THE FOIA IMPROVEMENT ACT: USING A REQUESTED RECORD'S AGE TO RESTRICT EXEMPTION 5'S DELIBERATIVE PROCESS PRIVILEGE

Zachary D. Reisch[*]

[*] J.D. Candidate, Boston University School of Law, 2018; B.A. History, Haverford College, 2014. I would like to thank Professor Jack M. Beermann for his guidance, the Law Review staff for its edits, and my family and friends for their support.

INTRODUCTION

Cuban exiles intent on overthrowing Fidel Castro landed at the Bay of Pigs in Cuba on April 17, 1961.[1] The Central Intelligence Agency ("CIA") had trained them as soldiers and tried to assist them with an ineffective bombing raid on Castro's airplanes.[2] The Cuban military captured more than one thousand of the exiles and killed more than one hundred.[3] The invasion failed.[4]

A little more than a decade later, in 1973, CIA historian Jack Pfeiffer began working on a history of the Bay of Pigs invasion.[5] Pfeiffer's project produced five volumes, none of which were available to the public until 1998 when the CIA released volume three.[6] In April 2011, the National Security Archive (the "Archive"), a non-profit organization "that facilitates scholarship by placing declassified government documents into the public record,"[7] sued the CIA under the Freedom of Information Act ("FOIA")[8] for release of the other four volumes.[9]

FOIA, passed in 1966, obligates federal agencies to make records available upon request except under specified circumstances.[10] Before Congress passed FOIA, members of the public who wanted access to government records had to rely on a provision of the Administrative Procedure Act ("APA") that allowed requesters to see government information only with good reason; under the APA, executive agencies retained broad authority to deny such requests.[11]

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[1] *The Bay of Pigs*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://www.jfklibrary.org/JFK/JFK-in-History/The-Bay-of-Pigs.aspx [https://perma.cc/5N5H-7HVJ] (last visited May 10, 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Brief for Appellant at 3, Nat'l Sec. Archive v. CIA, 752 F.3d 460 (D.C. Cir. 2014) (No. 12-5201), 2013 WL 241775, at *3; Kyle Singhal, Essay, *Disclosure, Eventually: A Proposal to Limit the Indefinite Exemption of Federal Agency Memoranda from Release Under the Freedom of Information Act*, 84 GEO. WASH. L. REV. 1388, 1391 n.15 (2016).

[6] Peter Kornbluh, *CIA Sued for 'Holding History Hostage' on Bay of Pigs Invasion*, NAT'L SECURITY ARCHIVE (Apr. 14, 2011), http://nsarchive.gwu.edu/NSAEBB/NSAEBB341/index.htm [https://perma.cc/8FNQ-ETVA].

[7] Brief for Appellant, *supra* note 5, at *3.

[8] 5 U.S.C. § 552 (2012), *amended by* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

[9] Kornbluh, *supra* note 6.

[10] *Introduction*, DEP'T JUST. GUIDE TO THE FREEDOM INFORMATION ACT 1 (July 24, 2013) [hereinafter FOIA GUIDE: *Introduction*], https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/intro-july-19-2013.pdf [https://perma.cc/VT6C-M6CU].

[11] RONALD A. CASS ET AL., ADMINISTRATIVE LAW 849-50 (7th ed. 2016); *see also* S. REP. NO. 89-813, at 40-41 (1965) (discussing differences between pre-FOIA disclosure rule and proposed FOIA legislation).

Additionally, requesters could not seek judicial review if their requests were denied.[12] Today, FOIA allows "any person" to request documents,[13] permits agencies to withhold records only in specific circumstances,[14] and allows for judicial review of withholdings.[15] If an agency denies a FOIA request, the requester may appeal within the agency.[16] If that appeal fails, the requester may then bring suit in federal court to compel release.[17]

The Archive's FOIA lawsuit against the CIA was partially successful. Later in 2011, the CIA declassified and released the first, second, and fourth volumes of Pfeiffer's history, but refused to release the fifth volume.[18] When the Archive filed a new lawsuit against the CIA to compel disclosure of volume five, the CIA argued that it could withhold the manuscript pursuant to the deliberative process privilege, which is incorporated into FOIA's Exemption 5.[19]

The exemptions to FOIA's general disclosure requirement reflect the tension within the statute between promoting government openness and maintaining government secrecy when necessary.[20] One of FOIA's exemptions, Exemption 5, walks this line by allowing agencies to withhold records that would be privileged at trial.[21] When using Exemption 5, agencies most often invoke the deliberative process privilege; this privilege protects records relevant

[12] CASS ET AL., *supra* note 11, at 850.

[13] 5 U.S.C. § 552(a)(3)(A). *But see* FOIA GUIDE: *Introduction*, *supra* note 10, at 8 (describing 2003 amendment to FOIA that prevents intelligence agencies "from disclosing records in response to any FOIA request that is made by any foreign government or international government organization" and stating that "this was the first time that Congress departed from the general rule that 'any person' may submit a FOIA request").

[14] 5 U.S.C. § 552(b) (listing nine exemptions to FOIA's disclosure requirement).

[15] *Id.* § 552(a)(4)(B) ("[T]he district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . .").

[16] *Id.* § 552(a)(6)(A)(i) (stating that in its denial letter, the agency must notify the requester of "the right of such person to appeal to the head of the agency").

[17] *See Procedural Requirements*, DEP'T JUST. GUIDE TO THE FREEDOM INFORMATION ACT 72 (last updated Sept. 4, 2013) [hereinafter FOIA GUIDE: *Procedure*], https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf#p4 [https://perma.cc/RRT4-Y7U5] ("[A]lthough failure to file an administrative appeal is not an absolute bar to judicial review, . . . the District of Columbia Circuit has held that exhaustion of the administrative appeal process is 'generally required before filing suit in federal court.'" (quoting Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003))).

[18] Peter Kornbluh, *Top Secret CIA 'Official History' of the Bay of Pigs: Revelations*, NAT'L SECURITY ARCHIVE (Aug. 15, 2011), http://nsarchive.gwu.edu/NSAEBB/NSAEBB355 [https://perma.cc/2M2T-5FRV].

[19] *See* Brief for Appellant, *supra* note 5, at *4.

[20] *See infra* Section I.B.

[21] *See infra* Section I.B.

to government policymaking.[22] Agencies, however, can often release records that fall under Exemption 5 at their discretion.[23] When President Barack Obama took office, his administration articulated a foreseeable harm standard that governed when agencies should release otherwise exempt records.[24] Under this standard, an agency should withhold an exempt record only if there is a reasonably foreseeable chance that disclosure would harm "an interest protected by one of the statutory exemptions,"[25] such as the deliberative process of government officials.[26]

The CIA refused to make a discretionary release of Pfeiffer's fifth volume, leaving the Court of Appeals for the D.C. Circuit to decide whether the record fell under Exemption 5's deliberative process privilege. In *National Security Archive v. CIA*,[27] the D.C. Circuit affirmed the lower court's decision that the fifth volume did fall within Exemption 5 and did not have to be released.[28]

During congressional hearings about two bills to amend FOIA, advocates for FOIA reform criticized the decision in *National Security Archive*.[29] Anne Weismann, the Executive Director of a nonprofit organization that "expose[s]

[22] *See infra* Section I.B.2.

[23] *See infra* Section I.C.

[24] *See infra* Section I.C.1.

[25] Memorandum for Heads of Executive Departments and Agencies, 74 Fed. Reg. 51,879-51,881 (Oct. 8, 2009) [hereinafter Holder Memorandum]; *see also infra* Section I.C.1.

[26] *See infra* note 138.

[27] 752 F.3d 460 (D.C. Cir. 2014).

[28] *Id.* at 462, 470. For critiques of the court's decision in this case, see David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. FORUM 232, 237 (2016); Singhal, *supra* note 5, at 1391.

[29] *See, e.g.*, *Ensuring Transparency Through the Freedom of Information Act (FOIA): Hearing Before the H. R. Comm. on Oversight and Gov't Reform*, 114th Cong. 114-15 (2015) (statement of Nate Jones, Director, Freedom of Information Act Project, National Security Archive, George Washington University), https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg22315/pdf/CHRG-114hhrg22315.pdf [https://perma.cc/W6QD-P7MT] (explaining that the CIA "continues to hide" the fifth volume); *Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 8 (2015) [hereinafter Blanton Testimony] (statement of Thomas Blanton, Director, National Security Archive, George Washington University), https://www.judiciary.senate.gov/imo/media/doc/05-06-15%20Blanton%20Testimony.pdf [https://perma.cc/YFT2-9JA4] ("This is the exemption that the CIA used . . . to withhold volume 5 of a 30-year-old internal draft history of the disaster at the Bay of Pigs, even though we pried loose the other 4 volumes, even though there was no sign of the CIA picking up the draft to revise it, even though the now-deceased author of the draft had even filed a FOIA request to get it released.").

misconduct and malfeasance in public life,"[30] specifically attacked the decision's refusal to place greater importance on the requested record's age.

> The government's need to protect deliberative process material that is 25 or more years old is virtually non-existent, yet Exemption 5 has been invoked for this very purpose. . . . [T]he CIA withheld . . . as deliberative a volume of history pertaining to the Bay of Pigs, an event that happened more than 50 years ago and about which there is little that is not publicly known.[31]

According to Weismann, the deliberative process no longer needs to be protected after a certain period of time.

Congress took this reasoning to heart when it passed the FOIA Improvement Act of 2016 (the "FOIA Improvement Act").[32] President Obama signed the bill into law on June 30, 2016, around FOIA's fiftieth anniversary.[33] Among other changes, the statute added a twenty-five-year sunset provision to records withheld under Exemption 5's deliberative process privilege[34] and included the language of the Obama administration's foreseeable harm standard in FOIA itself.[35] Now, agencies cannot use Exemption 5's deliberative process privilege to withhold records that are twenty-five or more years old.[36] Additionally, agencies cannot withhold a record under any exemption that allows for discretionary release unless releasing the record could harm an exemption-protected interest, such as government deliberations.[37] Congress made these changes, at least in part, because it believed that Exemption 5 and other discretionary exemptions were being overused, thereby tilting FOIA too far toward government secrecy.[38]

The new FOIA amendments resolved the Archive's legal dispute with the CIA. On October 31, 2016, the CIA released the fifth volume of Pfeiffer's Bay of Pigs history because the volume was over twenty-five years old and,

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[30] *Our Mission*, CAMPAIGN FOR ACCOUNTABILITY, http://campaignforaccountability.org/about/ [https://perma.cc/3CK7-GUWR] (last visited Sept. 17, 2017).

[31] *Ensuring Transparency Through the Freedom of Information Act (FOIA)*, *supra* note 29, at 148 (statement of Anne L. Weismann, Executive Director, Campaign for Accountability).

[32] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

[33] *Actions Overview: S.337*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/337/actions?q=%7B%22search%22%3A%5B%22s337%22%5D%7D&r=2 [https://perma.cc/5NU6-P99P] (last visited Sept. 17, 2017).

[34] *See infra* Section I.B.4.

[35] *See infra* Section I.C.2.

[36] *See infra* Section I.B.4.

[37] *See infra* Section I.C.2.

[38] *See infra* Sections I.B.4, I.C.2.

therefore, could no longer be withheld under the deliberative process privilege.[39] After examining the volume, the Archive hypothesized that the CIA had withheld the manuscript because its critique of the CIA's internal investigations negatively portrayed the CIA.[40]

Even though documents such as the Bay of Pigs history's fifth volume will now be released under the FOIA Improvement Act, many academics and journalists have suggested that the sunset provision on Exemption 5's deliberative process privilege will not sufficiently curb the exemption's overuse.[41] Similarly, commentators have suggested that the newly codified foreseeable harm standard will be ineffective in decreasing Exemption 5's

[39] Lauren Harper & Thomas Blanton, *CIA Releases Controversial Bay of Pigs History*, NAT'L SECURITY ARCHIVE (Oct. 31, 2016), http://nsarchive.gwu.edu/NSAEBB/NSAEBB564-CIA-Releases-Controversial-Bay-of-Pigs-History [https://perma.cc/SE3H-32T6]. The cover letter to the volume stated, "[w]e are releasing this draft volume today because recent 2016 changes in the [FOIA] requires us to release some drafts that are responsive to FOIA requests if they are more than 25 years old." David S. Robarge, *Context for Readers of the Attached CIA Draft Volume*, NAT'L SECURITY ARCHIVE (Sept. 2016), http://nsarchive.gwu.edu/NSAEBB/NSAEBB564-CIA-Releases-Controversial-Bay-of-Pigs-History/CoverLetter.pdf [https://perma.cc/S2N3-9K33].

