No. 19-547

IN THE
Supreme Court of the United States

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.
Petitioners,

v.

SIERRA CLUB, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals
for the Ninth Circuit

BRIEF OF ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues, to promote government transparency, and to protect privacy, the First Amendment, and other constitutional values.

EPIC has filed several briefs before this Court and other federal courts concerning the Freedom of Information Act ("FOIA"). *See, e.g.*, Brief of *Amici Curiae* EPIC et al., *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-481) (arguing that an objective definition of "confidential" in Exemption 4 is necessary to ensure public oversight of government programs that implicate privacy); Brief of *Amici Curiae* EPIC et al., *FCC v. AT&T*, 562 U.S. 397 (2011) (No. 09-1279) (arguing that the phrase "personal privacy" applies to individuals, not corporations); Brief of *Amici Curiae* EPIC et al., *ATF v. City of Chicago*, 537 U.S. 1229 (2003) (No. 02-322) (arguing that FOIA procedures should be updated "in an age of electronic record keeping"); Brief of *Amici Curiae* EPIC et al., *N.Y. Times v. DOJ*, 756 F.3d 100 (2d Cir. 2014) (No. 13-422) (arguing that OLC opinions should be disclosed under FOIA).

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

EPIC routinely seeks documents under the FOIA that would shed light on agencies' compliance with privacy and transparency laws. *See, e.g.,* EPIC, *EPIC v. FBI—Privacy Assessments* (2020) (seeking Privacy Threshold Analyses for FBI databases);[2] EPIC, *EPIC v. DOJ (The Mueller Report)* (2020) (seeking the complete version of the final Mueller Report);[3] EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)* (2020) (seeking a DOJ report for the White House on predictive policing);[4] EPIC, *EPIC v. DOJ—Warrantless Wiretapping Program* (2020) (seeking OLC opinions on warrantless surveillance);[5] EPIC, *EPIC v. TSA—Body Scanner Modifications (ATR)* (2020) (seeking a presentation made by the TSA to the House on body scanners);[6] EPIC, *Investigations of Google Street View* (2020) (seeking explanations for agency decisions on whether to initiate enforcement action against Google).[7] EPIC has also challenged agency withholdings under the deliberative process privilege in several cases. *See, e.g.*, *EPIC v. DOJ*, 320 F. Supp. 3d 110 (D.D.C. 2018); *EPIC v. TSA,* 928 F. Supp. 2d 156 (D.D.C. 2013); *EPIC v. DOJ*, 584 F. Supp. 2d 65 (D.D.C. 2008); *see also* Complaint for Injunctive Relief, *EPIC v. DOJ*, No. 19-cv-00810 (D.D.C. Mar. 22, 2019), 2019 WL 1324248.

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[2] https://epic.org/foia/fbi/pia.

[3] https://epic.org/foia/doj/mueller-report.

[4] https://epic.org/foia/doj/criminal-justice-algorithms.

[5] https://epic.org/privacy/nsa/foia.

[6] https://epic.org/foia/tsa/atr.

[7] https://epic.org/privacy/streetview.

SUMMARY OF THE ARGUMENT

The Freedom of Information Act ("FOIA") ensures that Americans know what their government is up to. Congress understood that agencies prefer to keep their records secret, and that the only way to effectively protect the public interest was to make all agency records presumptively subject to disclosure, unless they fall within a specific exemption. This Court has repeatedly emphasized that the FOIA is a disclosure—not a withholding—statute, has made clear the Act's broad scope, and has construed the exemptions narrowly. This case provides another opportunity to clarify the narrow scope of Exemption 5.

One of the primary purposes of the FOIA is to prevent agencies from operating under policies, regulations, and precedents that are unknown to the public. There shall be no "secret law." The Court has recognized that agency decisions frequently have intra-agency precedential effect. Even when agencies do not publicize these decisions, they still make up the working law and policies by which agencies function. But final decisions are not the only agency decisions with precedential effect; decisions on threshold questions, as well as intermediate decisions, also reveal why an agency acts or withholds action. In fact, if an agency withholds an action then the only way for the public to evaluate the adequacy of that decision is to access the record explaining the agency's reasoning.

