



U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

SEP 12 2008

1200 New Jersey Avenue SE.
Washington, DC 20590

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Michael Brooks, Staff Attorney
Center for Auto Safety
1825 Connecticut Avenue, NW
Washington, DC 20009-5708

RE: Appeal of Freedom of Information Act (“FOIA”) Request

Dear Mr. Brooks:

This responds to your letter dated May 29, 2006¹ (received by this office for action on June 4, 2008), in which you appeal the agency’s April 29, 2008 response to your Freedom of Information Act (FOIA) request.

Original FOIA Request

In your FOIA request, dated March 27, 2008, you request documents referenced in an article published in the *L.A. Times* on March 25, 2008, entitled “Cellphone Law May Not Make Roads Safer.” Specifically, you request the National Highway Traffic Safety Administration’s “2003 review” of “worldwide research,” as referenced in the article, along with “any documents, including powerpoint presentations, related to the review.”

FOIA Response

By letter of April 29, 2008, the agency denied your FOIA request. The agency explained that while it found documents responsive to your request, it withheld the documents pursuant to exemption (b)(5) of FOIA (5 U.S.C. § 552(b)(5)) (Exemption 5). The withheld documents consist of the 2003 review, which was created in a PowerPoint presentation, and additional documents related to the review. The agency found that because the requested documents contain internal pre-decisional, deliberative information, releasing the information “would reveal advice, opinions or recommendations of agency officials and would have a chilling effect on the decision-making process.” The agency, therefore, denied your request under Exemption 5.

¹ For purposes of this letter, we assume that the date indicated on your FOIA appeal was a typographical error. The agency nonetheless preserves its right to assert a timeliness objection in connection with your FOIA appeal.

FOIA Appeal

In your letter dated May 29, 2008, you appeal the agency's decision. You contend that the requested documents fall outside the scope of Exemption 5 because NHTSA "failed to establish that the 2003 review and associated documents were anything more than research and data." You note that "NHTSA regularly releases the results of similar driver distraction and cell phone usage surveys to the public." You cite case law for the proposition that factual, investigative material contained in deliberative memoranda is not exempt from disclosure. On that basis, you contend that the agency should disclose data and other factual materials contained in the requested documents. Finally, you argue that because the alleged "worldwide research" used to create NHTSA's fatality estimate was public information, it cannot be considered part of the deliberative or policy-making process, and thus, should be disclosed.

Agency Response

As an initial matter, I have determined that a number of responsive documents contain personally identifiable information, the release of which would constitute a clearly unwarranted invasion of personal privacy. I am withholding these documents pursuant to exemption (b)(6) of FOIA (Exemption 6) and Exemption 5, discussed below.

Exemption 5 of FOIA (a.k.a. the "deliberative process" privilege) provides that an agency may withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). An agency may invoke Exemption 5 if it can show that the documents in question are both predecisional and deliberative. See *Kidd v. Dep't of Justice*, 362 F. Supp. 2d 291, 295 (D.D.C. 2005) (finding that draft documents were protected by the deliberative process exemption). A decision is predecisional if "it was generated before the adoption of an agency policy." *Id.* (citation omitted). A document is deliberative if it reflects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* (citing *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

Exemption 5 is designed to protect documents "which would prematurely reveal the personal opinions of the author or the views of the agency on a decision not yet finalized at the time the document was created." *Id.* The privilege is also designed to "prevent injury to the quality of agency decisions," by withholding documents that "reflect the agency's group thinking in the process of working out its policy and determining which its law shall be." *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 82 (D.D.C. 2005) (citation omitted). In essence, the privilege is designed to promote a frank exchange of ideas by assuring "agency employees that they can provide a decisionmaker with their uninhibited opinion without fear of public scrutiny, to prevent premature disclosure of proposed policies, and to protect against public confusion through the disclosure of documents advocating or discussing reasons for policy decisions that were ultimately not adopted." *Kidd*, 362 F. Supp. 2d at 295-96.