[40] Harper & Blanton, *supra* note 39 (quoting Peter Kornbluh, an analyst for the Archive, as saying, "[w]e know now why the CIA attempted to cover up this document for so long. It is a vivid historical example of what Pfeiffer called 'the Agency's dirty linen' that CIA officials never wanted to air in public").

[41] *See* WENDY GINSBERG, CONG. RESEARCH SERV., R43924, FREEDOM OF INFORMATION ACT LEGISLATION IN THE 114TH CONGRESS: ISSUE SUMMARY AND SIDE-BY-SIDE ANALYSIS 12-13 (2016) (citing David S. Ferriero, *Bulletin 2015-01*, NAT'L ARCHIVES (June 17, 2015), https://www.archives.gov/records-mgmt/bulletins/2015/2015-01.html [https://perma.cc/C7RU-TFTV]) (stating that the twenty-five-year sunset period is too long to have a large impact because agencies already have a statutory obligation to give certain records to the National Archives and Records Administration ("NARA") after thirty years at the latest; because "NARA does not apply Exemption 5 to the . . . records it accepts from agencies," there is already an indirect thirty-year sunset provision on all of Exemption 5 for documents transferred to NARA); McCraw, *supra* note 28, at 237 (stating that the sunset provision "was typical of much of the remedial FOIA litigation: well-intentioned but exceedingly modest"); Singhal, *supra* note 5, at 1404 (arguing that the new statute "miss[es] the mark" in part because "the Act's twenty-five-year expiration date is very limited" in that "it only applies to documents protected under the deliberative-process privilege" and is too long); Jonathan Bruno, *The Freedom of Information Act Was Just Amended. Here's What Changed—And Didn't.*, JURIST (July 29, 2016, 5:03 PM), http://www.jurist.org/forum/2016/07/jonathan-bruno-foia-changes.php [https://perma.cc/9EJF-MRAY] (stating that the sunset provision is "a good start, though it still gives official blessing to far more secrecy than is necessary to safeguard the frankness of agency conversation").

application.[42] Accordingly, the statute's critics have suggested alternative changes that the FOIA Improvement Act should have made.[43]

This Note argues that although the FOIA Improvement Act's sunset and foreseeable harm provisions might be narrow in scope when viewed individually, when interpreted together they are powerful disclosure tools with the potential to limit the deliberative process privilege's application to older records. Specifically, a holistic understanding of the provisions suggests that Congress intended a record's age to be the most important factor in the

[42] *See* GINSBERG, *supra* note 41, at 12 (observing that the "codification should not affect current agency practices," presumably because agencies were already applying the foreseeable harm standard before Congress passed the FOIA Improvement Act); Singhal, *supra* note 5, at 1403-04 (opining that "the Act's simple requirement that agencies reasonably foresee harm to 'an interest protected by an exemption' in order to justify nondisclosure seems to offer little if any improvement" because "general" statements of foreseeable harm might satisfy the new standard); Bruno, *supra* note 41 ("In the rare cases in which a requester actually litigates an agency's decision to withhold, the presumption's only likely effect will be to compel the government's lawyers to describe some harm that might result from disclosure. That's hardly an insurmountable hurdle, especially if judges continue their easy acquiescence in agency assertions about such matters.").

[43] According to Singhal, because the Presidential Records Act, 44 U.S.C. § 2204(a), only limits presidential documents for twelve years, the sunset on Exemption 5's deliberative process privilege should be twelve years as well. Singhal, *supra* note 5, at 1405 ("If presidential records can be disclosed twelve years after a presidency without risking an unjustifiable chilling effect on presidential decisionmaking, then one is hard pressed to imagine why agency deliberations deserve greater protection."); *see also* Stephen Gidiere, *FOIA Gets a Facelift*, 48 TRENDS 9, 11 (2016) ("Here's an idea for the next FOIA amendments: change 25 years to one year. Or six months."). Singhal proposed a new amendment to Exemption 5 that creates "a presumptive twelve-year expiration date from the date of a requested record's creation, beyond which agencies cannot invoke Exemption 5 unless they demonstrate their own need for nondisclosure with some specificity." Singhal, *supra* note 5, at 1405. McCraw seems to support the idea that "the secrecy should end at the time an agency decision was made, not two and half [sic] decades later, when the news value is gone and the public interest in a particular topic has waned." McCraw, *supra* note 28, at 237. According to the Electronic Frontier Foundation, future amendments should "[e]xplicitly prohibit[] certain types of records from being withheld" and should "[r]equir[e] all documents withheld under FOIA to be balanced against the public interest in disclosing them." Aaron Mackey, *Fixing FOIA: Senate-Passed Bill is a Good Start, But More is Needed*, ELECTRONIC FRONTIER FOUND. (Mar. 16, 2016), https://www.eff.org/deeplinks/2016/03/fixing-foia-senate-passed-bill-good-start-more-needed [https://perma.cc/5KUU-BBSN]. And the Washington Examiner has suggested that "[i]f bureaucrats refuse to preserve and deliver requested documents in a timely fashion as the law requires, perhaps all of their communications should by default be made available online after 30 days, with exemptions applied for on a case-by-case basis and subject to court challenge." Editorial, *Bureaucrats Can't Run But They Can Hide, and It's Time to Stop Them*, WASH. EXAMINER (Aug. 14, 2017), http://www.washingtonexaminer.com/bureaucrats-cant-run-but-they-can-hide-and-its-time-to-stop-them/article/2631407 [https://perma.cc/X2RT-DVF4].

foreseeable harm analysis for all records withheld under the deliberative process privilege, even those that are less than twenty-five years old.[44] Before the FOIA Improvement Act, agencies took age into account as only one factor in their foreseeable harm inquiry.[45] Likewise, courts performing analyses similar to the foreseeable harm inquiry did not make age a central factor, which resulted in documents being withheld despite arguments that they were too old to affect the government's deliberative process.[46] Therefore, if agencies and courts make age the most important factor in foreseeable harm decisions, disclosure proponents will have a new weapon when the government invokes Exemption 5's deliberative process privilege.

Part I of this Note provides background on FOIA's history, Exemption 5, the Obama administration's discretionary release standard, and the FOIA Improvement Act's relevant amendments. Part II uses the FOIA Improvement Act's text and legislative history to argue that Congress intended age to be the most important factor in the foreseeable harm analysis for documents withheld under Exemption 5's deliberative process privilege, and this interpretation would give requesters a new tool to use when appealing agency decisions to withhold requested records. Finally, Part III proposes that agencies and courts make age the most important factor in the foreseeable harm analysis for records withheld under the deliberative process privilege by implementing a sliding-scale test centered around the requested record's age.

I. BACKGROUND

A. *FOIA's History*

Representative John E. Moss introduced the first federal open records bill in 1955, in response to the government excesses of the McCarthy era.[47] For the next decade, various presidential administrations successfully lobbied Congress to block the proposed legislation.[48] Even when Congress was poised to pass FOIA in the mid-1960s, the statute was still opposed by all executive branch

[44] *See infra* Section II.B.

[45] *See infra* Section II.A.1.

[46] *See infra* Section II.A.2.

[47] Steve Zansberg, *July 4, 1966: Birth of the FOIA—A Look Back*, 32 COMM. LAW. 34, 34 (2016). The "McCarthy era" refers to a period in the 1940s and 1950s when Senator Joseph McCarthy and others led a hunt against alleged Communists in the United States. According to one observer, "[a]ll over the country, thousands of Americans entered into a nightmare world of inquisition—by Congressional and state legislative committees, FBI agents, and local vigilantes, all of whom publicly sought to point the finger at 'subversives.'" Alger Hiss, *How McCarthyism Silenced America*, 7 BARRISTER 10, 53 (1980).

[48] Zansberg, *supra* note 47, at 34 (stating that Moss's bill "was repeatedly defeated in Congress owing to stiff opposition from the administrations of Presidents Eisenhower, Kennedy, and the first two years of President Lyndon Baines Johnson").

agencies and by President Lyndon Johnson.[49] Journalists, however, including the American Society of Newspaper Editors, successfully lobbied in favor of the bill.[50] The Senate passed FOIA in October 1965, and the House of Representatives unanimously passed it in June 1966.[51] On July 4, 1966, President Johnson "begrudgingly" signed the bill into law.[52]

Commentators and government officials have debated FOIA's merits and possible pitfalls since its passage.[53] When he signed FOIA, President Johnson released a signing statement that recognized both the benefits and dangers of giving the public greater access to government records.[54] He acknowledged that "[a] democracy works best when the people have all the information that the security of the Nation permits," then emphasized, "[a]t the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available."[55] The latter statement was a reference to the enumerated exemptions to FOIA's disclosure requirement.[56] By drawing attention to the exemptions, President Johnson argued that although the new statute could benefit the country by creating an informed citizenry, it also had the potential to cause the release of damaging information.[57]

Despite Johnson's concerns, the original statute "was . . . relatively toothless" and federal agencies skirted it by "delay[ing] responses to requests for

[49] *Id.* at 34-35.

[50] *Id.* at 35; *see also* David L. Hudson, Jr., *Sharing Secrets*, 102 A.B.A. J. 48, 53 (2016) (quoting Columbia Journalism School professor Michael S. Schudson as saying, "FOIA was generated . . . without grassroots support. The only supporters . . . were journalists, especially organized associations of journalists like the American Society of Newspaper Editors and the journalism honorary society, Sigma Delta Chi. FOIA emerged from congressional efforts to control a rapidly growing executive branch of government, not from a general public faith in a right to know").

[51] Zansberg, *supra* note 47, at 35.

[52] *Id.*

[53] *See* CASS ET AL., *supra* note 11, at 850-51 ("On the one side are arrayed familiar and attractive arguments about the need for a fully informed citizenry in a functioning democracy; on the other, equally familiar and attractive arguments about preserving efficiency of operations and necessary confidentiality.").

[54] Zansberg, *supra* note 47, at 35 (describing how President Johnson followed a Department of Justice ("DOJ") recommendation to "add his own 'spin' to the law").

[55] *Id.* (quoting Statement by President Johnson upon Signing the "Freedom of Information Act," 316 PUB. PAPERS 699, 699 (July 4, 1966) [hereinafter Johnson Signing Statement]).

[56] *See id.* (stating that in his signing statement, "Johnson took great pains to emphasize the myriad exemptions from disclosure that the bill recognized, highlighting the need to maintain secrecy to protect the nation's interest").

[57] *Id.* ("As long as threats to peace exist, for example, there must be military secrets." (quoting Johnson Signing Statement, *supra* note 55, at 699)).

documents" and by "reply[ing] with arbitrary denials."[58] Congress amended the statute in 1974 in response to the Watergate scandal,[59] another event, like McCarthy's hunt for Communists in the 1950s, that deepened mistrust of the federal government—although Watergate focused the public eye on the executive branch in particular.[60] The amendments added, among other changes, a deadline for agency responses to records requests and a penalty for government employees who wrongfully withheld records.[61] President Gerald Ford vetoed the amendments, but Congress passed the bill over his veto.[62] Although Congress

[58] Antonin Scalia, *The Freedom of Information Act Has No Clothes*, Mar./Apr. 1982 AEI J. ON GOV'T & SOC'Y 14, 15.

[59] *Id.* ("The amendments were drawn and debated in committee while President Nixon was in the final agony of Watergate, and were passed when President Ford was in the precarious early days of his unelected term.").

[60] *See* Richard D. Schwartz, *After Watergate*, 8 LAW & SOC'Y REV. 3, 3 (1973) ("To my way of thinking, the Watergate affair has revealed the profound vulnerability of democratic government to the threat of governmental control of information."); *see generally The Watergate Story*, WASH. POST, https://web.archive.org/web/20161118183554/http://www.washingtonpost.com/wp-srv/politics/special/watergate/ [https://perma.cc/9CVR-27CX] (last visited Sept. 17, 2017) ("A burglary at a Washington office complex called the Watergate in June 1972 grew into a wide-ranging political scandal that culminated in the resignation of President Richard Nixon two years later.").