Documents that explain threshold and intermediate-step decisions are important oversight tools and do not implicate the concerns at the core of the deliberative process privilege. For example, a Privacy Threshold Analysis reveals an agency's determination of a proposed data collection's privacy risks, whether

further steps are necessary for the agency to comply with privacy laws and, thus, whether an agency is in fact complying with its privacy obligations. Similarly, records explaining agency decisions to withhold enforcement action for alleged privacy harms explain how agencies interpret their privacy authorities and how they will enforce these authorities in the future. These threshold and intermediate decisions are not part of the give and take of staff deliberations, they are final agency determinations.

The Court should make clear that records describing the basis of an agency decision that are not followed by further deliberation are final and not deliberative. In the absence of this clear guidance, agencies will continue to interpret the deliberative process privilege broadly and cause years of delay and unnecessary litigation. In EPIC's experience, agencies frequently make broad deliberative process privilege claims in the first instance that do not hold up upon a court's inspection, but nevertheless delay the release of reports and memoranda that reflect final agency decisions. This is not the narrow construction that Congress intended.

ARGUMENT

I. A primary purpose of FOIA is to prevent the development of "secret law."

All three branches of government have recognized that one of FOIA's primary purposes is to prevent the development of "secret law." Despite this clear statutory purpose, agencies frequently seek to withhold materials under Exemption 5 that describe the reasoning of agency decisionmakers. But Exemption 5 only protects a limited interest—the ability of agency

staff to engage in candid deliberations. Agencies should not be allowed to leave the public in the dark by withholding the reasoning behind their formal decisions.

When the FOIA was first adopted, one of Congress's key aims was to stop agencies from operating under a hidden legal regime. The FOIA's predecessor "was plagued with vague phrases" that led to the provision becoming more "a withholding statute than a disclosure statute." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink,* 410 U.S. 73, 79 (1973). The House report, issued prior to enactment of the law in 1967, emphasized that some agency decisions with "the force and effect of law in most cases" had been "kept secret from the members of the public affected by the decisions." H.R. Rep. No. 89-1497, p. 7 (May 9, 1966). The law's drafters sought to provide the public with access to any decisions that could have precedential significance or legal force. *Id.* at 8 (noting that the new information disclosure law "would help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions" and "prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen . . . .").

Congress did not intend for access to be limited to formal agency decisions with legal force. Congress intended for the public to have access to all "statements of policy and interpretations which have been adopted by the agency" and all concurring and dissenting opinions of decisionmakers precisely because the reasoning behind these decisions can impact future decisions. 5 U.S.C. § 552(a)(2)(A)–(B). Indeed, the

Attorney General's commentary on the 1974 FOIA Amendments made clear that withholding of final agency determinations would create "secret law." Edward H. Levi, *A.G.'s 1974 FOI Amdts. Mem.* (Feb. 19, 1975).[8]

Both the House and Senate reports on the 1967 Act made clear that explanations of agency positions and determinations are not to be protected under Exemption 5. Congress recognized that Exemption 5 would allow agencies to withhold deliberative records that included the frank exchange of opinions among agency *staff*—but not records that explain the reasoning adopted by agency decisionmakers. S. Rep. No. 89-813, p. 9 (Oct. 4, 1965); H.R. Rep. No. 89-1497, p. 10. The House report explained that agency decisionmakers would not receive "completely frank" "advice from staff *assistants* and the exchange of ideas among agency *personnel*" would be stifled if "*all* internal communications" were subject to full disclosure—not that agencies and decisionmakers could keep the reasons for their decisions secret simply because they are based on *some* of the advice and opinions of agency staff. H.R. Rep. No. 89-1497, p. 10 (emphasis added); *see also* S. Rep. No. 89-813, p. 9 (emphasizing that "frank discussion" would be impacted if "*all* such writings were subject to public scrutiny") (emphasis added). Indeed all agency decisions are based on an underlying deliberative process, but the decisions themselves cannot be kept secret. The House report acknowledged this issue, noting that staff memoranda should be exempted "wherever necessary without, at the same time, permitting indiscriminate

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[8] https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia.

administrative secrecy." H.R. Rep. No. 89-1497, p. 10. For the same reason, the Senate report noted that "it has attempted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 89-813, p. 9. Congress recognized that Exemption 5, if construed too broadly, would result in excessive and unjustifiable secrecy.