Applying the foregoing standard, I have decided to release three documents related to the 2003 review. Specifically, enclosed at TAB A are copies of two reports entitled, "NHTSA Driver Distraction Expert Working Group Meetings" and "NHTSA Driver Distraction Internet Forum," both of which are available on NHTSA's public website. Enclosed at TAB B is a document entitled "References" which served as a bibliography for the 2003 review.² You will not be charged a fee for these materials.

However, after reviewing the content of the remaining documents sought in your FOIA request (*i.e.*, the 2003 analysis, drafts of related documents and drafts of related PowerPoint presentations), I have determined that the agency properly withheld these documents under Exemption 5. As discussed in more detail below, these internal briefing documents are both pre-decisional and deliberative, and were compiled as part of the Department of Transportation's (DOT) consideration of a formal policy on the use of wireless communications devices by drivers.

1. The Withheld Documents Are Pre-Decisional

The remaining responsive documents are pre-decisional because they were generated prior to the adoption by DOT of a formal policy on the use of wireless communications devices by drivers. In fact, with the exception of the 2003 briefing document, all of the withheld documents are drafts, which "by their very nature, are typically predecisional and deliberative." *Id.* (citing *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)). Given the foregoing, I find that the documents are pre-decisional, and thus, satisfy the first prong of Exemption 5.

2. The Withheld Documents Are Deliberative

Having reviewed the remaining documents, I find that the second prong of Exemption 5 is satisfied because the documents are deliberative in nature. The information contained within these documents, including the draft policies and estimates, reflects deliberations which served as a basis for DOT's consideration of a formal policy on the use of wireless communications devices by drivers. Moreover, to the extent the relevant documents contain "worldwide research," as alleged in your FOIA request, such factual information consists of the selection of facts and summaries of relevant, publicly available research, which were prepared by agency staff in an effort to aid the DOT in establishing its official policy.

² Please note that the document entitled *References* is substantially similar to a document entitled *A Bibliography of Research Related to the Use of Wireless Communications Devices from Vehicles*, dated February 2005. This document may be accessed at the following location on NHTSA's public website:

http://www.nhtsa.gov/portal/site/nhtsa/template.MAXIMIZE/menuitem.8f0a414414e99092b477cb30343c44cc/?javax.portlet.tpst=4670b93a0b088a006bcd6b760008a0c_ws_MX&javax.portlet.prp_4670b93a0b088a006bcd6b760008a0c_viewID=detail_view&itemID=97b964d168516110VgnVCM1000002fd17898RCRD&overrideViewName=Article

Courts have found such factual material exempt, where, as here, "disclosure 'would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Quarles v. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990). See also *Mead Data Central, Inc. v. United States Dep't of the Air Force*, et al., 575 F.2d 932, 934 (D.C. Cir. 1978) (finding data exempt under Exemption 5 because it served "primarily to reveal the 'evaluative' process by which different members of the decisionmaking chain arrived at their conclusions and what those predecisional conclusions [were]"); *Hamilton Securities Group, Inc. v. Dep't of Housing and Urban Development*, 106 F. Supp. 2d 23, 33 (D.D.C. 2000) (noting that factual information is exempt "if the 'manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policymaking process'").

In *Montrose Chemical Corporation v. Train*, the U.S. Court of Appeals for the District of Columbia found that Exemption 5 protected summaries consisting of compilations of public facts that were created by staff members in an effort to aid an administrator in the resolution of a complex issue. See 491 F.2d 63, 71 (D.C. Cir. 1974). The court recognized that Exemption 5 was intended to protect both the selection of facts and summaries that reflected a deliberative process. See *id.* As noted by the court, "[t]o require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision." *Id.* at 68.

In *Mapother v. Department of Justice*, the same court addressed whether Exemption 5 covered a report that was created by staff to aid in a supervisor's discretionary action, and involved extracting pertinent facts from a vast number of documents, organizing them to adhere to a specific purpose, and identifying significant issues associated with the matter. See 3 F.3d 1533, 1539 (D.C. Cir. 1993). The court held that Exemption 5 covered a majority of the staff's report, in part, because the "selection of facts thought to be relevant clearly involves 'the formulation or exercise of . . . policy-oriented judgment' or 'the process by which policy is formulated,' . . . in the sense that it requires 'exercises of discretion and judgment calls.' . . . Such tasks are . . . part of processes with which '[t]he deliberative process privilege . . . is centrally concerned.'" *Id.* (citations omitted).