[61] *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE (Nov. 23, 2004), http://nsarchive.gwu.edu/NSAEBB/NSAEBB142/index.htm#_ednref2 [https://perma.cc/5KFP-DLLP] (describing the many changes included in the 1974 amendments).

[62] *Id.* ("Concern about leaks (shared by his chief of staff Donald Rumsfeld and deputy Richard Cheney) and legal arguments that the bill was unconstitutional (marshaled by government lawyer Antonin Scalia, among others) persuaded Ford to veto the bill . . . ."). One possible reason why President Ford and executive agencies did not support FOIA and the 1974 amendments is that FOIA applies to executive agencies and the Executive Office of the President, but not to Congress. *See* 5 U.S.C. § 552 (2012), *amended by* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (defining "agency" as "includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"); FOIA GUIDE: *Procedure*, *supra* note 17, at 4-6 (listing groups that "are not subject to the FOIA," including Congress); Josh Gerstein, *FOIA Reform Bill Headed to Obama*, POLITICO (June 13, 2016, 10:14 PM), http://www.politico.com/blogs/under-the-radar/2016/06/foia-reform-bill-headed-to-obama-224293 [https://perma.cc/4HW6-BEF2] (describing "a provision White House officials have repeatedly urged that would expand FOIA to cover Congress"). It makes sense that Congress, which need not go through the trouble of releasing documents in response to FOIA requests, would support open government legislation, whereas the executive branch, which must handle FOIA requests, would be against such legislation. *See* JACK M. BEERMANN, INSIDE ADMINISTRATIVE LAW 345 (2011) ("From the executive branch's

has amended FOIA multiple times since 1974,[63] these amendments constitute the statute's most comprehensive changes.[64]

B. *Exemption 5*

One of FOIA's exemptions, Exemption 5, states that agencies do not have to disclose records that are "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."[65] The Supreme Court has interpreted this "opaque" language to "exempt those documents, and only those documents[,] that are normally privileged in the civil discovery context."[66] Specifically, if a document "would 'routinely be disclosed' in private litigation," then the document does not fall within Exemption 5 and must be released.[67] The three Exemption 5 privileges upon which agencies most often rely are the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege.[68]

1. Attorney-Client and Attorney Work-Product Privileges

Long before FOIA was passed, evidentiary privileges developed as a way to protect certain information from being disclosed in discovery and at trial.[69] In Anglo-American law, "[t]he first privilege to be recognized was that of the

perspective, [the movement toward government openness] . . . may be viewed as an attack by Congress on executive power.").

[63] Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 456 (2015) (citing Freedom of Information Act, 5 U.S.C. § 552) ("Congress has substantively amended FOIA seven times since it was first passed, most recently in 2009.").

[64] *Veto Battle*, *supra* note 61 (calling the 1974 amendments "the core Freedom of Information Act still in effect today").

[65] 5 U.S.C. § 552(b)(5). As originally passed, Exemption 5 used the words "private party" as a defined term that meant "party other than an agency." Act of July 4, 1966, Pub. L. No. 89-487, § 3(e)(5), (g), 80 Stat. 250, 251. Congress replaced the words "private party" with "party other than an agency" in 1967. Act of June 5, 1967, Pub. L. No. 90-23, § 552(b)(5), 81 Stat. 54, 55. The exemption was not subsequently amended until Congress passed the FOIA Improvement Act of 2016. *See* 5 U.S.C. § 552.

[66] DEP'T OF JUSTICE, *Exemption 5*, DEP'T OF JUST. GUIDE TO THE FREEDOM OF INFO. ACT 1, [hereinafter FOIA GUIDE: *Exemption 5*] (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf [https://perma.cc/ZPH8-JJP9] (last updated May 7, 2014).

[67] *Sears*, 421 U.S. at 149 n.16; *see also* FOIA GUIDE: *Exemption 5*, *supra* note 66, at 2 ("[T]he Supreme Court has held that the standard to be employed is whether the documents would 'routinely be disclosed' in civil litigation.").

[68] FOIA GUIDE: *Exemption 5*, *supra* note 66, at 3.

[69] 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 2.2 (Richard D. Friedman, ed.) (3d ed. 2017) (discussing the origins of evidentiary privileges in English common law).

attorney-client relationship."[70] The attorney-client privilege protects "confidential communications between the client and the attorney."[71] Originally, lawyers could invoke this privilege to safeguard their "sense of honor."[72] Today the privilege is justified from a more practical perspective, as a way to encourage prospective clients to seek out and confide in attorneys.[73] The privilege is "absolute," meaning a litigant cannot overcome the privilege by a showing of need.[74]

The work-product privilege, unlike the attorney-client privilege, is a twentieth century creation.[75] This privilege protects materials that would reveal an attorney's mental impressions.[76] The justification for this privilege is purely practical: "to remove the disincentive to attorneys' preparation for trial" by ensuring that attorneys need not disclose their "creative efforts with the opposition."[77] In some jurisdictions, the privilege is qualified and can be overcome if the party opposing the privilege shows sufficient need.[78] This qualification does not exist in the FOIA context, however, where all of the Exemption 5 privileges are treated as absolute.[79]

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[70] *Id.*

[71] *Attorney-Client Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[72] 1 IMWINKELRIED, *supra* note 69, § 2.3.

[73] *Id.* § 2.4.

[74] *Id.* § 6.3 (stating that, with regard to "absolute" privileges such as the attorney-client privilege, "if there is a prima facie case for invoking the privilege and no special exception applies, the litigant seeking to discover or introduce the privilege cannot defeat the privilege by showing a case-specific, compelling need for the privileged information").

[75] *Id.* § 1.3.11 (discussing the factors that gave rise to the work-product privilege, such as increased use of courts and the creation of the Federal Rules of Civil Procedure). Imwinkelried does not think that the work-product privilege is a privilege at all, stating, "[t]he protection is perhaps the doctrine most easily confused with a true privilege, especially the attorney-client privilege. Indeed, the work product doctrine is sometimes described as a 'privilege.'" *Id.* (citing multiple sources). For consistency, however, this Note refers to the "work-product privilege." *See* FOIA GUIDE: *Exemption 5*, *supra* note 66, at 3 (referring to "the attorney work-product privilege").

[76] *See Work-Product Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "work-product rule" as "[t]he rule providing for qualified immunity of an attorney's work product from discovery or other compelled disclosure").

[77] 1 IMWINKELRIED, *supra* note 69, § 1.3.11.

[78] *See id.* ("[I]n some jurisdictions no work product protection is absolute; and in others only a small category of work product material enjoys absolute protection."); *see also* FED. R. CIV. P. 26(b)(3)(A)(ii) (stating that attorney work product "may be discovered if . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means").

[79] FOIA GUIDE: *Exemption 5*, *supra* note 66, at 2-3 ("[I]n the FOIA context there is no difference between qualified and absolute privileges, and courts do not take into account a party's need for the documents in ruling on a privilege's applicability. This approach prevents

2. Deliberative Process Privilege

In his signing statement, President Johnson mentioned specific types of information that should be precluded from release.[80] For example, "[o]fficials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions."[81] In this passage, the President was referring, at least in part, to Exemption 5's deliberative process privilege.[82]

The deliberative process privilege, which is the privilege "most commonly invoked"[83] under Exemption 5, is a component of the executive privilege.[84] Specifically, it is "[a] privilege permitting the government to withhold documents relating to policy formulation."[85] To fall under the privilege, the requested record must be pre-decisional, meaning it was created before "the adoption of an agency policy,"[86] and it must be "deliberative," meaning it "makes recommendations or expresses opinions on legal or policy matters."[87] For example, "a letter from one government department to another about a joint decision that has not yet been made" would fall under the deliberative process privilege, as would "a memorandum from an agency employee to his [or her] supervisor describing options for conducting the agency's business."[88] Like the

the FOIA from being used to circumvent civil discovery rules." (footnote omitted)). *But cf.* Singhal, *supra* note 5, at 1395 (arguing that this approach goes beyond Exemption 5's language by exempting documents that would be available at trial in some circumstances).

[80] Johnson Signing Statement, *supra* note 55, at 699.

[81] Zansberg, *supra* note 47, at 35 (quoting Johnson Signing Statement, *supra* note 55, at 699).

[82] *See id.*

[83] FOIA GUIDE: *Exemption 5*, *supra* note 66, at 13.

[84] Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 279 (1989); *see also* RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 907 (5th ed. 2011) ("The term *executive privilege* includes several different categories of privileges for governmental secrets. First, the state secrets privilege protects military, diplomatic, or sensitive national security secrets. Second, the qualified presidential communications privilege protects confidential conversations between the president and the president's advisers . . . . Last, there are privileges to protect a wide range of official information, such as law enforcement files and governmental agency deliberations.").

[85] *Deliberative-Process Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[86] FOIA GUIDE: *Exemption 5*, *supra* note 66, at 15 (quoting Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011)).

[87] *Id*. (quoting Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)).

[88] *DEA FOIA Information*, DRUG ENFORCEMENT ADMIN., https://www.dea.gov/FOIA/information.shtml [https://perma.cc/5BHQ-TEAJ] (last visited Sept. 17, 2017).

attorney work-product privilege, the deliberative process privilege is qualified at common law and can be overcome by a showing of need.[89]

Further, the privilege, also like the attorney work-product privilege, is a modern creation.[90] One of its early articulations was in the 1958 Court of Claims decision in *Kaiser Aluminum & Chemical Corp. v. United States*,[91] in which the court held that the government could use the deliberative process privilege to withhold from discovery a record pertaining to the sale of an aluminum plant.[92] The court in *Kaiser Aluminum* likened the privilege to the work-product privilege in that it encourages administrators to work without restraint.[93] The court observed that it was "immaterial" whether the author of the allegedly privileged documents was alive, stating that the deliberative process privilege "is not a privilege to protect the official but one to protect free discussion of prospective operations and policy."[94] Two other justifications that courts have used when applying the privilege are "to protect against premature disclosure of proposed policies before they are actually adopted" and "to protect against public confusion that might result from disclosure of reasons and rationales that were not . . . ultimately the grounds for an agency's action."[95]

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[89] 2 IMWINKELRIED, *supra* note 69, § 7.7.2.

[90] *See* Weaver & Jones, *supra* note 84, at 279 (stating that deliberative process privilege "has emerged as one of the important governmental privileges . . . [d]uring the last thirty years"); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 (1990) ("The general deliberative privilege is relatively new to the list of evidentiary privileges that the federal executive may assert in the course of judicial proceedings." (footnote omitted)).

[91] 157 F. Supp. 939 (Ct. Cl. 1958).

[92] *Id.* at 947; *see also* 2 IMWINKELRIED, *supra* note 69, § 7.7.1.

[93] *Kaiser Aluminum*, 157 F. Supp. at 947 ("It is akin to the request for 'production of written statements and mental impressions contained in the files and the mind of the attorney.'"); *see also* FOIA GUIDE: *Exemption 5*, *supra* note 66, at 13 (stating that one justification for the privilege is "to encourage open, frank discussions on matters of policy between subordinates and superiors"). Although federal courts have tended to accept this justification for the privilege, "[s]ome commentators . . . are highly skeptical of this . . . rationale." 2 IMWINKELRIED, *supra* note 69, § 7.7.1; *see* Wetlaufer, *supra* note 90, at 886-87 (asserting that there is no "empirical evidence" supporting the argument that revealing deliberative materials will have a "chilling" effect on decisionmaking).

[94] *Kaiser Aluminum*, 157 F. Supp. at 947; *see* Weaver & Jones, *supra* note 84, at 281 (describing how agencies may not want to release documents that show their decision-making processes because they "fear[] that the release of deliberative materials will chill the deliberative process and will have an adverse effect on the quality of agency decisionmaking"). *But see* Singhal, *supra* note 5, at 1400 ("If the sole author of the requested work himself desires the work to be disclosed, then what need is there for the reviewing court to assure him that his work will be protected?").

[95] FOIA GUIDE: *Exemption 5*, *supra* note 66, at 13.

