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Legal Sidebar

D.C. Circuit Limits FOIA's Consultant Corollary for Members and Staff

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Members of Congress and the executive branch frequently engage in discussions about pending legislative proposals. The frankness of those conversations may depend on the likelihood that the content of those communications remains secret.

The Freedom of Information Act (FOIA) does not provide public access to legislative branch records. Evidence of the substance of conversations between Members and executive branch officials, however, may sometimes be subject to public disclosure thorough a FOIA request made to executive branch agencies. Congressional information held by an executive branch agency can be shielded from public disclosure under at least two doctrines: the congressional records exception to FOIA and the "consultant corollary" to the law's deliberative process exemption. The consultant corollary permits an agency to withhold certain information subject to FOIA that the agency receives from a third-party consultant, including (until recently) Members or their staff in some circumstances. The consultant corollary, however, may no longer provide the same protection it once did to communications between Congress and the executive branch.

In a May 2024 opinion issued by the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), *American Oversight v. U.S. Department of Health and Human Services*, the court appears to have greatly narrowed the consultant corollary such that communications between Members and their staff with the executive branch may rarely, if ever, qualify for the exception. Narrowing the consultant corollary may expose more communications between Congress and the executive branch to disclosure through FOIA and may lead more Members and their staff to take additional precautions to shield their communications from disclosure. This sidebar concludes with considerations for Congress in light of these new developments.

FOIA and the Consultant Corollary

FOIA confers on the public a right to access federal agency information. Enacted in 1966, FOIA generally allows any person—individual or corporate, U.S. citizen or not—to request and obtain, without explanation or justification, a large swath of records and information held by the federal government. Seeking to balance transparency with the government's legitimate interests in keeping some records out of the public view, Congress included in FOIA nine exemptions. The exemptions function as justifications or

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reasons that an agency may, but is not required to, invoke to withhold information requested through a FOIA request. One of the exemptions, known as Exemption 5, permits an agency to withhold requested records if they are "inter-agency or intra-agency memorandum or letters" that reveal the agency's pre-decisional deliberative processes. The 1966 House report accompanying the legislation indicates that the exemption seeks to ensure the "full and frank exchange of opinions" within the executive branch and is based on the idea that requiring an agency to release information prior to finalizing an action or decision will hinder its ability to function effectively.

To fall within Exemption 5's coverage, a document must qualify as an "inter-agency or intra-agency" document. Material is "inter-agency or intra agency" if it originates from an "agency," as that term is defined by FOIA. FOIA's definition of "agency" includes, among other things, all executive branch agencies, but does not include Congress or private third parties. Due to this definition of "agency," Congress and private parties are not subject to FOIA's disclosure requirements, but executive branch agencies with which Congress and third parties may communicate, are. Courts developed the consultant corollary to Exemption 5 to shield from public disclosure communications between agencies and entities not covered by FOIA but used by the agency in its deliberative processes.

To qualify for the consultant corollary, the source of the records must fit within the statutory terms of Exemption 5. In other words, the source of the records must be considered "inter-agency or intra-agency." In its 2001 decision in *Department of the Interior v. Klamath Water Users Protective Association*, a unanimous Supreme Court recognized the existence of the consultant corollary without determining its legality. In that case, the Court was called upon to determine whether the consultant corollary shielded documents exchanged between the Department of the Interior (the Department) and Indian Tribes related to ongoing disputes over the Tribes' water rights. The Court explained that a number of federal courts of appeals have applied the consultant corollary doctrine to records withheld under Exemption 5.

In those cases, the outside consultants played the same role as an agency employee would in the agency's deliberative process. To that end, "in the typical case[] . . . the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency." Rather, "[i]ts only obligations are to truth and its sense of what good judgment calls for." The Tribes in *Klamath*, the Court held, were communicating with the Department with "their own . . . interests in mind" and "at the expense of others seeking [water rights] inadequate to satisfy everyone." The Tribes' distinct and independent interests in securing their own water rights distinguished the case from other cases where the consultant corollary applied. The records exchanged between the Tribes and the Department, accordingly, could not be considered inter- or intra-agency records within the meaning of Exemption 5.

After the *Klamath* decision, there was some debate in the lower courts about whether the consultant corollary survived the Court's "narrow" approach to Exemption 5. Ultimately, the lower courts continued to apply the consultant corollary, often paying more attention to the interests of the consultant in relation to the agency that received the FOIA request. In *Judicial Watch, Inc. v. Department of Energy*, decided in 2005, the D.C. Circuit held that, despite the Supreme Court's admonition in *Klamath* that Exemption 5 is limited to records that are truly inter-agency or intra-agency, a record prepared by a non-agency but held by an agency can still fall within the scope of Exemption 5 if it is also pre-decisional and deliberative.