The Court has since recognized that an important purpose of FOIA is to prevent the development of agency "secret law." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). In *Sears*, the Court ruled that memoranda discussing the reasoning behind the National Labor Relations Board's decision not to file a legal complaint were "final opinions" and could not be withheld under Exemption 5. *Id.* at 148. The Court rejected the agency's argument that the records should be exempt because they "represent only the first step in litigation and are not final." *Id.* at 157. Instead, the Court reasoned that the decisions not to pursue these complaints "constitute final dispositions of matters by an agency" and that the reasons for the agency decisions "constitute the working law of the agency." *Id.* at 153–54 (internal quotations omitted).

Indeed, when an agency decides to withhold an action, that decision does not simply disappear into the ether. Instead, as the *Sears* Court recognized, agency decisions usually hold intra-agency precedential value. *Sears*, 421 U.S. at 156. Agencies have an interest in "achiev[ing] some measure of uniformity" when making legal and policy decisions. *Id.* at 141. If an agency decides at the threshold to withhold action, it is likely to withhold action when a similar situation arises in the future. The Court called this information "precisely the kind of agency law in which the public is

so vitally interested and which Congress sought to prevent the agency from keeping secret." *Id*. at 156. At the same time, the Court recognized that disclosing documents that explain an agency's decision to withhold action "would not intrude on predecisional processes, and protecting them would not improve the quality of agency decisions." *Id*. at 155.

The Court also held in *Sears* that inter- and intra-agency memoranda referenced in a final agency opinion are subject to disclosure—and indicated that other intermediate and threshold decisions should also be subject to disclosure. While the Court found that documents explaining decisions to proceed with litigation were not subject to disclosure, the Court grounded its decision on the attorney work-product doctrine and not the deliberative process privilege. *Sears*, 421 U.S. at 160. The Court noted that it has "a reluctance to construe Exemption 5 to protect" documents that explain decisions reached by agency officials with authority to determine agency policy, and did so in *Sears* "only because the decisionmaker—the General Counsel—must become a litigating party to the case with respect to which he has made his decision." *Id*. at 160. But where a decision was not made in contemplation of litigation, and where the public has no other way of obtaining information explaining the decision, the Court indicated that the documents should be disclosed.

Indeed, the Court recognized that disclosure of inter- and intra-agency memoranda explaining agency decisions do not, in most instances, implicate the interests protected by Exemption 5. The Court explicitly rejected the notion that agency employees would be inhibited from freely advising decisionmakers for fear

that their advice will be adopted. *Sears*, 421 U.S. at 161. The Court stated that reality was to the contrary: "agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency." *Id.* Thus, once the reasoning for a decision is adopted by a decisionmaker, "the reasoning becomes that of the agency and becomes its responsibility to defend." *Id.*

The interest in preventing the development of secret law, coupled with FOIA's broad mandate for disclosure, counsel a narrow interpretation of Exemption 5 when agency policies "actually adopted" are at stake. *Sears*, 421 U.S. at 152. Thus, policies that "constitute the 'working law' of the agency" – even if they are intermediate decisions – fall outside of the ambit of Exemption 5 because the public has a vital interest in understanding the way agencies function. Disclosure of records that explain agency decisions would not interfere with the interests Congress intended to protect under Exemption 5. *Id.* at 153. Threshold and intermediate decisions that represent the views and policies of an agency decisionmaker, rather than individual employees, clearly implicate a key interest of FOIA and fall outside of Exemption 5's scope.

II. Public access to agencies' threshold and intermediate decisions is necessary to ensure compliance with privacy and other oversight obligations.