Although courts did not articulate the privilege until the twentieth century, a concern with protecting government deliberations has existed in America since its founding. The Continental Congress that met in Philadelphia in 1774 was closed to the public, as was the Constitutional Convention that met in 1787.[96] Further, delegates to the Convention voted to record only the votes of states, not of individual members, because otherwise "[t]he minutes would be filled 'with contradictions' as members changed their positions."[97] Delegates worried that if they changed their views throughout the drafting process and their voting record became public, political opponents would use their inconsistencies against them.[98] Hiding the deliberative process by obscuring individual votes was a way to give deliberators greater freedom as they maneuvered "the inevitable complexity of the drafting process."[99]

Michael Kennedy has given a more recent example of public access to pre-decisional deliberations having a potentially harmful effect on the deliberative process. As a way to predict terrorism incidents, the Defense Advanced Research Project Agency ("DARPA") considered developing a market where people would bet on the likelihood of terrorist attacks.[100] Politicians sharply criticized the plan after it was "prematurely" revealed in 2003.[101] Consequently, DARPA scrapped the project and "a high DARPA official resigned under pressure, partly as a result of this controversy."[102] According to Kennedy, regardless of its merits, "the 'terrorism betting pool' is an example of a government agency trying to think outside the box."[103] After this controversy, DARPA could be less willing to make creative choices that are "politically risky."[104] According to Kennedy, then, public access to DARPA's pre-decisional deliberations might hinder its future policymaking, an outcome against which the deliberative process privilege is designed to protect.

3. The Relationship Between Exemption 5 and Open Government

The committee reports for the bill that became the original FOIA suggest that, although Congress wanted to protect the deliberative process when it drafted Exemption 5, it also wanted to ensure that the public had access to as many governmental records as possible. The Senate Committee on the Judiciary stated

[96] MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 20, 55 (2015).

[97] *Id.* at 58.

[98] *Id.*

[99] *Id.*

[100] Michael N. Kennedy, Comment, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1795-96 (2005).

[101] *Id.* at 1795.

[102] *Id.* at 1796.

[103] *Id.*

[104] *Id.*

that although "[t]he committee is convinced of the merits of th[e] general proposition" that "it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny," the committee "has attempted to delimit the exception as narrowly as consistent with efficient Government operation."[105] The House Committee on Government Operations took a more lenient view toward the exemption's use but still emphasized the importance of government openness, stating that Exemption 5 was designed "to exempt from disclosure . . . information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy."[106] Therefore, it seems that Congress crafted Exemption 5 as it did to ensure that the exemption did not interfere with FOIA's promotion of openness in government.[107]

4. The FOIA Improvement Act's Sunset Provision

This concern with both creating an open government and protecting the deliberative process is apparent in the FOIA Improvement Act's amendment to Exemption 5, the only exemption that the statute amended. The Act added a sunset provision to the exemption's deliberative process privilege, stating, "the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested."[108] There is no sunset on the other privileges incorporated into Exemption 5.[109]

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[105] S. REP. NO. 89-813, at 44 (1965).

[106] H.R. REP. NO. 89-1497, at 31 (1966). For an argument that FOIA does not fully protect the deliberative process, see Robert L. Saloschin, *FOIA's Impact on the Agency Decision-Making Process*, 33 FED. B. NEWS & J. 72, 73 (1986) (arguing that "FOIA has eroded the completeness and practicality of the [deliberative process] protection in several ways").

[107] Additionally, the Senate report said that "[t]he purpose of [the bill's amendment to Exemption 5] . . . is to protect from disclosure *only* those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency." S. REP. NO. 89-813, at 37 (1965) (emphasis added). This wording suggests that FOIA's final version, at least in the Senate Judiciary Committee's view, had a narrower Exemption 5 than previous versions.

[108] FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 540.

[109] David Ryan, *FOIA Improvement Act of 2016 Becomes Law*, LAWFARE (July 1, 2016, 7:00 AM), https://www.lawfareblog.com/foia-improvement-act-2016-becomes-law [https://perma.cc/38L9-7NNS] (stating that the FOIA Improvement Act "does not affect Exemption 5 as it pertains to work product or attorney-client privilege, but it sunsets the deliberative process privilege after 25 years" and that "agencies are now unable to invoke deliberative process when an individual's FOIA request seeks documents created more than 25 years prior to the date of the request"). When Congress passed the FOIA Improvement Act, Senator Patrick Leahy suggested that, although the other privileges within Exemption 5 were not expressly limited, they were not strengthened either. 162 CONG. REC. S1496 (daily ed. Mar. 15, 2016) (statement of Sen. Leahy) ("[T]he deliberative process privilege sunset is not intended to create an inference that the other privileges—including attorney-

The FOIA Improvement Act's statutory and legislative histories, which speak to changes in the statute's language over time and discussions between legislators about these changes, respectively,[110] reveal Congress's desire to both limit the deliberative process privilege's overuse and protect the various privileges incorporated into Exemption 5. Although Congress wanted to curb the overuse of Exemption 5 in general,[111] it was particularly worried about agencies overusing the deliberative process privilege.[112] After all, FOIA is designed to make policy-making more transparent, and the deliberative process privilege restricts access to records that illuminate the policy-making process. The committee report for a FOIA reform bill that did not pass into law emphasized the need to rein in the deliberative process privilege so the public could have greater access to the government's inner workings. The report observed that of all the privileges included in Exemption 5, "[t]he deliberative process privilege is the most used privilege and the source of the most concern

client and attorney work product, just to name a few—are somehow heightened in strength or scope because they lack a statutory sunset or that we believe they should not be released after 25 years. Courts should not read the absence of a sunset for these other privileges as Congress's intent to strengthen or expand them in any way.").

[110] *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 601 (2014) (describing the difference between "statutory history," which is "the formal evolution of the statutory code," and "legislative history," which is "the internal institutional progress of a bill to enactment and the deliberation accompanying that progress" (emphasis omitted)). Although legislative history's value is contested, it "is regularly briefed in federal and state courts," *id.* at 602, and "regulatory agencies routinely look to legislative history as evidence of Congress's directions for implementation," *id.* at 604.

[111] *See, e.g.*, H.R. REP. NO. 114-391, at 10 (2016) (recognizing the "overuse of exemption five" and stating that "[e]xemption five has been singled out as a particularly problematic exemption"). The extent to which this exemption has been overused is the subject of some debate. *Compare* Blanton Testimony, *supra* note 29, at 8 (stating that Exemption 5's use was at an "all-time high" when he testified before Congress in May 2015), *with* Kelly Cohen, *Earnest to Press: Give Obama Credit for Being 'Transparent,'* WASH. EXAMINER (Dec. 25, 2016), http://www.washingtonexaminer.com/earnest-to-press-give-obama-credit-for-being-transparent/article/2610364 [https://perma.cc/7MA5-FUH8] (quoting White House Press Secretary Josh Earnest as saying that "President Obama has been the most transparent president in American history"). To reach one's own conclusions, see DEP'T OF JUSTICE, *Create a Basic Report*, FOIA.GOV, https://www.foia.gov/data.html [https://perma.cc/8YWX-UPUH] (last visited Sept. 17, 2017).

[112] Gidiere, *supra* note 43, at 11 (stating that Congress, "[r]ecognizing the increased usage of . . . [the deliberative process] privilege and others in recent years, . . . attempted a partial solution in the new amendment[]" by adding a sunset provision). Although Congress focused on agencies overusing Exemption 5, rather than on federal courts approving this overuse, commentators have implicated the courts as well. *See* McCraw, *supra* note 28, at 237-38 ("[C]ourts have done little to give Exemption 5 boundaries . . . ."); Singhal, *supra* note 5, at 1391 ("Federal courts' broad interpretation of Exemption 5 has produced absurd results.").

regarding overuse."[113] The privilege, according to the report, "has become the legal vehicle by which agencies continue to withhold information about government operations," which was "a central problem FOIA was trying to fix."[114]

The report, however, encouraged only restricting the privilege in a manner that did not reduce the privilege's benefits. The twenty-five-year sunset's purpose was to "strike the appropriate balance between privacy that is absolutely necessary for candid conversations in the development of effective public policy and transparency that is necessary and expected in a government by the people and for the people."[115] Similarly, the report for the FOIA reform bill that did pass into law stated that the sunset provision is designed to "strike the proper balance between achieving [FOIA's] goals and avoiding unintended consequences that might chill internal decision-making between government employees."[116] The sunset provision, the report went on, "provid[es] sufficient time for agencies to protect against the disclosure of their deliberative processes."[117]

This view that the privilege is no longer necessary after twenty-five years is premised on the idea that deliberative processes are less likely to be harmed when older records are released. In its amicus brief in the Bay of Pigs case,[118] the National Coalition for History explained this perspective. According to the brief, older pre-decisional documents are less likely to be confused "with the current government view" because "the document does not pertain to current events and was not likely written by current government officials."[119] Further, government officials are unlikely to "temper their advice" just because their communications might be revealed "decades in the future," at which time they

[113] H.R. REP. NO. 114-391, at 10.

[114] *Id.* This critique of the deliberative process privilege is consistent with attitudes toward the privilege outside the FOIA context. For example, open meetings laws, such as the Government in the Sunshine Act, 5 U.S.C. § 552b, bring government deliberation into the open. *See* 2 IMWINKELRIED, *supra* note 69, § 7.7.1 (stating that "[c]ontemporary 'open government' statutes, forbidding private meetings of public bodies, are inspired by [the] concern" with government secrecy); William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 414 (describing tension between open meetings laws and Exemption 5's deliberative process privilege).

[115] H.R. REP. NO. 114-391, at 11.

[116] S. REP. NO. 114-4, at 4 (2015).

[117] *Id.*; *see* McCraw, *supra* note 28, at 237 (citing S. REP. NO. 114-4, at 4) (observing that Congress created an expiration date in the FOIA Improvement Act with the belief that the "time limit allowed adequate protection of governmental deliberations").

[118] *See supra* Introduction.

[119] Brief for Nat'l Coal. for History as Amici Curiae Supporting Appellant at 7, Nat'l Sec. Archive v. CIA, 752 F.3d 460 (D.C. Cir. 2014) (No. 11-cv-00724), 2013 WL 354014, at *7 [hereinafter Amicus Brief].

will have likely retired "or even died."[120] Finally, the Presidential Records Act allows presidential papers to be released after twelve years,[121] and therefore, according to the brief, records withheld under Exemption 5 should have a sunset provision as well.[122]

Changes to Exemption 5's language throughout the amendment process also demonstrate Congress's desire to preserve the exemption's integrity. FOIA reform bills introduced beginning in 2013 proposed various limitations on Exemption 5. For example, an early Senate bill included a sunset on all of Exemption 5's privileges, not just the deliberative process privilege, and a public-interest balancing test that compelled release if the "public interest in disclosure" outweighed the agency interest in withholding.[123] Additionally, an early House bill would have prohibited agencies from using Exemption 5 to withhold "opinions that are controlling interpretations of law," "final reports . . . created by an entity other than the agency . . . and used to make a final policy decision," and "guidance documents used by the agency to respond to the public."[124] Despite these proposals, the final version of the FOIA Improvement Act only included a sunset on the deliberative process privilege.[125] This statutory evolution, which reveals a rejection of sweeping restrictions, demonstrates Congress's reluctance to minimize Exemption 5's effectiveness.

C. *Discretionary Release*

1. Discretionary Release Standard Before the FOIA Improvement Act

One of the mechanisms built into FOIA that mediates between government transparency and necessary withholdings is the possibility of discretionary release. Even if an agency believes that a requested document falls within

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[120] *Id.* at *8 (emphasis omitted).

[121] 44 U.S.C. § 2204(a) (2012) (stating that "[p]rior to the conclusion of his term of office . . . the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record").

[122] Amicus Brief, *supra* note 119, at *9-11; *see, e.g.*, Daniel Schuman, *Three Ways to Strengthen FOIA*, CITIZENS FOR RESP. & ETHICS IN WASH. (June 10, 2013), http://www.citizensforethics.org/three-ways-to-strengthen-foia/ [https://perma.cc/93AB-UEAY] ("[T]he assertions of deliberative process privilege should expire over time . . . . The Presidential Records Act provides an analogous sunset where public access to presidential records can be withheld for no more than twelve years. FOIA could benefit from this example.").