Here, the responsive documents are briefing materials and drafts of briefing materials containing, in part, a selection of facts and summaries of factual research created by agency staff in an effort to aid senior DOT officials in formulating an official policy regarding the use of wireless communications devices by drivers. As in *Montrose* and *Mapother*, the staff extracted pertinent facts, organized them to suit a specific purpose (in this case, to address the use of wireless communication devices while driving), and identified issues associated with this matter. In addition, the staff's selection of facts thought to be relevant involved an exercise of policy-related judgment because it required the staff to exercise discretion and make judgment calls in extracting pertinent material from a vast number of documents that would be considered by the decision-maker. As held in *Mapother*, these tasks are part of the processes that the deliberative process privilege is designed to protect.

After reviewing the factual material in light of the policies underlying Exemption 5, I conclude that the selection of facts and summaries of factual research in the withheld briefing documents are inextricably intertwined with the agency's policy-making process. Disclosure of the information you request would permit an inquiry into the mental processes of DOT officials by disclosing the facts that were relied upon in making the decision. Exemption 5 permits me to protect not simply deliberative material, but also the deliberative process of this agency. See *Mapother*, 3 F.3d at 1539. The fact that I have released to you a bibliography of references related to the 2003 review, all of which are to publicly available sources, further supports the protection of the factual summaries, as disclosure would serve no purpose but to reveal the mental processes of the agency and subject them to undue public scrutiny – a purpose which is clearly improper under Exemption 5. Given the foregoing, I find that the factual information relevant to your FOIA request is not severable, but is inextricably intertwined with the policymaking process, and thus, protected by Exemption 5.

Furthermore, a majority of Federal courts, including the U.S. District Court for the District of Columbia, have held that "briefing materials" such those responsive to your request – that is, reports or other documents that summarize issues and advice superiors, either generally or in preparation for an event – are properly protected by the deliberative process privilege. See, e.g., *Judicial Watch, Inc. v. U.S. Department of Energy*, 310 F. Supp. 2d 271, 3176 (D.D.C. 2004) (protecting briefing materials prepared for Secretary of Interior).

In summary, all of the withheld documents are briefing materials and draft briefing materials that are predecisional to the DOT's establishment of a formal policy on the use of wireless communications devices by drivers, and deliberative in that they were prepared as part of the Department's decision-making process with respect to this issue. Further, the factual information that is contained within the withheld documents is exempt because it is inextricably intertwined with the policymaking process and would reveal the deliberative process of the agency and its decision-makers. As such, the release of the information you request would reveal advice, opinions or recommendations of agency officials and would have a chilling effect on the decision-making process. See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980); and *Russell v. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982). For these reasons, I find that the remaining documents you requested are exempt from disclosure under the deliberative process privilege.

I have nonetheless decided to exercise my discretion, without prejudice to any of the arguments advanced in the agency's initial decision and above, to release select portions of the 2003 briefing materials. Consequently, in addition to the three documents identified above, enclosed at TAB C are additional documents responsive to your request, for which you will not be charged. With the exception of these materials, I affirm the agency's initial decision to refuse disclosure of the remaining documents responsive to your FOIA request.

I am the person responsible for this decision. It is administratively final and has been concurred in by the Office of General Counsel, Department of Transportation. If you wish to seek review of my decision, you may do so in the U.S. District Court for the District of Columbia or in the district where you reside, have your principal place of business, or where the records are located. 5 U.S.C. § 552(a)(4)(B).

Sincerely yours,

A handwritten signature in black ink that reads "Anthony M. Cooke". The signature is written in a cursive style with a large initial "A" and "C".

Anthony M. Cooke
Chief Counsel

Enclosures