This case implicates significant transparency and oversight interests because the Government's proposed interpretation of Exemption 5 would allow agencies to block release of threshold and intermediate decisions. Access to records that explain agency's threshold and intermediate decisions is essential to facilitate

public oversight. For example, EPIC and the public have an interest in understanding how agencies protect privacy, both through internal policies and external regulation. Privacy Threshold Analyses and documents explaining agency decisions on whether and to what extent to enforce privacy laws are key to this work. EPIC has been able to obtain some of these records through FOIA litigation, and they have shed light on important agency functions. There is no evidence that release of this type of material threatens the deliberative process. Yet the Government's broad reading of the deliberative process privilege would allow agencies to withhold this type of important information and block public oversight.

The E-Government Act of 2002 requires federal agencies to conduct Privacy Impact Assessments ("PIAs") before collecting, maintaining, or disseminating personally identifiable information. Pub. L. No. 107-347, 116 Stat. 2899, 2921. A PIA must explain why an agency intends to collect personal data and how the resulting risks to privacy will be mitigated, among other requirements. *Id.* Similarly, the Privacy Act of 1974 requires agencies to publish System of Records Notices ("SORN") when they collect personally identifiable information that is retrievable by a personal identifier. 5 U.S.C. § 552a.[9]

Before an agency conducts a PIA or a SORN, it often conducts a Privacy Threshold Analysis. A Threshold Analysis is typically a questionnaire that allows agency personnel to determine if a proposed agency action has significant implications for privacy. *See, e.g.*, Dep't of Homeland Sec.*, Privacy Compliance*

[9] https://dhs.gov/system-records-notices-sorns.

(June 24, 2019);[10] Office for Privacy & Open Gov't, *Privacy Compliance* (Oct. 8, 2019);[11] Bureau of Justice Assistance, Dep't of Justice, *Guide to Conducting Privacy Impact Assessments for State, Local, and Tribal Justice Entities* 5 (June 2012).[12] Agencies use Threshold Analyses to determine whether a PIA or SORN is necessary. Thus, an agency will frequently have a Threshold Analysis on file to explain the agency's decision not to conduct a PIA or SORN.

EPIC regularly seeks Privacy Threshold Analyses from federal agencies under the FOIA. And agencies have argued that these records are deliberative and thus subject to Exemption 5. Through the disclosure of these records, EPIC can ensure that agencies are complying with applicable federal law and protecting the privacy of individuals whose data is collected. In cases where an agency decides a PIA or SORN is unnecessary, Threshold Analyses allow the public to scrutinize the agency's analysis and understand the practical and legal implications. The agency's position regarding its privacy obligations form internal precedents under which an agency operates. Indeed, when an agency determines that it is not obligated to conduct a PIA or a SORN, the Threshold Analysis is often the only document that can explain the agency's position regarding the privacy risks at stake in the data collection. And these Threshold Analysis records are important public oversight tools because they allow organizations like EPIC to determine whether the agency is meeting its privacy obligations.

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[10] https://www.dhs.gov/compliance.

[11] https://www.osec.doc.gov/opog/privacy/compliance.html.

[12] https://it.ojp.gov/documents/d/Guide%20to%20Conducting%20Privacy%20Impact%20Assessments_compliant.pdf.

EPIC has obtained Privacy Threshold Analyses on numerous occasions through FOIA litigation after agencies withheld the documents under the deliberative process privilege. For example, in *EPIC v. FBI*, 235 F. Supp. 3d 207 (D.D.C. 2017), the court explicitly recognized that a FOIA requester may obtain a Threshold Analysis under FOIA, even when the agency concluded that a PIA was not necessary. *Id.* 216; *see also EPIC v. DEA,* 208 F. Supp. 3d 108, 112 (D.D.C. 2016). Yet some agencies, including the Department of Homeland Security, continue to treat Threshold Analyses as deliberative documents under the FOIA. E-mail from Dena Kozanas, Chief Privacy Officer, U.S. Dep't of Homeland Sec., to Jeramie Scott, Senior Counsel, EPIC (July 10, 2020, 01:03 PM EST) (on file with author).