[123] S. 2520, 113th Cong. § 5(A)-(C) (as introduced by Sen. Leahy and Sen. Cornyn, June 24, 2014). For a description of this bill and other precursors to the FOIA Improvement Act, see Singhal, *supra* note 5, at 1402-03.

[124] H.R. 653, 114th Cong. § 2(b)(1)(A)-(C) (as passed by House of Representatives, Jan. 11, 2016).

[125] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

Exemption 5, the agency can still release the document at its discretion.[126] Although other statutes, such as the Privacy Act, prevent some documents that fall under FOIA exemptions from being disclosed, records that fall under Exemption 5 are "not generally subject to a disclosure prohibition."[127]

The Obama administration articulated a discretionary release standard based on "foreseeable harm." In a 2009 memorandum addressed to agency heads, Attorney General Eric Holder wrote that pursuant to an earlier FOIA memorandum issued by President Obama, "the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[128] Until Congress passed the FOIA Improvement Act, this statement encapsulated the Department of Justice's ("DOJ") discretionary release standard.[129] In his memorandum, Attorney

[126] *See* DEP'T OF JUSTICE, *Reverse FOIA*, DEP'T OF JUST. GUIDE TO THE FREEDOM OF INFO. ACT 866 (Aug. 10, 2009), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/reverse-foia-2009.pdf [https://perma.cc/R2JC-7Q9Z] (citing Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (holding that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure")).

[127] DEP'T OF JUSTICE, *Discretionary Disclosure*, DEP'T OF JUST. GUIDE TO THE FREEDOM OF INFO. ACT 3 (Dec. 8, 2014) [hereinafter FOIA GUIDE: *Discretionary Disclosure*], https://www.justice.gov/sites/default/files/oip/pages/attachments/2014/12/08/discretionary_disclosure_sent_for_posting_december_5_2014.pdf [https://perma.cc/993T-GZLC]. Exemptions 1, 3, 4, 6, and part of 7 do not allow for discretionary release. *Id.* at 3-5. Exemption 1 exempts classified national security information, and a record that falls under this exemption cannot be disclosed. *Id.* at 3-4. Exemption 3 "incorporates into the FOIA nondisclosure provisions that are contained in a variety of other federal statutes," and some of these statutes prohibit discretionary release. *Id.* at 4. Exemption 4 protects trade secrets, the disclosure of which is prohibited by the Trade Secrets Act, 18 U.S.C. § 1905. *Id.* at 4. Finally, Exemption 6 and subsection (c) of Exemption 7 "protect personal privacy interests," many of which cannot be disclosed pursuant to the Privacy Act, 5 U.S.C. § 552a. *Id.* at 5.

[128] Holder Memorandum, *supra* note 25, at 51,880; *see also* FOIA GUIDE: *Introduction*, *supra* note 10, at 9-10.

[129] *See President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines*, OIP GUIDANCE: DEP'T OF JUST. (Apr. 17, 2009) [hereinafter OIP GUIDANCE], https://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government [https://perma.cc/M94K-GMF6] (stating that "[t]he determination of whether an agency reasonably foresees harm from release of a particular record . . . goes hand-in-hand with the determination of whether to make a discretionary release of information" and that "[f]or any document or portion of a document for which a discretionary release is possible, agencies should . . . withhold only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption"). The DOJ's interpretation is important because "[w]hen an agency's withholding is challenged in court, attorneys from the Justice Department are typically called upon to defend the agency's action. Therefore[,] the standards used by these attorneys in determining which withholding actions will be defended, and which will not, send a powerful signal to federal agency officials and FOIA staff on the extent to which the

General Holder stated that although "openness prevails,"[130] under FOIA "the disclosure obligation under FOIA is not absolute. The [FOIA] provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests."[131] The foreseeable harm standard was meant to help agencies determine when government secrecy should prevail.

According to DOJ Office of Information Policy ("OIP")[132] guidance from 2009, under the foreseeable harm standard an agency should first determine whether a requested record can legally be withheld under the FOIA exemptions.[133] If the record does not fall within an exemption, then the agency must release it. If the record does fall within an exemption, then "the agency should . . . take the second step of determining whether to make a discretionary release of the record or portion of the record."[134] Specifically, "FOIA professionals should examine . . . [the] record with an eye toward determining whether there is foreseeable harm from . . . [its] release," and "[e]ach record should be reviewed by agencies for . . . the actual impact of disclosure for that particular record."[135] In his FOIA memorandum, President Obama also emphasized the importance of withholding records only when release could cause a specific harm, stating that agencies should not withhold records based on "speculative or abstract fears."[136] He further explained that agencies "should

agency will have a free hand in withholding government records." *Defensive Standards Hinder FOIA Openness*, FOIA PROJECT (Mar. 1, 2012) [hereinafter *Defensive Standards*], http://foiaproject.org/2012/03/01/defensive-standards-hinder-foia-openness/ [https://perma.cc/GB82-X4PH]. For an example of an agency implementing the foreseeable harm discretionary release standard, see Alexandra Mallus, FOIA Officer, Dep't of the Interior, Address at the DOI FOIA Training Conference: FOIA Exemptions (Nov. 2, 2010), http://nsarchive.gwu.edu/NSAEBB/NSAEBB338/DOI_foia.PDF [https://perma.cc/237X-MTBF] ("Records covered by Exemption 5 are often good candidates for discretionary release under the 'foreseeable harm' standard.").

[130] Holder Memorandum, *supra* note 25, at 51,879 (quoting Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009) [hereinafter Obama Memorandum]).

[131] *Id.*

[132] *See generally* DEP'T OF JUSTICE, *About the Office*, OFF. INFO. POL'Y, https://www.justice.gov/oip/about-office [https://perma.cc/4TCC-FZ52] (last updated Feb. 15, 2017) ("The mission of the Office of Information Policy (OIP) is to encourage and oversee agency compliance with the Freedom of Information Act (FOIA). OIP is responsible for developing government-wide policy guidance on all aspects of FOIA administration.").

[133] OIP GUIDANCE, *supra* note 129 ("[I]n reviewing a record the agency must first ensure that any portion being considered for withholding fits all requirements of the exemption being considered.").

[134] *Id.*

[135] *Id.*

[136] Obama Memorandum, *supra* note 130, at 4683.

not keep information confidential merely because public officials might be embarrassed by disclosure" or "because errors and failures might be revealed."[137] Under the foreseeable harm analysis, therefore, only harms against which the exemptions are meant to protect, not harms to government reputation, should be considered.

With regard to records withheld under Exemption 5, agencies were encouraged to take age into account as one factor when determining whether to release a record. The OIP guidance explained that "the content of . . . [the record] should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its *age*, content, and character, would harm an interest protected by Exemption 5."[138] The OIP guidance also said that when considering the discretionary release of documents withheld under the deliberative process privilege, "[i]n addition to the *age of the record* and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed."[139] Before the FOIA Improvement Act, then, agencies were supposed to look at multiple factors, including the document's age, when determining whether to release records that could be withheld under Exemption 5's deliberative process privilege.

2. Codification of the Discretionary Release Standard in the FOIA Improvement Act

a. *Statutory and Legislative History*

The FOIA Improvement Act codified the foreseeable harm standard by adding the following provision to FOIA: "[a]n agency shall . . . withhold information under this section only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption . . . ; or (II) disclosure is prohibited by law."[140] The Act also states that the foreseeable harm

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[137] *Id.*

[138] OIP GUIDANCE, *supra* note 129 (emphasis added). For a Department of the Interior PowerPoint presentation that shows the deliberative process is a protected interest, see DEP'T OF THE INTERIOR, *Foreseeable Harm Standard*, FOIA BASICS Slide 20, http://nsarchive.gwu.edu/NSAEBB/NSAEBB338/DOI_foia.PDF [https://perma.cc/28WU-P9GZ] (last visited Sept. 17, 2017) (stating with regard to the foreseeable harm standard that "[t]o justify withholdings under such exemptions, you must be able to identify a harm that will occur to an interest protected by an exemption, e.g., harm to personal privacy, law enforcement interests, *the deliberative process*, etc." (emphasis added)), *cited in Glass Half Full*, NAT'L SECURITY ARCHIVE (Mar. 14, 2011), http://nsarchive.gwu.edu/NSAEBB/NSAEBB338 [https://perma.cc/XQG7-7M7Y].

[139] OIP GUIDANCE, *supra* note 129 (emphasis added).

[140] 5 U.S.C. § 552(a)(8)(A)(i) (2012), *amended by* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538; *see* DEP'T OF JUSTICE, *OIP Summary of the FOIA*

provision does not "require[] disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under" Exemption 3.[141] Exemption 3 applies to records "specifically exempted from disclosure by statute."[142] The foreseeable harm standard, therefore, applies only to records that can be released at an agency's discretion.[143]

Additionally, Congress seems to have imported into the FOIA Improvement Act the Obama administration's suggestions for implementing the foreseeable harm standard. The report for the bill that passed into law used the OIP's language verbatim to describe the foreseeable harm standard's application, stating that "age," "content," and "character" should all be considered when agencies are deciding whether to release a document.[144]

As with the sunset provision, the foreseeable harm standard's statutory and legislative histories demonstrate Congress's desire to both increase government transparency and maintain the integrity of the FOIA exemptions. Each FOIA reform bill presented the foreseeable harm standard as a codification of the Obama administration's "presumption of openness."[145] The report for the bill that passed into law articulated a typical rationale for the standard, stating, "[t]here is a growing and troubling trend towards relying on . . . discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure."[146] The foreseeable harm standard, according to the report, was designed to stop agencies from withholding records unless releasing them could actually harm an interest that FOIA protected

Improvement Act of 2016, OIP, http://www.justice.gov/oip/oip-summary-foia-improvement-act-2016 [https://perma.cc/RM4Z-4EVB] (last updated Aug. 17, 2016).

[141] 5 U.S.C. § 552(a)(8)(B).

[142] *Id.* § 552(b)(3).

[143] *See supra* note 127 (explaining why some exemptions do not allow discretionary disclosure).

[144] S. REP. NO. 114-4, at 8 (2015) ("Under this standard, the content of a particular record should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by the applicable exemption.").

[145] *See* H.R. REP. NO. 114-391, at 9 (2016) ("Building on the Administration's efforts, H.R. 653 would codify the presumption of openness, making it a permanent requirement for agencies."); S. REP. NO. 114-4, at 4 (2015) ("Most importantly, this measure [Senate Bill 337] codifies the policy established in January 2009 by President Obama for releasing Government information under FOIA . . . . This is commonly referred to as the 'presumption of openness.'"); S. REP. NO. 113-287, at 3-4 (2014) ("Most importantly, this measure [Senate Bill 2520] codifies the policy established in January 2009 by President Obama for releasing Government information under FOIA . . . . This is commonly referred to as the 'presumption of openness.'"); H.R REP. NO. 113-155, at 7 (2013) (stating that House Bill 1211 codifies "President Obama's and Attorney General Holder's memorandums requiring agencies to adopt a presumption of openness when responding to requests").

[146] S. REP. NO. 114-4, at 3.

through its exemptions.[147] It was an attempt to force agencies to release certain records that could legally be withheld.

Nevertheless, the provision's evolution suggests that Congress did not want this new requirement to undermine FOIA's exemptions.[148] FOIA reform bills that did not pass into law proposed foreseeable harm provisions more difficult to satisfy than the final version. One bill would have required agencies to identify a "specific identifiable harm," rather than simply a "harm," before withholding a record.[149] Another would have codified the policy behind the foreseeable harm provision by stating that an agency could not withhold a record just because the record "technical[ly]" fell under an exemption, to avoid releasing a record that was "embarrassing to the agency," or in response to "speculative or abstract concerns."[150] Congress eventually rejected these proposals, requiring agencies to identify only "harm" and removing the policy statement.[151] As with the sunset provision, Congress's desire to protect FOIA's exemptions led it to adopt a more limited restriction on withholdings than it could have.

