

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JUDICIAL WATCH, INC.,**

Plaintiff,

v.

**U.S. DEPARTMENT OF COMMERCE,**

Defendant.

Case No. 15-cv-2088 (CRC)

**OPINION AND ORDER**

Plaintiff Judicial Watch brought this Freedom of Information Act (“FOIA”) suit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (“NOAA”) related to a study (the “Hiatus Paper”) by several NOAA scientists that was published in the journal *Science*. NOAA withheld three sets of documents—drafts of the Hiatus Paper, internal correspondence among NOAA scientists concerning the Hiatus Paper, and outside peer reviewer comments—under Exemption 5 of FOIA. The parties have filed cross-motions for summary judgment regarding this withholding. For the reasons below, the court grants the Department of Commerce’s motion for summary judgment and denies Judicial Watch’s cross-motion.<sup>1</sup>

Summary judgment is appropriate when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “FOIA cases typically and appropriately are decided on motions for summary judgment.” Cavezza v. Dep’t of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015).

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<sup>1</sup> Judicial Watch has withdrawn its challenges to the adequacy of the Department’s search for records and the Department’s withholding of other information under Exemption 6. Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 2 n.1.

Exemptions to FOIA are to be narrowly construed and the agency bears the burden of proving that any withheld records fall within the scope of an exemption to FOIA. AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 102–03 (D.C. Cir. 2017). Exemption 5 of FOIA, which NOAA has invoked, permits the withholding of “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). As relevant here, this includes documents protected by the deliberative process privilege. See, e.g., Formaldehyde Inst. v. Dep’t of Health & Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989). To qualify for the deliberative process privilege, an inter-agency or intra-agency document must be “predecisional,” meaning that it was “generated before the adoption of an agency policy,” and “deliberative,” meaning that it “reflects the give-and-take of the consultative process.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

Judicial Watch offers no basis on which to distinguish Formaldehyde Institute. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and "recommendation[s] (with suggestions) regarding an article's suitability for publication," Formaldehyde Inst., 889 F.2d at 1123. These documents are likewise deliberative because they form part of "the deliberative decision about whether and in what form to publish" the Hiatus Paper, id. at 1124. And finally, NOAA (and its *amici*) put forth un rebutted evidence that disclosure here would harm the deliberative process, such as by creating a "chilling effect on . . . the candor of potential reviewers of government-submitted articles," id. at 1125. See Spinrad Decl. ¶¶ 23–26. The drafts of the Hiatus Paper, internal deliberations, and peer reviewer comments thus fall within the scope of Exemption 5.

Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at \*6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at \* 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

explained, the misconduct alleged must be particularly severe, as where “the ‘policy discussions’ sought to be protected . . . were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.” ICM Registry, LLC v. Dep’t of Commerce, 538 F. Supp. 2d 130, 132–33 (D.D.C. 2008).

Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

**ORDERED** that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

**SO ORDERED.**

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CHRISTOPHER R. COOPER  
United States District Judge

Date: August 21, 2017