Public access to these Threshold Analysis records is especially important where they call for subsequent agency action. By obtaining these types of records, EPIC has discovered that certain agencies fail to conduct privacy assessments even when their own Threshold Analysis calls for them. For example, the FBI's Threshold Analysis for the National Name Check Program and the Professional Flight Management program stated that the agency was required to conduct privacy assessments. Fed. Bureau of Investigation, *Privacy Threshold Assessment for National Name Check Program* (2013) (Partially declassified and released under the Freedom of Information Act, EPIC-413);[13] Fed. Bureau of Investigation, *Privacy Threshold Assessment for Professional Flight*

[13] *Available at* https://epic.org/foia/fbi/pia/3rd-Prod-Privacy-Threshold-Analysis-2of4.pdf.

Management (2009) (Partially declassified and released under the Freedom of Information Act, EPIC-186).[14] But EPIC determined that the FBI had not conducted those assessments. The Threshold Analysis for another program, the RMD Document Processing System, stated not only that a PIA was required, Fed. Bureau of Investigation, *Privacy Threshold Assessment for RMD Document Processing System* (2010) (Partially declassified and released under the Freedom of Information Act EPIC-244),[15] but that no significant changes had been made to "how information is kept or disseminated" since the previous Analysis—and that no privacy assessment was conducted even after *that subsequent* Threshold Analysis. Fed. Bureau of Investigation, *Privacy Threshold Assessment for RMD Document Processing System*, (2010) (Partially declassified and released under the Freedom of Information Act, EPIC-250).[16] To date, the FBI has not published the required privacy assessments for any of these programs. *See* Fed. Bureau of Investigation, *Department of Justice/FBI Privacy Impact Assessments (PIAs)* (2020).[17]

EPIC has also obtained documents explaining whether and to what extent agencies took enforcement action pursuant to their privacy authorities. For

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[14] *Available at* https://epic.org/foia/fbi/pia/3rd-Prod-Privacy-Threshold-Analysis-2of4.pdf.
[15] *Available at* https://epic.org/foia/fbi/pia/3rd-Prod-Privacy-Threshold-Analysis-3of4.pdf.
[16] *Available at* https://epic.org/foia/fbi/pia/3rd-Prod-Privacy-Threshold-Analysis-3of4.pdf.
[17] https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments.

instance, after several agencies—including the FTC, FCC, and DOJ—investigated Google Street View for unauthorized data collection and only the FCC took enforcement action, EPIC sought documents explaining the agencies' decisions. EPIC*, Investigations of Google Street View* (2020).[18] The FCC released a redacted version of its notice of liability, and EPIC obtained documents from the DOJ and the FTC through the FOIA, yielding hundreds of pages of records concerning the Street View investigations that explained why each agency decided to take enforcement action or not. *Id*. These records were essential to evaluating the adequacy of the agency's response.

The fact that the agencies did not attempt to withhold the Street View records under Exemption 5 makes clear that withholding records that explain an agency's rationale for declining to take an enforcement action is not necessary to protect the deliberative process. These disclosures did not undermine the purpose of Exemption 5 because the documents explain the final positions of the agencies and their decisionmakers—not the types of communications that would chill the candid speech of agency employees.

III. This Court should provide clear guidance on the narrow scope of Exemption 5 to prevent unnecessary litigation and delay.

At its core, "[d]isclosure, not secrecy, is the dominant objective of the [Freedom of Information] Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, FOIA exemptions "have been consistently given a narrow compass." *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989). Yet agencies have taken an

[18] https://epic.org/privacy/streetview.

unjustifiably broad view of the deliberative process privilege, often improperly withholding documents that are clearly not deliberative. Without guidance from this Court that cabins use of the deliberative process privilege, agencies will continue to assert the privilege and force FOIA requesters to litigate in order to obtain agency records.