This desire is further demonstrated by the evolution of the provision that expressly limits the foreseeable harm standard to records that are subject to discretionary release. A FOIA reform bill that did not pass into law clarified that the amendments should not "be construed to require the disclosure of information that" is protected by Exemption 1 or that "would adversely affect

[147] *Id.* at 8 (quoting Obama Memorandum, *supra* note 130, at 4683) ("Agencies should note that mere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information."). The Senate Report also observed that codifying the foreseeable harm standard is beneficial because it creates a standard that will remain consistent across administrations. *Id.* at 3 ("Codification of . . . [the 'foreseeable harm'] policy . . . makes clear that FOIA, under any administration, should be approached with a presumption of openness.").

[148] *Cf.* Matthew F. Phillips, The Freedom of Information Act Reimagined: Lawmaking, Transparency, and National Security in Twenty-First-Century America 145, 147 (Mar. 24, 2017) (unpublished thesis), *available at* http://scarab.bates.edu/cgi/viewcontent.cgi?article=1231&context=honorstheses [https://perma.cc/346A-V42P] (arguing that "legislators tried to make the foreseeable harm standard as expansive as possible but simultaneously failed to address legitimate concerns that doing so would ultimately slow down the entire process," and that the legislators "knew that any expected changes would not come to fruition").

[149] H.R. 1211, 113th Cong. § 2(b) (as passed by House of Representatives, Feb. 25, 2014) ("An agency may not withhold information under this subsection unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.").

[150] S. 2520, 113th Cong. § 2(1)(D) (as introduced by Sen. Leahy and Sen. Cornyn, June 24, 2014).

[151] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

intelligence sources and methods that are protected by an exemption."[152] Exemption 1 exempts records that are classified "in the interest of national defense or foreign policy."[153] This proposal, therefore, expressed a concern with applying the foreseeable harm provision to a specific category of documents. In contrast, the FOIA Improvement Act states that the provision does not apply to any "information that is otherwise prohibited from disclosure by law," suggesting a broader concern with all records that are not subject to discretionary release.[154] Congress's decision to adopt this more comprehensive warning to agencies demonstrates its preoccupation with limiting the sorts of records that could be released.

b. *Difference Between Discretionary Release and Statutory Release*

Codifying the Obama administration's foreseeable harm standard shifted its application from discretionary release to statutory release. Before the FOIA Improvement Act, there was no legal obligation to release a record that fell within an exemption even if the record would not likely harm an exemption-protected interest if released. Rather, releasing records with no foreseeable harm was a matter of DOJ policy. After the FOIA Improvement Act, an agency must, as a matter of law, release a record that falls within an exemption if releasing the record is unlikely to harm an exemption-protected interest. The Obama administration's discretionary release standard is now grounds for mandatory release.

The implications of this change were described in a DOJ memorandum opposing a FOIA reform bill that did not pass into law. Although that bill's foreseeable harm standard included the "specific identifiable harm" language that was later removed from the statute,[155] the analysis is still applicable. The memorandum argued that "the bill effectively amends each and every one of the existing exemptions in a manner that is fatally vague and subjective," that the new standard "would require judges to determine, on a document-by-document basis, whether disclosure of a record protected by an exemption would cause 'identifiable harm,'" and that "[b]y removing agency discretion to determine when a document covered by an exemption should be released, it would create massive uncertainty and would chill intragovernmental communication."[156]

[152] H.R. 653, 114th Cong. § 2(b)(2) (as passed by House of Representatives, Jan. 11, 2016).

[153] 5 U.S.C. § 552(b)(1)(A) (2012), *amended by* Pub. L. No. 114-185, 130 Stat. 538.

[154] *Id.* § 552 (a)(8)(B).

[155] *See supra* note 149 and accompanying text.

[156] Karen L. Wilson, *H.R. 1211—FOIA Oversight and Implementation Act of 2014*, at 2 (Apr. 16, 2014) (unpublished talking points), *cited in* Trevor Trimm, *New Documents Show the Obama Admin Aggressively Lobbied to Kill Transparency Reform in Congress*, FREEDOM PRESS FOUND. (Mar. 8, 2016), https://freedom.press/news-advocacy/new-documents-show-the-obama-admin-aggressively-lobbied-to-kill-transparency-reform-in-congress [https://perma.cc/M4J4-PB4J].

Regardless of whether the DOJ's concerns about the foreseeable harm standard's codification are well-founded, the memorandum makes some accurate points. For example, the new foreseeable harm standard does modify all of the exemptions that allow for discretionary release because, under the standard, an agency cannot use an exemption unless it articulates a reasonably foreseeable harm. In practice, this change should not affect agencies because they already had to articulate a reasonably foreseeable harm to satisfy the DOJ's requirements.[157] The change does affect the FOIA analysis in courts, though. Before the FOIA Improvement Act, courts were concerned only with whether a record fit within an exemption; this was the only factor that FOIA itself required agencies to consider.[158] Now, because FOIA requires agencies to perform a foreseeable harm analysis, courts will determine not only whether an exemption applies, but also whether the higher foreseeable harm standard is met. Although this shift does not entirely "remov[e] agency discretion" as the DOJ memorandum asserted, it does reduce agency discretion by allowing courts to review agency foreseeable harm determinations.[159]

D. *Standards of Review on Appeal*

If an agency denies a FOIA request in whole or in part, the requester can appeal the decision within the agency itself.[160] Although FOIA does not address the standard of review on administrative appeal, "[i]deally [for the requester], reviewing individuals give the request an entirely fresh look and do not . . . give

[157] Some commentators, however, have observed that the DOJ did not enforce its foreseeable harm standard. *See The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of John Podesta, President and CEO, Center for American Progress Action Fund), *available at* https://www.judiciary.senate.gov/imo/media/doc/11-3-15%20Podesta%20Testimony.pdf [https://perma.cc/WU6G-P46Q] ("[T]he Justice Department continues to defend expansive agency interpretations of FOIA exemptions . . . ."); *Defensive Standards*, *supra* note 129 (finding "little evidence that these new ['foreseeable harm'] standards are actually being followed").

[158] 5 U.S.C. § 552(a)(4)(B) (stating that reviewing courts must "determine whether . . . records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section").

[159] For a summary of the effect of codifying the foreseeable harm standard, see Gidiere, *supra* note 43, at 10.

[160] *See* 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa) (stating that "in the case of an adverse determination," the agency must notify the requester of "the right of such person to appeal to the head of the agency"); FOIA GUIDE: *Procedure*, *supra* note 17, at 72 (citing 28 C.F.R. § 16.6(c) (2012)) ("Under DOJ regulations . . . adverse determinations include denials of records in full or in part; 'no records' responses; denials of requests for fee waivers; and denials of requests for expedited processing.").

any deferential weight to the initial decision."[161] If the administrative appeal results in the denial being upheld, again "in whole or in part," the agency must notify the requester of his or her ability to seek judicial review.[162]

FOIA calls for de novo judicial review of agency withholdings,[163] meaning that "courts owe agencies no deference with respect to the agency's fact-finding, legal interpretations, or application of law to facts. Rather, courts must look at the matter as if deciding it in the first instance."[164] On its face, then, FOIA is "an anomaly in administrative law" because it does not employ "any of the myriad deferential standards usually associated with review of agency actions."[165] The D.C. Circuit has explained that Congress did not want courts to defer to agencies in FOIA cases because "agencies have a strong interest in preserving the secrecy

[161] *Federal FOIA Appeals Guide: The Administrative Appeals Process*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2012), https://www.rcfp.org/federal-foia-appeals-guide/administrative-appeals-process [https://perma.cc/5YA6-XLTF].

[162] 5 U.S.C. § 552(a)(6)(A)(ii).

[163] *Id.* § 552(a)(4)(B), *cited in* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 186 n.8 (2013) (establishing jurisdiction to review agency decisions and stating that "the court shall determine the matter de novo").

[164] Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1066 (2014) (footnote omitted); *see also Judicial Review*, BLACK'S LAW DICTIONARY (10th ed. 2014) (stating that de novo judicial review is "[a] court's nondeferential review of an administrative decision").

[165] Kwoka, *supra* note 164, at 1066. As Professor Margaret Kwoka has pointed out, *id.*, the Supreme Court has articulated these deferential standards of review in several cases. *See* Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."), *reh'g denied*, 468 U.S. 1227 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of [the agency's decision] . . . in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1996) (applying "deferential standard" to agency's interpretation of its own regulation). Additionally, the APA, 5 U.S.C. § 706, articulates the deferential "arbitrary, capricious" and "substantial evidence" standards of review. Kwoka, *supra* note 164, at 1066.

of their own records and are naturally disposed to resist certain disclosures."[166] De novo review in the courts provides a check on this reluctance to disclose.[167]

Despite the policy behind Congress's call for de novo review, Professor Margaret Kwoka has found that "strong deference . . . has crept into FOIA jurisprudence."[168] For example, some federal district courts have deferred to agency decisions to withhold records under Exemption 5's deliberative process privilege. In *Chemical Manufacturers Ass'n v. Consumer Product Safety Commission*,[169] the plaintiffs sued to compel release of information about a chemical used in children's toys. The U.S. District Court for the District of Columbia stated that "[t]here should be considerable deference to the Commission's judgment as to what constitutes" deliberative process because "[t]he Commission is better situated than . . . this Court to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'"[170] According to Professor Kwoka, "[a]lthough no precedential opinion has endorsed this type of deference, several other district court judges have adopted the same approach."[171]

Additionally, the Congress that passed the FOIA Improvement Act seems to have wanted courts to defer to agencies when performing the foreseeable harm analysis for certain records withheld under the deliberative process privilege. According to the report for the bill that passed into law, "[i]t is the intent of Congress that agency decisions to withhold information relating to current law enforcement actions under the foreseeable harm standard be subject to judicial review for abuse of discretion,"[172] which is a more deferential standard than de novo review.[173]

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[166] Reporters Comm. for Freedom of the Press v. U.S. DOJ, 816 F.2d 730, 740 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989), *and cited in* Steven Croley, *The Applicability of the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 103, 108 n.18 (John F. Duffy & Michael E. Herz eds., 2005). The court also explained that "*Chevron* deference," which is predicated on the idea that Congress has delegated interpretive authority to the agency, does not apply because FOIA "applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation." *Id.* at 734.

[167] *Id.* at 740.

[168] Kwoka, *supra* note 164, at 1068.

[169] 600 F. Supp. 114, 115 (D.D.C. 1984).

[170] *Id.* at 118 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)); *see* Kwoka, *supra* note 163, at 219-20.

[171] Kwoka, *supra* note 163, at 219-20.

[172] S. REP. NO. 114-4, at 8 (2015).

[173] *See Abuse of Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term as "[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence").

At first glance it seems that the abuse of discretion standard should apply only when courts are determining whether there is foreseeable harm to an interest protected by Exemption 7, which exempts "records or information compiled for law enforcement purposes."[174] Nevertheless, in a colloquy regarding an earlier FOIA reform bill,[175] Senator John D. Rockefeller said that he was "concerned that requiring government law enforcement agencies to show foreseeable harm . . . when invoking FOIA exemptions for attorney-client, work-product, and deliberative process privileges will undermine law enforcement efforts," and that "courts should review agency law enforcement decisions on the new foreseeable harm standard under an 'abuse of discretion' standard."[176] Senator Rockefeller was concerned with protecting the deliberative process of law enforcement officials. If courts adopt this view of congressional intent, they could review the agency's foreseeable harm analysis for abuse of discretion whenever law enforcement's deliberative process is at issue.

II. AGE SHOULD BE THE MOST IMPORTANT FACTOR IN THE FORESEEABLE HARM ANALYSIS

Codifying the foreseeable harm standard not only transformed it into a statutory provision that courts must analyze during judicial review, but also modified the standard by bringing it into contact with other provisions within the FOIA Improvement Act's cohesive statutory scheme. This Part argues that the foreseeable harm provision interacts with the Exemption 5 sunset provision to make age the most important factor in the foreseeable harm analysis for all records withheld under Exemption 5's deliberative process privilege, including those records that are less than twenty-five years old. By adding two provisions to FOIA that use a requested record's age to balance government secrecy and transparency, Congress transformed the foreseeable harm standard from one that took age into account as only one factor, among several, to a standard that emphasizes a record's age above its other characteristics. In so doing, Congress has given disclosure advocates a new way to persuade agencies and courts that older records should be released because of their ages.

