10 times while on the district court, and two of those 10 decisions involved FOIA issues. One of those reversals provides a particularly helpful example of Judge

Jackson's willingness to defer to agency decisions.

In *Pavement Coatings Technology Council v. United States Geological Survey*, Judge Jackson found that certain documents withheld by the U.S. Geological Survey (USGS) fell within the "deliberative process" exemption to the federal FOIA statute.<sup>[4]</sup> The deliberative process exemption covers "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,"<sup>[5]</sup> and has been interpreted to apply to an agency's "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."<sup>[6]</sup> Courts apply a two-part test to determine whether a document qualifies for the exemption, asking whether the information is both "pre-decisional," as well as "deliberative."<sup>[7]</sup> The impetus for the privilege comes from a desire to avoid exposure of "an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."<sup>[8]</sup>

In *Pavement Coatings*, the USGS withheld and redacted several categories of documents, including notes from scientists regarding tar and asphalt sealant studies, an "exploratory analysis" of data used by scientists to assess various sealant techniques, and drafts of numerous "working papers" and "journal articles" used by the agency in the drafting of certain publications on tar sealants.<sup>[9]</sup> Judge Jackson found that the documents were "pre-decisional" because they involved USGS's underlying methods utilized to study tar sealant and pre-publication findings regarding such sealants.<sup>[10]</sup> Essentially, the documents captured "the agency's thought process leading up to its sealant-related publications."<sup>[11]</sup> She further held that they were "deliberative," because "the material plainly reflect[ed] the deliberations that the agency undertook as part of its decision-making process, which is all that FOIA requires."<sup>[12]</sup>

The D.C. Circuit reversed, disagreeing with Judge Jackson on both prongs of the two-factor test and holding that the documents were neither pre-decisional nor deliberative.<sup>[13]</sup> The appellate court focused on the fact that USGS used the documents in determining whether to publish a particular article, not in coming to some scientific result.<sup>[14]</sup> Further, the court noted that releasing the scientists' work might enable criticism of USGS, but that was not enough to justify withholding: "[C]riticism is not a recognized harm against which the deliberative process privilege is intended to protect."<sup>[15]</sup> Judge Jackson was far more willing than the D.C. Circuit to defer to USGS's judgment and shield the agency's internal procedures even where the ultimate decision was the mere publication of a research article.

### III. Takeaways

Judge Jackson's FOIA record is particularly interesting when compared to that of Justice Breyer. In recent years Justice Breyer penned notable dissents in which he was much less willing to defer to agencies when asserting exemption claims. In 2019, Justice Breyer sharply criticized the six-member majority's decision to exempt from disclosure information related to grocery stores' food stamp totals, warning that the decision would "deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia."<sup>[16]</sup> And just a year ago, Justice Breyer dissented in *United States Fish & Wildlife Service v. Sierra Club*, a 7-2 majority case many touted as marking a significant expansion of the deliberative process exemption to greater protect agency information from disclosure.<sup>[17]</sup> The question before the Court in that case was whether the deliberative process privilege exempts from disclosure certain documents prepared during a statutorily required interagency consultation process between two agencies, specifically when those documents do not reflect the agency's final

view on the matter.[18] Ultimately, the majority adopted a “dies on the vine” approach and held that the documents could be withheld given that they discussed merely “dead-ends” and could “hardly be described as reflecting the agency’s chosen course.”[19] Justice Breyer dissented, emphasizing that courts should take a more intensive, draft-by-draft approach — an approach that would make it more difficult and costly for agencies or third parties to oppose FOIA requests.[20]

To be sure, Judge Jackson has ordered production of documents in some circumstances and in others has at least declined to hold in favor of agency decisions at the summary judgment stage.[21] Her deference surely has its limits. But if past rulings are any indication, Judge Jackson’s addition to the highest court will likely add another justice to a growing majority that is inclined to protect information from disclosure.

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[1] 5 U.S.C. § 552.

[2] *Id.*

[3] Department of Justice, Reverse FOIA: Department of Justice Guide to the Freedom of Information Act (2009), [https://www.justice.gov/archive/oip/foia\\_guide09/reverse-foia.pdf](https://www.justice.gov/archive/oip/foia_guide09/reverse-foia.pdf).

[4] 436 F. Supp. 3d 115 (D.D.C. 2019).

[5] 5 U.S.C. § 552(b)(5).

[6] *Department of Interior v. Klamath Water Users Protective Association*, 531 U.S. 1, 8 (2001).

[7] 436 F. Supp. 3d at 125.

[8] *Id.* (quoting *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

[9] *Id.* at 122.

[10] *Id.* at 127.

[11] *Id.*

[12] *Id.* at 129 (citing *Hooker v. U.S. Department of Health and Human Services*, 887 F. Supp. 2d 40, 58 (D.D.C. 2012))

[13] *Pavement Coatings Technology Council v. United States Geological Survey*, 995 F.3d 1014, 1021-22 (D.C.C. 2021).

[14] *Id.*

[15] *Id.* at 1022.

[16] *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2368 (2019) (Breyer, J., concurring in part and dissenting in part).

[17] 141 S. Ct. 777 (2021).

[18] *Id.*

[19] *Id.* at 786.

[20] *Id.* at 789-92 (Breyer, J., dissenting).

[21] *Poitras v. Department of Homeland Security*, No. 15-CV-1091, 2017 WL 7053929 (D.D.C. Mar. 31, 2017) (denying Federal Bureau of Investigation’s motion for summary judgment where agency declarations failed to provide particularized justifications for withholdings); *AquaAlliance v. United States Bureau of Reclamation*, 139 F. Supp. 3d 203 (D.D.C. 2015) (holding that the Bureau of Reclamation had offered “nothing more than conclusory allegations as to the existence of a substantial privacy interest” that would support the agency’s decision to withhold the relevant documents).

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