In light of the *Klamath* decision, however, the D.C. Circuit has recognized two elements that must be met in order for the consultant corollary to apply. First, the consultant must not be acting in its self-interest when providing advice to the agency. Second, the agency must have actually solicited the advice from the consultant.

The D.C. federal courts have struggled since *Klamath* to apply the first element, differing on how much self-interest on a consultant's part disqualifies the relevant records from protection under Exemption 5. In 2018, the U.S District Court for the District of Columbia (the federal trial courts in Washington, DC) held in *Judicial Watch, Inc. v. U.S. Department of State* that the consultant corollary shielded communications

between two nominees for State Department positions and State Department officials used in preparation for the nominees' Senate confirmation hearings. The court reasoned that "under some circumstances a consultant and an agency may share common goals such that even if the consultant appears to be acting to foster its own interests, its actions might also be construed as aiding an agency process." Although the nominees in this case may have had their own interests in submitting information to the agency, the communications "were . . . for the purpose of aiding the agency's deliberative process."

Just a year later, in 2019 in *American Oversight v. U.S. Department of Health and Human Services* (a different case from the one decided by the D.C. Circuit in 2024), the D.C. district court held that the consultant corollary did not apply to communications between the Department of Health and Human Services (HHS) and Members of Congress and their staff regarding legislative proposals. The court interpreted *Klamath* as foreclosing the application of the consultant corollary to outside consultants that harbored their own interests in dealing with the agency, even if those interests did not predominate over shared goals. During the litigation, HHS admitted that the Members and their staff may have had their own interests when communicating with HHS. To fall within the consultant corollary, the court held, the outside consultant "must be a neutral party" that "lack[s] an independent interest."

The Consultant Corollary and Congressional Communications

Prior to the *Klamath* decision, the D.C. Circuit applied the consultant corollary to communications between Members and their staff and the executive branch without much hesitation. The D.C. Circuit's first significant analysis applying the corollary dates back to 1980. In that case, *Ryan v. Department of Justice*, the D.C. Circuit held that questionnaires returned to the Department of Justice (DOJ) by Senators regarding their views on future judicial appointees were intra-agency memoranda protected by Exemption 5. In *Ryan*, DOJ sent questionnaires to all fifty Senators asking questions about their preferences for future judicial appointments. The Senators returned the questionnaires to DOJ, which were then the subject of a FOIA request. DOJ objected to providing the questionnaires on a number of different grounds, including that the questionnaires and the responses they contained were "intra-agency" memoranda protected by Exemption 5. The D.C. Circuit agreed, reasoning that the purpose of Exemption 5 is to protect the deliberative process of the government by ensuring that advisors to agencies can express their opinions freely without fear that their opinions will be subject to public scrutiny. As applied to the facts in *Ryan*, the court explained that Congress intended the terms "intra-agency" and "inter-agency" in Exemption 5 to be read flexibly and in light of the purpose of Exemption 5 to shield documents that are part of the agency's deliberative process. The documents in *Ryan*, the court held, were deliberative, as they concerned advice about who the President should nominate for federal judicial posts. The court held that it was "common sense" to mark the questionnaires as "intra-agency."

In a footnote in *Klamath*, the Supreme Court suggested that the D.C. Circuit's approach in *Ryan* possibly extended beyond what the Court considers the proper bounds of the consultant corollary. Subsequent D.C. Circuit cases have recognized *Ryan* may be in tension with *Klamath* but held that *Ryan* remains "good law."

As noted above, after the Court issued the *Klamath* decision, the D.C. federal courts had difficulty applying the first prong of the consultant corollary test—that is, when does a consultant represent their own self-interest such that they are no longer properly considered a "consultant?" The difficulty answering this question appeared to be particularly acute in cases that concerned communications between Congress and the executive branch. In a series of cases brought by American Oversight (a nonprofit organization), the D.C. district court reached conflicting conclusions on whether any amount of self-interest disqualified Members and their staff from being considered "consultants" for the purposes of

Exemption 5. (Decisions of the federal district courts have no precedential effect on future cases in the same court.)

The first case to squarely consider this issue was the 2019 *American Oversight v. U.S. Department of Health and Human Services* decision. As noted above, the court was skeptical of finding Members and their staff akin to consultants during communications about legislative proposals. The court reasoned that, although the Members and their staff may have provided "useful" and "influential" information to HHS, they did not function as if they were employees of the agency. They were not, the court explained, "neutral part[ies]" "play[ing] essentially the same part in an agency's process of deliberation as documents prepared by agency personnel."