A. *Use of a Record's Age Before the FOIA Improvement Act*

1. Agency Decisions

As discussed above, before the FOIA Improvement Act, DOJ guidelines suggested taking age into account as one of multiple factors when determining

[174] 5 U.S.C. § 552(b)(7) (2012), *amended by* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

[175] The *Congressional Record* for the bill that passed into law does not discuss the abuse of discretion standard.

[176] 160 CONG. REC. S6442 (daily ed. Dec. 9, 2014) (statement of Sen. Rockefeller).

whether releasing a document could harm the deliberative process.[177] Age was meant to be considered along with the record's "content" and "character," and the DOJ did not place particular importance on any one of these factors.[178]

In practice, both before and after the DOJ announced its foreseeable harm standard, at least some agency decisions did not emphasize a requested record's age when determining whether release could harm the deliberative process. In 2002, for example, the Federal Communications Commission ("FCC") upheld on administrative appeal its decision to deny a FOIA request for Daily Circulation Reports, which "are lists of pending orders" on which the Commissioners will vote.[179] In the last two sentences of its three-page analysis, the agency rejected the argument "that the passage of time supports release of the reports," stating, "[t]he release of even the oldest of the reports . . . could have a possible adverse effect on our decision making process."[180]

The FCC employed similar reasoning when it upheld its denial of a FOIA request for records pertaining to Amazon.com, Inc. in February 2016, before Congress passed the FOIA Improvement Act. At the very end of its discussion about Exemption 5, the FCC rejected the argument "that the passage of time removes [the requested records] from the scope of the deliberative process privilege."[181] According to the FCC, "[t]he mere passage of time does not itself render the deliberative process privilege inapplicable," and "release of these documents could still cause harm to the agency's deliberative process by chilling such candid discussions in the future."[182] In both of these cases, the FCC minimized the importance of the records' ages by not addressing the issue until the end of their Exemption 5 discussions and then refusing to release the records.

2. Court Decisions

Although courts did not have to perform a foreseeable harm analysis in Exemption 5 deliberative process cases before the FOIA Improvement Act,[183] some performed the analysis anyway.[184] At least some of these courts stated that arguments based on the record's age are not persuasive when determining

[177] *See supra* Section I.C.1.

[178] *See supra* note 138 and accompanying text.

[179] In the Matter of Michael Ravnitzky, 17 FCC Rcd. 23240, 23240 (2002).

[180] *Id.* at 23242.

[181] In the Matter of Russell Carollo, 31 FCC Rcd. 1461, 1464 (2016).

[182] *Id.* (footnote omitted).

[183] *See supra* note 158 and accompanying text (describing the role of courts before the FOIA Improvement Act).

[184] *See* Hunton & Williams LLP v. U.S. EPA, Nos. 15-1203, 15-1207, 15-1208, 2017 WL 1207410, at *13 (D.D.C. Mar. 31, 2017) (citing cases decided before the FOIA Improvement Act became law) ("[O]ther courts in this jurisdiction have held, and the D.C. Circuit has suggested, that 'the agency must make the additional showing that disclosure would cause injury to the decisionmaking process.'").

whether releasing a document could harm the deliberative process. In *National Security Archive v. CIA*,[185] the Bay of Pigs case, the D.C. Circuit, near the end of its opinion, rejected the argument that the fifth volume of Pfeiffer's history was too old to be withheld under Exemption 5's deliberative process privilege.[186] The Archive argued that it was a "common-sense proposition . . . that the need for confidentiality of deliberations erodes over time."[187] The court disagreed, stating, "privileges that are intended to facilitate candid communication, such as the deliberative process privilege, generally do not have an expiration date. That makes sense because such a privilege otherwise would not fully serve its purposes."[188] This observation, which is akin to a foreseeable harm analysis, suggests that a record's age is not always important because even old documents can harm the deliberative process by hindering "candid communication."[189]

The District Court for the Eastern District of New York applied similar reasoning in *Shinnecock Indian Nation v. Kempthorne*,[190] which reviewed the Department of the Interior's ("DOI") decision to withhold documents related to the plaintiff's attempt to recover land.[191] In its administrative appeal the plaintiff argued, in part, that "the privileges asserted . . . were . . . made meaningless by the passage of time."[192] Nevertheless, both the DOI and the court held that the two documents were properly withheld under Exemption 5.[193] According to the court, "even though the documents at issue are roughly thirty years old, . . . the passage of time, even as considerable as it may be in this case, does not render the deliberative process covered by Exemption 5 inapplicable."[194]

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[185] 752 F.3d 460 (D.C. Cir. 2014); *see supra* Introduction.

[186] *Nat'l Sec. Archive*, 752 F.3d at 464.

[187] Brief for Appellant, *supra* note 5, at *37.

[188] *Nat'l Sec. Archive*, 752 F.3d at 464. Although other commentators have discussed this passage, they have not linked it to the foreseeable harm analysis. *See* McCraw, *supra* note 28, at 237; Singhal, *supra* note 5, at 1400-01.

[189] *Nat'l Sec. Archive*, 752 F.3d at 464. The court also based its decision on FOIA's lack of a time limit for Exemption 5. *Id.* ("We must adhere to the text of FOIA and cannot judicially invent a new time limit for Exemption 5."). The FOIA Improvement Act's sunset provision has nullified this rationale. *See* McCraw, *supra* note 28, at 237 (stating that "Congress begged to differ" with the *National Security Archive* court when it added the twenty-five-year sunset provision).

[190] 652 F. Supp. 2d 345 (E.D.N.Y. 2009).

[191] *Id.* at 352.

[192] *Id.*

[193] *Id.* at 351-52.

[194] *Id.* at 359. For a brief critique of the *Shinnecock Indian Nation* court's refusal to place a time limit on the deliberative process privilege, see McCraw, *supra* note 28, at 236-37. McCraw does not discuss the court's foreseeable harm analysis.

In reaching this conclusion, the court performed a sort of foreseeable harm analysis by discussing the effect that a document's age can have on its ability to harm the deliberative process.[195] The court examined "[w]hether or not the intended purposes of the deliberative process privilege become moot or unattainable or outweighed by other policy considerations after a certain time period,"[196] concluding that "it is far from clear that the effects of the privilege diminish in effectiveness or become inconsequential when older documents are involved."[197] With respect to the records at issue, the court held in a footnote that "the principles underlying the deliberative process privilege, including the need to protect candid and creative debate within an agency and to protect the integrity of the decisionmaking process, are not overriden [sic] by the substantial passage of time in the instant case."[198] It seems that the court did not place much weight on the argument that an older record's age should require its release.[199]

B. *The Sunset Provision's Impact on the Foreseeable Harm Provision*

Requesters who have unsuccessfully argued for a record's release based on the record's age now have a new tool in the FOIA Improvement Act. There have not been any cases interpreting the FOIA Improvement Act's foreseeable harm provision as of yet.[200] Nevertheless, requesters can now use this provision to

[195] The court also reasoned that a record's age does not influence whether a record is pre-decisional and deliberative, which are the requirements for a record to fall under the deliberative process privilege. *Shinnecock Indian Nation*, 652 F. Supp. 2d at 359-60; *see also* Brinton v. U.S. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (stating that "the age of the [document] has nothing to do with whether it has been adopted as effective agency working law," which in turn determines whether the document is pre-decisional), *cert. denied*, 452 U.S. 905 (1981); FOIA GUIDE: *Exemption 5*, *supra* note 66, at 19-20 ("[T]he predecisional character of a document is not altered by the passage of time in general . . . .").

[196] *Shinnecock Indian Nation*, 652 F. Supp. 2d at 360.

[197] *Id.*

[198] *Id.* at 361 n.8.

[199] The court left open the possibility that Congress could establish a time limit for FOIA, stating, "[i]t would have been a simple matter for Congress to have included a provision in FOIA requiring release of all documents of a certain vintage." *Id.* at 360 (quoting Diamond v. FBI, 707 F.2d 75, 76 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984)). This argument is now moot.

[200] As of September 18, 2017, a search on Westlaw for state and federal cases containing the words "FOIA Improvement Act" yields six cases, none of which analyze the statute's foreseeable harm provision. Only one of these cases mentions the provision. *See* Edelman v. SEC, No. 14-1140, 2017 WL 908473, at *6 n.5 (D.D.C. Mar. 6, 2017) (refusing to address a foreseeable harm argument because the requests at issue occurred before the FOIA Improvement Act was enacted). Four of the cases do not reference the foreseeable harm standard at all, observing only that the sunset provision does not apply either because the records at issue were less than twenty-five years old when requested or because they were requested before the FOIA Improvement Act went into effect. *See* Hall v. CIA, No. 04-0814,

argue that age should be the most important factor in the foreseeable harm analysis for records withheld under the deliberative process privilege, regardless of whether the record is at least twenty-five years old. If age is the most important factor, then agencies and courts will likely give more weight to an assertion that the record's age should compel release.

If a statutory provision "admits no ambiguity, then judges will almost always apply that plain meaning."[201] The text of the foreseeable harm provision itself, however, does not provide guidance on how to approach the foreseeable harm inquiry. The report for the FOIA reform bill that passed into law does reference "age" as one of the factors to consider, but it also references "content" and "character."[202] Perhaps an agency or court should conduct a totality of the circumstances analysis that accounts for all of these characteristics. Or perhaps an agency or court should emphasize one of the record's characteristics, such as age, over the others. Either interpretation would be consistent with the provision's language and with the congressional report's instructions.

When a statutory provision is ambiguous, one can look to the rest of the statute for guidance. One "convention of legal interpretation" says that a statutory provision "should be read in light of the whole statute. If one interpretation . . . is more consistent with the whole statute than a rival interpretation . . . , the

2017 WL 3328149, at *5 n.3 (D.D.C. Aug. 3, 2017); Hunton & Williams LLP v. U.S. EPA, Nos. 15-1203, 15-1207, 15-1208, 2017 WL 1207410, at *12 n.22 (D.D.C. Mar. 31, 2017); Davidson v. U.S. Dep't of State, 206 F. Supp. 3d 178, 196 n.10 (D.D.C. 2016); Pinson v. U.S. DOJ, 202 F. Supp. 3d 86, 111 n.12 (D.D.C. 2016). And one case leaves any discussion of the FOIA Improvement Act to the District Court on remand. *See* Florez v. CIA, 829 F.3d 178, 190 n.14 (2d Cir. 2016). A search on Westlaw for state and federal cases decided after June 13, 2016—when Congress passed the FOIA Improvement Act—that contain the words "FOIA" or "Freedom of Information Act" and "reasonably foresees" yields zero results. *See Actions Overview: S.337*, *supra* note 33 (showing date that bill passed both houses of Congress). Finally, a search on Westlaw for state and federal cases containing the words "FOIA" or "Freedom of Information Act" and "foreseeable harm" in the same time period yields six results. Five of the cases cite agency affidavits attesting to foreseeable harm and either accept or reject the agency's claim without examining the standard in depth. *See* Borda v. U.S. DOJ, No. 14-0229, 2017 WL 1166297, at *7 (D.D.C. Mar. 28, 2017); Reporters Comm. for Freedom of the Press v. FBI, No. 15-1392, 2017 WL 729126, at *7 (D.D.C. Feb. 22, 2017); McCash v. CIA, No. 5:15-cv-02308, 2016 WL 6650389, at *13 (N.D. Cal. Nov. 10, 2016); Hedrick v. FBI, No. 15-cv-00648, 2016 WL 6208361, at *8 (D.D.C. Oct. 24, 2016); McClanahan v. U.S. DOJ, 204 F. Supp. 3d 30, 56 (D.D.C. 2016). One case does not address the foreseeable harm issue because the records request occurred before the FOIA Improvement Act went into effect. *See Edelman*, 2017 WL 908473, at *6 n.5. The same searches in Westlaw's Administrative Guidance and Decisions archive do not yield any relevant agency opinions.

[201] ESKRIDGE, *supra* note 110, at 4 (emphasis omitted).

