EXHIBIT 5

Plaintiff's May 14 Administrative Appeal

AMERICANS FOR PUBLIC TRUST

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Re: Freedom of Information Act (FOIA) Appeal: #21-00613-FOIA

To Whom It May Concern:

This is an appeal of the Center for Disease Control's (CDC) April 21, 2021 response to Americans for Public Trust's ("APT") request for records under the Freedom of Information Act ("FOIA").

On February 4, 2021, APT submitted its request for records, which was assigned request identification number 21-00613-FOIA. On April 21, APT received a response in a letter signed by Roger Andoh, CDC/ATSDR FOIA Officer from the Office of the Chief Operating Officer. A copy of this letter is attached here. APT now appeals the CDC's response with its numerous redactions of documents and requested information.

In its response to APT's request, the CDC identified 400 pages of responsive records, but only released 63 of those pages in full, while withholding 148 pages in full (citing FOIA Exemption 5, or the "deliberative process privilege"). The remaining 189 pages were only released in part, and still contained a large number of redactions, again primarily citing Exemption 5 (or "(b)(5)") to justify withholding that information. Beyond referencing "(b)(5)" in the redactions and providing a conclusory statement in its response letter that "[t]he materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative, and do not contain or represent formal or informal agency policies or decisions," the CDC provides no additional explanation for why these voluminous redactions are necessary or justified under FOIA.

As courts have frequently recognized, "[b]ecause FOIA's purpose is to encourage disclosure, its exemptions are to be narrowly construed." *Moye, O'Brien, O'Rourke, Hogan & Pickert v. AMTRAK*, 376 F.3d 1270, 1277 (11th Cir. 2004) (*citing Cochran v. United States*, 770 F.2d 949, 954 (11th Cir. 1985)). Accordingly, these "limited exemptions" should not be interpreted to "obscure the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA]." *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). Government agencies like the CDC bear the burden of proving that any requested document is exempt from disclosure under these exemptions. *Id.*; *see also EPA v. Mink*, 410 U.S. 73, 80 (1973); 5 U.S.C. § 552(a)(4)(B).

Additionally, records protected from disclosure by Exemption 5 "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *DOI v.*

Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001); 5 U.S.C. § 552(b)(5). To fall within this deliberative process privilege, a document must be both "predecisional" and "deliberative." Predecisional documents do not include documents that are "*merely peripheral* to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *AMTRAK*, 376 F.3d at 1278 (quoting *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999)) (emphasis added). Furthermore, a document is only "deliberative" if it "reveal[s] the mental processes of decision-makers." *Id.* (quoting *Assembly of California v. U.S. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992)). This means that "factual information generally must be disclosed and materials embodying officials' opinions are ordinarily exempt from disclosure." *Id.* Accordingly, the relevant factors for deliberative process are whether the document "(i) formed an *essential link* in a specified consultative process, (ii) reflects the personal *opinions* of the writer rather than the policy of the agency, and (iii) if released, would inaccurately reflect or prematurely disclose the views of the agency." *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks omitted) (emphasis added).

From the records that the CDC did produce, it is apparent that many of the fully withheld records (as well as numerous substantially redacted portions of those that were produced) were improperly withheld under the deliberative process privilege exemption and are subject to disclosure under FOIA. Instead of applying Exemption 5 narrowly as required by law, *AMTRAK*, 376 F. 3d at 1277, the CDC has apparently invoked it to redact all communicated information that related to the agency's consideration of reopening of schools in any way, even if only "peripheral[ly]" related to the ultimate decision, *cf. id.* at 1278.

The statute does not permit this kind of sweeping, overbroad approach to redacting information subject to FOIA disclosure. For instance, it blinks reality for the agency to assert that the 148 pages it withheld in full consist exclusively of "personal opinions of the writer[s] rather than the policy of the agency," *Grand Cent. P'ship*, 166 F.3d at 482, and are thus entirely devoid of "factual information," *AMTRAK*, 376 F.3d at 1278, on any of those pages. Surely the CDC does not maintain that those numerous pages of documents that it ostensibly relied on to shape its ultimate guidance on reopening schools are entirely bereft of facts or factual support for the opinions shared there. Even if many of these records contain portions that are exempt from disclosure, FOIA does not permit the agency to obtain blanket exemption for entire documents to avoid disclosing portions that are non-exempt. *Cf. Mead Data Cent. v. U.S. Dep't of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). This is especially true where the agency has provided no explanation or description of the nature of any particular information that has been withheld, much less whether it would be reasonable to segregate portions of the records for disclosure. *See id.*

Furthermore, even if most of the "Exemption 5" redactions interspersed throughout the documents consist of opinions rather than facts, it is highly unlikely that each piece of information "formed an essential link" in the consultative process leading to the CDC's formulation of its policy, *Grand Cent. P'ship*, 166 F.3d at 482. Instead, as can be readily gleaned from pages where less information was redacted, the agency's redactions here under are primarily peripheral rather than essential to actual policy formation. For instance, numerous redactions from routine scheduling memos produced here do not likely encompass personal opinions that were essential to the formation of the CDC's ultimate guidance on schools.

Simply put, because many of these materials that have been redacted would be discoverable in litigation, Exemption 5 does not protect them from disclosure under FOIA. Accordingly, APT requests that these documents (and non-exempt segments thereof) be disclosed as required.

Because of the time-sensitive nature of this request, I respectfully request expedited consideration of this appeal, and ask that the 20-day time limit for a response established by the applicable HHS regulations be strictly adhered to. *See* 45 C.F.R. § 5.63(a).

Please do not hesitate to contact me by phone at (202) 656-5175 or by email at info@americansforpublictrust.org with any questions about this appeal.

Sincerely,

Nathaniel C. Serslev

Enclosures:
21-00613-FOIA
Andoh Correspondence
CDC Responsive Records