EPIC's experience with FOIA illustrates the need for clear guidance on the limited scope of the privilege and Exemption 5. Many of the documents that EPIC has obtained through litigation were initially withheld by the agency under Exemption 5. Yet none of the material in these records reflect the type of information that Congress intended to protect under Exemption 5. The Court should reject this broad view and affirm Exemption 5's "narrow compass." *Tax Analysts*, 492 U.S. at 151. Specifically, the Court should reject the Government's contention that the deliberative process privilege provides a basis for withholding agency memoranda and other records that describe the basis of agency decisions.

Recent experience in two of EPIC's FOIA suits underscores the overbroad assertion of Exemption 5 that agencies commonly adopt.

Department of Justice's Withholding of a Report on Predictive Policing

In June of 2016, EPIC filed a FOIA request with the Department of Justice ("DOJ") "seek[ing] records relat[ed] to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies." FOIA Request from EPIC to Laurie Day, Chief, Initial Request Staff, Office of Info. Policy, Dep't

of Justice 1 (June 15, 2016).[19] EPIC sought to improve public understanding of and increase transparency surrounding predictive policing and criminal risk assessment techniques. *See id.* at 3.

After 265 days passed without any FOIA determination, EPIC brought suit against the DOJ. *See* Complaint for Injunctive Relief, *EPIC v. DOJ*, 320 F. Supp. 3d 110 (D.D.C. 2018) (No. 17-cv-00410), 2017 WL 914690. Although the DOJ provided EPIC with roughly 400 pages of material on October 31, 2017—more than 500 days after EPIC's initial request—it withheld roughly 2,400 additional pages pursuant to FOIA Exemption 5. *See* Memorandum of Points and Authorities in Support of Plaintiff's Opposition and Cross-Motion for Summary Judgment at 5, *EPIC v. DOJ*, 320 F. Supp. 3d 110 (D.D.C. 2018) (No. 17-cv-00410), 2018 WL 1510130. Many of the 400 pages that the DOJ did provide were partially redacted based on Exemption 5. *Id.*

In its Cross-Motion for Summary Judgment, EPIC alleged that the DOJ improperly invoked the deliberative process privilege as to numerous records, including a DOJ report on predictive policing ("Predictive Policing Report"). EPIC argued that the Predictive Policing Report was "by the DOJ's admission . . . a final product," *id.* at 9, and that the DOJ "provided no hint of [what] final agency policy its 'predecisional' material preceded," *id.* at 11 (quoting *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007)). EPIC further argued that materials related to the Predictive Policing Report—including source lists, bullet points, and

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[19] https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-v-DOJ-criminal-justice-algorithms-FOIA-request.pdf.

research—were "aggregated factual material not subject to the deliberative process privilege." *Id.* at 13.

The DOJ responded that the Predictive Policing Report was deliberative because it might reveal "potential benefits and concerns, tentative next steps, [and] questions for consideration." *Id.* at 10. As to the related materials, the DOJ argued that the "selection of facts and source material is itself a part of the deliberative process." Defendant's Motion for Summary Judgment at 13, *EPIC v. DOJ*, 320 F. Supp. 3d 110 (D.D.C. 2018) (No. 17-cv-00410), 2018 WL 949174.

Although the district court ruled in favor of the DOJ, *see EPIC v. DOJ*, 320 F. Supp. 3d 110, 114 (D.D.C. 2018), the agency subsequently agreed to release the report while EPIC's appeal was pending, *see EPIC v. DOJ,* No. 18-5307, 2020 WL 1919646 (D.C. Cir. Mar. 24, 2020). Pursuant to the settlement, the DOJ released both the Predictive Policing Report and the list of research sources it originally withheld. EPIC, *EPIC Obtains DOJ Report on Predictive Policing and AI—"Individual Liberty is at Stake"* (2020).[20]

Review of the records made clear that the DOJ's invocation of Exemption 5 was overbroad. The Predictive Policing Report is a finalized memorandum submitted by the agency to the White House, and it contains no information that can fairly be characterized as deliberative.[21] The report describes itself as an

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[20] https://epic.org/2020/03/epic-obtains-doj-report-on-pre.html.