[202] *See supra* note 144 and accompanying text.

consistency supports the first interpretation."[203] Specifically, if the statute has a "regulatory regime" with a "logical policy structure," then the interpretation should be "consistent with that logical policy structure."[204]

The Supreme Court applied this principle of statutory interpretation in *King v. Burwell*,[205] in which the Court interpreted the Affordable Care Act to provide tax credits to people who purchase health insurance through both federal and state marketplaces.[206] The Court decided that the relevant statutory language was ambiguous and turned to the statute's purpose to make its decision.[207] The majority opinion concluded:

> Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. [The relevant statutory provision] can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.[208]

The Court recognized that in making its decision, it "depart[ed] from what would otherwise be the most natural reading of the pertinent statutory phrase."[209]

A plaintiff advocating an age-centered foreseeable harm inquiry can apply the reasoning in *Burwell* to argue that, even though nothing in the foreseeable harm provision's language suggests that age should be central to the analysis, this interpretation is "consistent with . . . Congress's plan"[210] to use the foreseeable harm and sunset provisions to both promote transparency and maintain the integrity of the FOIA exemptions.

According to the sunset provision, documents withheld under the deliberative process privilege that are less than twenty-five years old are treated differently than documents that are at least twenty-five years old: the deliberative process privilege can apply to the former but not to the latter. The only explanation for this disparity that is consistent with the FOIA Improvement Act's statutory

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[203] ESKRIDGE, *supra* note 110, at 6; *see* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 361-62 (2010) ("The whole act rule views statutory interpretation as a 'holistic endeavor' and directs interpreters to consider the rest of the statutory scheme to clarify ambiguous provisions 'because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" (quoting U.S. Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988))).

[204] ESKRIDGE, *supra* note 110, at 6 (emphasis omitted).

[205] 135 S. Ct. 2480 (2015).

[206] *Id.* at 2492-93 ("[T]he statutory scheme compels us to reject petitioners' interpretation . . . .").

[207] *Id.* at 2492 ("Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B.").

[208] *Id.* at 2496.

[209] *Id.* at 2495.

[210] *Id.* at 2496.

scheme is that Congress believed records that are at least twenty-five years old cannot have a reasonably foreseeable harm to the deliberative process. If these records *can* be harmful, then the FOIA Improvement Act would be forcing agencies to release harmful records.[211] However, Congress carefully crafted the sunset provision to avoid harming any of the privileges incorporated into Exemption 5, including the deliberative process privilege.[212] Likewise, Congress rejected versions of the foreseeable harm provision that would have made it harder for agencies to withhold records and made clear that the provision allows agencies to withhold harmful documents.[213] Therefore, Congress must have thought that records that are at least twenty-five years old cannot harm the deliberative process.[214]

It follows from this reasoning that a document's age is particularly important to the foreseeable harm analysis when the deliberative process privilege is involved.[215] Congress had many options for limiting Exemption 5,[216] and if it had restricted the exemption based on a different criterion, for example the requested record's status as an advisory opinion that the agency used to make policy,[217] then it would have implied that the foreseeable harm analysis should

[211] Agencies must release records that are at least twenty-five years old if Exemption 5's deliberative process privilege is the only applicable exemption, despite any foreseeable harm the records' release might cause, because no foreseeable harm analysis is performed if a record does not fall within a statutory exemption. *See supra* notes 133-34 and accompanying text (explaining DOJ guidance about when to release information). This is assuming that the codified foreseeable harm standard will be applied the same way as the discretionary release standard in this regard.

[212] *See supra* Section I.B.4.

[213] *See supra* Section I.C.2.a.

[214] In reality, it is likely that the release of some records that are at least twenty-five years old will harm the deliberative process. In a different context, the Supreme Court has said, "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding . . . must necessarily be overinclusive or underinclusive." Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988). The foreseeable harm to the deliberative process from a record's release is a "fact-specific finding." *See id*. Therefore, Congress's "bright-line rule," *id.*, will likely result in some records that will harm the deliberative process being released and some records that would not harm the deliberative process being withheld.

[215] For an argument, in the Exemption 5 context but unrelated to the FOIA Improvement Act, that setting a specific time limit emphasizes the importance of age in general, see Plaintiff's Motion for Summary Judgment or, in the Alternative, for a More Adequate *Vaughn* Index at 16-17, Lardner v. U.S. DOJ (D.D.C. Mar. 31, 2005) (No. 03-0180), 2004 WL 3334411 ("[B]y 'waiving' any applicable Exemption 5 privileges for clemency records more than 30 years old . . . the Department has acknowledged that both the presidential communications and deliberative process privileges erode over time for this category of records as for others." (citation omitted)).

[216] *See supra* Section I.B.4.

[217] *See supra* note 124 and accompanying text.

be centered around that different criterion. That Congress chose age as the limiting factor in the face of multiple options means that age, where the deliberative process privilege is concerned, should be the central factor in the foreseeable harm analysis. Therefore, if an agency is deciding whether to withhold a record under the deliberative process privilege, it should strongly consider the record's age even if the record is less than twenty-five years old.

III. RECOMMENDATION: A SLIDING-SCALE TEST

A. *The Test*

Requesters can use the reasoning in the previous Section to argue on a case-by-case basis that their particular records should be released based on age. The requester can make this argument to the agency in its appeal of the agency's initial decision.[218] If the argument to the agency fails, then the requester can make the same argument in court. In considering these appeals, agencies and courts should take congressional intent into account by placing age at the center of the foreseeable harm analysis for records withheld under Exemption 5's deliberative process privilege.

The report for the FOIA reform bill that passed into law makes clear that age should not be the only factor considered in the foreseeable harm analysis. Rather, the requested record's "content" and "character" should also be considered.[219] Therefore, agencies and courts should adopt a sliding-scale test whereby the requested record's "content" and "character" hold less weight the older the record is.[220] Under this test, the older the record, the stronger the rebuttable presumption that its release would not harm the deliberative process and, therefore, that the record should be released. For example, if a record is twenty-four years old, only one year away from not being able to harm the deliberative process, then an agency would be allowed to withhold the record only if there were strong proof, based on the record's "content" and "character," that the deliberative process would be harmed if the record were released. In contrast, if a record is only five years old, then there would be a weaker presumption in

[218] *See Federal FOIA Appeals Guide: Arguing for Discretionary Disclosure*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2012), https://www.rcfp.org/federal-foia-appeals-guide/discretionary-disclosures/ii-exemptions-ripe-discretionary-disclosure [https://perma.cc/DT4J-6KU3] (suggesting before the FOIA Improvement Act was passed that in administrative appeal letters, requesters "should assert an argument that, given the passage of time, the document contains information that is no longer sensitive" and should therefore be subject to discretionary release).

[219] S. REP. NO. 114-4, at 8 (2015).

[220] For an example of a sliding-scale test in the public records context, see People for the Ethical Treatment of Animals, Inc. v. Dep't of Agric. Res., 76 N.E.3d 227, 237 (Mass. 2017) ("[T]he more the record sought resembles the records enumerated in exemption (n), the lower the custodian's burden in demonstrating 'reasonable judgment'—and vice versa.").

favor of disclosure and the record's other characteristics would be more influential. Another way to look at this test is as a requirement that agencies explain why releasing the record would harm the deliberative process even though the record will be released upon request when it becomes twenty-five years old. The closer a record is to twenty-five years old, the harder it will be for an agency to justify delaying release.

Admittedly, some agencies and courts might put records of the same age at different places on the sliding scale. For instance, one court might say that a thirteen-year-old record is old enough for the importance of its other characteristics to be greatly diminished, whereas another court might say that the same record's other characteristics should be given more weight. Consistency, however, cannot be expected from a broad standard such as the foreseeable harm analysis,[221] and imposing a bright-line rule other than the twenty-five-year age limit would go beyond congressional intent.[222]

Although the sliding-scale test would not create uniform outcomes, it would bring the foreseeable harm inquiry in line with congressional intent by recognizing age's importance to the foreseeable harm analysis when a record is withheld under Exemption 5's deliberative process privilege. Under the sliding-scale test, the District Court for the Eastern District of New York would no longer be able to shrug off a record's age by saying that "it is far from clear that the effects of the privilege diminish in effectiveness or become inconsequential when older documents are involved."[223] The court could still allow an agency to use the deliberative process privilege to withhold a record less than twenty-five years old, but it would always have to justify why the particular record's age did not reduce the foreseeable harm enough to compel disclosure. Further, this justification would have to be central to the analysis, not an afterthought as it was in the agency and court decisions discussed above.[224] By forcing agencies and courts to emphasize a record's age in situations where they might not otherwise do so, the sliding-scale test would likely lead to more records being released.

B. *Implementing the Test*

Because courts might defer to agency decisions on the issue of whether releasing a record could harm the deliberative process, agencies should take the

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[221] *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (stating that under one view, "uniformity" is a characteristic of rules whereas "individualization" is a characteristic of standards).

[222] *See* Scott, *supra* note 203, at 363 (describing canon of statutory interpretation that "warns interpreters not to create exceptions in excess of those specified by the legislature").

[223] Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 360 (E.D.N.Y. 2009); *see supra* note 197 and accompanying text.

[224] *See supra* Section II.A.

lead in implementing the sliding-scale test.[225] Specifically, the DOJ should issue guidance that says it will not defend agencies in FOIA litigation unless they apply the sliding-scale approach to the foreseeable harm analysis.[226] If the DOJ issues this guideline, then congressional intent will be followed even if courts defer to agencies in FOIA cases. Then, if a court applies true de novo review to an agency's decision that releasing a record could harm the deliberative process, the court should itself apply the sliding-scale approach.

CONCLUSION

This Note has proposed one way that requesters can convince agencies and courts to release more records that technically fall within Exemption 5's deliberative process privilege. Both the FOIA Improvement Act's text and its legislative history demonstrate Congress's intent to not only sunset the deliberative process privilege after twenty-five years, but also to make age the most important factor in the foreseeable harm analysis when the deliberative process privilege is invoked. If courts and agencies follow this intent, then arguments about a requested record's age that were not given much weight before Congress passed the FOIA Improvement Act will likely have greater effect and more documents might be released.

FOIA has always attempted to balance government transparency and government secrecy. The sliding-scale test is another way to balance these conflicting interests. The test might result in more documents being released because of their age, but it will also protect older documents whose release could

[225] Courts might expressly defer to the agency's decision based on the withholding agency's expertise or they might apply an abuse of discretion standard of review. *See supra* Section I.D. Under the abuse of discretion standard, a court would not be able to overturn an agency's refusal to place significant weight on a requested record's age if the court believed that the agency's interpretation of the foreseeable harm provision was reasonable. *See Abuse of Discretion*, *supra* note 173.

[226] However, it is unlikely that, in the next four years, the DOJ will promulgate guidelines that would increase the number of released documents. According to FOIA advocate Ryan Shapiro, President Donald Trump's "administration has made it clear that it is entirely hostile to the notion of transparency." Ben Norton, *"FOIA Superhero" Launches Campaign to Make Donald Trump's Administration Transparent*, SALON (Nov. 27, 2016, 3:00 PM), http://www.salon.com/2016/11/27/foia-superhero-launches-campaign-to-make-donald-trumps-administration-transparent [https://perma.cc/U7VN-JK85]; *see also* Michael Morisy, *Under Trump's First 100 Days, FOIA a Little Slower While Open Data Takes a Hit*, MUCKROCK (Apr. 28, 2017), https://www.muckrock.com/news/archives/2017/apr/28/under-trumps-first-100-days-foia-little-slower-whi/ [https://perma.cc/J9WG-X3FQ] ("Since President Donald Trump took office, slow Freedom of Information Act processes have become even slower—although it is tough to determine what, if anything, that means."); Lauren Harper, Nate Jones & Tom Blanton, *Trump Visitor Logs Subject to FOIA Lawsuit*, NAT'L SECURITY ARCHIVE (Apr. 10, 2017), http://nsarchive.gwu.edu/NSAEBB/NSAEBB583-Trump-Visitor-Logs-Lawsuit/ [https://perma.cc/KJ6R-Q56V] (describing Trump administration's decision to stop publishing White House visitor logs).

harm the deliberative process. If an agency's foreseeable harm argument is strong enough, then any record less than twenty-five years old can still be withheld under Exemption 5's deliberative process privilege. The test, therefore, both promotes and checks government openness.