In three other American Oversight cases that followed, however, the district court found that the consultant corollary applied to facts similar to those presented in the first *American Oversight* case. One case—*American Oversight v. Department of Transportation*—includes an illuminating discussion of the competing approaches within the D.C. district and circuit courts. In *Department of Transportation* (*DOT*), congressional staff sought the input of DOT officials on draft legislation. The court held that the relevant inquiry should be whether the two staffs (those of the Members and of DOT) were working together to achieve the same goal, regardless of whether the congressional staffers harbored their own institutional or political goals. "In other words, when discussing draft legislation, members of the two political branches may share the exact same goals and desire to further the exact same piece of legislation." The court, however, recognized that applying the consultant corollary to Congress "constructs a kind of legal fiction." Members and their staff do not effectively become employees of the agency when providing advice. Nonetheless, the court reasoned, applying the consultant corollary to Congress served the purposes of Exemption 5 because "congressional and agency staff *would not* exchange full-throated discussions on common legislative goals" if those conversations could become public (emphasis in original).

The 2024 D.C. Circuit case *American Oversight v. HHS*, which has all but barred the application of the consultant corollary to congressional communications with the executive branch, grew out of the fourth district court case to address this issue. The case involved communications between House of Representatives leaders, HHS, and the Office of Management and Budget (OMB) related to the House's attempt to repeal the Affordable Care Act in 2017. While the House was debating the issue, American Oversight filed a FOIA request seeking records pertaining to the communications between the House, HHS, and OMB. Both agencies withheld the communications and invoked Exemption 5, maintaining that the communications were "intra-agency memorandums or letters."

Recognizing the competing lines of case law on this issue, the district court held that the consultant corollary "would only be inapplicable if the consultant's interests were (1) necessarily adverse [to the agency]; and (2) the members were competitors" for some benefit at the expense of other applicants, as the tribes were in *Klamath*. In this case, the district court explained that the mere fact that the Members may have had their own personal, political, or institutional interests did not disqualify them from being treated as consultants. The record, the court found, demonstrated that Members and agency staff shared the same interest in repealing the Affordable Care Act.

A divided panel of the D.C. Circuit disagreed, holding that, "[w]hen members of Congress and their staffs engage with executive agencies concerning legislation, they are *almost inevitably* acting on behalf of other interests than those of the agencies, including those of Congress as an institution and those of their constituents" (emphasis added). The court examined declarations provided by HHS and OMB describing the communications between the executive branch and Members and their staff. OMB described its communications as seeking to "influence and shape pending legislation" and noted that there was some disagreement between the agencies and Congress. HHS explained that its communications were intended to "monitor and build support" for the legislation. In these "back-and-forth negotiations" over the substance of the legislation, the court held, "Congress is plainly "represent[ing] an interest of its own." It

did not matter, the court reasoned, that Republican Members of Congress shared the same legislative goal as the Trump Administration; a consultant must have "no obligation or stake in the outcome of an agency's process other than a duty to provide good advice to the agency."

The D.C. Circuit's 2024 opinion raises questions of whether any communication between executive branch agencies and Members and their staff regarding legislative proposals could ever qualify for the consultant corollary. Although the court explicitly refrained from answering that question, its description of the relationship between Congress and the executive branch as "opposite and rival" and as "almost inevitably" acting on their own, separate interests appears to indicate that the universe of communications that could qualify is limited at best.

Considerations for Congress

The D.C. Circuit's *American Oversight* decision appears to have greatly narrowed the circumstances in which the consultant corollary applies to communications between Congress and the executive branch. In response to the government's argument that curtailing the consultant corollary in the way it did would expose "vital interests" of the government, the D.C. Circuit explained that it was simply holding that Congress did not include in the text of FOIA an exemption to cover those types of records. It is up to Congress, the court noted, to decide whether to amend FOIA to include such an exemption, and Congress could consider such legislation.

Notwithstanding the *American Oversight* decision, some records exchanged between Congress and the executive branch that qualify as *congressional records* will still be exempt from FOIA. FOIA requires federal agencies to disclose "agency records" after receiving a valid request. Congress is not an "agency" under FOIA and, accordingly, is not obligated to respond to FOIA requests for documents in its possession. Congress's exemption from FOIA extends beyond requests it receives directly. Crucially, if "Congress manifested a clear intent to control" a document that an agency obtains from Congress or creates in response to a congressional request, the D.C. Circuit has held that such documents qualify as a congressional record exempt from FOIA. Accordingly, when "Congress has manifested its own intent to retain control [of documents]. . . the agency—by definition—cannot lawfully 'control' the documents . . . , and hence they are not 'agency records.'"

Congress can manifest its intent to control records in a number of ways, including by placing standard language to that effect in emails with the executive branch or by including a cover letter expressing the intent to retain control over a document. Despite the narrowing of the consultant corollary, Congress can continue to rely on the congressional records exception to keep at least some correspondence with the executive branch from being publicly disclosed through FOIA requests.

Finally, if Congress feels that manifesting an intent to control the documents is unwieldy to protect congressional communications from public disclosure, it could amend FOIA to ensure greater protections for documents exchanged between Congress and the executive branch.

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