[21] Indeed, there is no opinion supporting the DOJ's assertion of deliberative process privilege for the Predictive Policing Report. The district court did not reach the DOJ's deliberative process argument for this document, instead

"overview of the current use of predictive analytics in law enforcement," and its sections detail the facts and challenges surrounding new policing technologies. *See* Dep't of Justice, *Predictive Analytics In Law Enforcement: A Report by the Department of Justice* 1 (2014).[22] Furthermore, the DOJ's source list is a compilation of public documents that does not reveal any scope of inquiry into predictive policing. There is no evidence that withholding these records was necessary to protect internal deliberations, yet the agency withheld the record for nearly four years despite the ongoing public interest in oversight of predictive policing programs. *See, e.g.*, Tim Cushing, *FOIA'ed DOJ Report Points Out the Downsides of Relying on 'Predictive Policing' to Fight Crime*, Techdirt (Mar. 31, 2020, 3:38 AM).[23]

Department of Justice's Withholding of a Report on Predictive Policing

Another example of an agency's overly broad deliberative process privilege claims arose in the case concerning release of records related to the warrantless wiretapping program. In 2006, EPIC filed FOIA requests seeking the legal basis for warrantless domestic eavesdropping conducted by the Federal Bureau of Investigation and the National Security Administration. EPIC *EPIC v. DOJ*, 511 F. Supp. 2d 56,

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ruling that the agency could withhold the report based on the presidential communications privilege. *See EPIC*, 320 F. Supp. 3d at 115-18.

[22] https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-16-06-15-DOJ-FOIA-20200319-Settlement-Production-pt1.pdf.

[23] https://www.techdirt.com/articles/20200324/12472544161/foiaed-doj-report-points-out-downsides-relying-predictive-policing-to-fight-crime.shtml.

62 (D.D.C. 2007). Ultimately, EPIC brought FOIA claims against the DOJ "seeking the release of agency records regarding the Bush Administration's policy of conducting surveillance of domestic communications without the prior authorization of the Foreign Intelligence Surveillance Court." *Id.* However, the DOJ relied on Exemption 5 to withhold various Office of Legal Counsel ("OLC") opinions. *Id.* at 70.

The district court sharply criticized the Justice Department for withholding OLC opinions based on nothing more than a "naked assertion" that they were predecisional, *EPIC v. DOJ*, 511 F. Supp. 2d at 70. In essence, the DOJ justified its invocation of the deliberative process privilege with "because we [said] so." *Id.* at 70. This, the court stated, was "an inadequate method for invoking Exemption 5." *Id.* Following the initial decision rejecting the agency's Exemption 5 claim, the court ordered *in camera* review of certain OLC opinions and rejected the agency's assertion of the deliberative process privilege on multiple grounds based on the "extraordinarily vague descriptions" of the records by agency officials. *EPIC v. DOJ*, 584 F. Supp. 2d 65, 77, 83 (D.D.C. 2008). The agency failed to identify with specificity any role that these records played "in a specific deliberative process" or to establish that they were predecisional. *Id.* at 77.

During the course of the litigation, the DOJ released several of the OLC opinions it had initially withheld. Public access to these opinions was essential to understand the asserted legal basis for the program and the role that the different executive branch agencies played in its development. Yet again, the agency's overbroad assertions of the privilege at the initial stages led to protracted litigation and delayed public

oversight. EPIC has seen similarly vague and overbroad assertions of Exemption 5 in numerous cases, and this trend undermines open government and accountability.

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Though the above cases typify EPIC's experience with overbroad agency assertions of the deliberative process privilege, they are not the only cases. In EPIC's experience, the problem is widespread.

If the Court adopts a broad reading of Exemption 5, it will reward agency efforts to withhold material from the public even though release would not actually harm the deliberative process. EPIC requests that the Court take the opposite approach. By recognizing the narrow scope of Exemption 5 and the deliberative process privilege, the Court will ensure that information reaches the public as Congress intended.

CONCLUSION

For the above reasons, *amicus* EPIC respectfully asks this Court to affirm the decision of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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