

Exhibit 5

From: [Coates, Laura](#)
To: [Benjenk, Randy](#)
Subject: FOIA Appeal Determination CFPB-2015-118-A (Final)
Date: Thursday, June 04, 2015 11:40:08 AM
Attachments: [Final Appellate Determination_CFPB-2015-118_06-04-2015.pdf](#)

Dear Mr. Benjenk,

Attached please find the Consumer Financial Protection Bureau's final determination regarding your appeal of the Bureau's response to Freedom of Information Act (FOIA) Request No. CFPB-2015-118-A.

If you have any questions or concerns, please do not hesitate to contact the CFPB FOIA Team at 1-855-444-FOIA (3642) or FOIA@cfpb.gov.

Thank you.

John R. Coleman
Assistant General Counsel for Litigation
Legal Division
Consumer Financial Protection Bureau



1700 G Street NW, Washington, DC 20552

June 4, 2015

VIA EMAIL

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**Re: Final Appellate Determination Denying Appeal of
FOIA Request No. 2015-118-F**

Dear Mr. Benjenk:

This letter constitutes the final determination of the Consumer Financial Protection Bureau (CFPB or Bureau) regarding your appeal dated May 6, 2015 (the Appeal) of the Bureau's response to Freedom of Information Act (FOIA) Request No. 2015-118-F (the Request). For the reasons set forth below, the Appeal is denied.¹

I. Background

On March 2, 2015, you submitted a FOIA request for the following documents and records relating to, or relied upon to prepare, the Bureau's report entitled "Consumer voices on credit report and scores" (the Report), which was issued in February 2015:

1. Agreement with Abt Associates, including without limitation, any statement of work, scope of work, purchase order, or work order for the Report and any research or testing relied upon to prepare the Report;
2. Any other agreements for products or services relating to preparation of the Report and any research or testing relied upon to prepare the Report, including without limitation subcontracts between Abt Associates and any vendors or subcontractors;
3. Communications between CFPB staff members and Abt Associates including, but not limited to, any directions or suggestions from CFPB staff members to Abt Associates or vice versa, and any communications regarding the questions to be asked of focus group participants, qualifications for prospective focus group participants, or the anticipated results or information to be included in the Report;

¹ The Bureau's FOIA regulations are codified at 12 C.F.R. §§ 1070.10 *et seq.* Pursuant to these regulations, the authority to determine FOIA appeals rests with the Bureau's General Counsel or her delegate. *See* 12 C.F.R. § 1070.21(e). The General Counsel has delegated to me the authority to determine the appeal of the Bureau's response to the Request. This letter therefore constitutes the Bureau's final response to the Request.



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4. Records of the process of, and parameters for, selecting focus group participants and focus group locations;
5. Communications, solicitations and/or marketing materials sent by CFPB staff or Abt Associates to, or targeted at, prospective focus group participants; and
6. Communications from CFPB staff or Abt Associates to focus groups participants, including, but not limited to, the purpose of the focus group, the sponsor of the focus group, the goals of the focus group the [sic] involvement of the CFPB, the potential uses of focus group data, and the questions asked of participants;
 - a. Focus group participants' responses;
 - b. Focus group demographic data;
 - c. Working papers, research memos, and draft Reports; and
 - d. The names and functional roles of the CFPB staff members involved with the development of any research – including without limitation strategies, testing or survey instruments – relied upon to prepare the Report; the drafting, editing, or development of the Report; or the interpretation of any data from the focus group testing or other research relied upon to prepare the report.

See Request, at 1.

The Bureau sent its final response to the request on April 16, 2015. The Bureau's search of the Offices of Procurement and Consumer Education and Engagement for documents responsive to your request produced a total of 1,494 pages of responsive records, of which 187 pages were released in full and 111 pages were released in part and withheld in part pursuant to 5 U.S.C. § 552(b)(4), (b)(5) and/or (b)(6). The remaining 1,196 pages were withheld in full pursuant to 5 U.S.C. § 552(b)(4) and/or (b)(5). The Bureau's final response informed you of your right to submit an appeal of the final determination. On May 6, 2015 you submitted a timely appeal of the Bureau's exemption determinations with respect to the following:

1. Records of the process of, and parameters for, selecting focus group participants and focus group locations;
2. Focus group participants' responses; and
3. Demographic data of focus group participants.

Appeal, at 1. You also claimed that the Bureau's response did not satisfy the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), because the response did not provide "a meaningful description of the withheld documents and an explanation of how the claimed exemptions apply to each of the 1,196 withheld documents (or portions of each document)." Appeal, at 1.

II. Appellate Determination

A. A *Vaughn* Index Is Not Required at the Administrative Appeals Stage.

As an initial matter, your assertion that the Bureau is required to produce an index pursuant to *Vaughn v. Rosen* is incorrect. Agencies are not required to produce a *Vaughn* index at the



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administrative appeals stage. See *Bangoura v. U.S. Dep't of the Army*, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009); *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (“Plaintiff is advised that there is no requirement that an agency provide a ‘search certificate’ or a ‘Vaughn’ index on an initial request for documents. The requirement for detailed declarations and *Vaughn* indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court.”). Accordingly, the Appeal is incorrect that the Bureau was required to provide additional description of the withheld documents and additional justification for their withholding. Although the Appeal does not explicitly request that the Bureau provide such additional information, to the extent such a request is implicit in the Appeal it is denied.

B. The Bureau Properly Withheld Documents Pursuant to Exemption 5.

Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Such records are exempt from disclosure if they would be “normally privileged in the civil discovery context.” *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus incorporates the privileges that are available to an agency in civil litigation, including the deliberative process privilege. *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008).

The deliberative process privilege exempts from the FOIA's disclosure requirements records “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.” *Nat'l Labor Relations Bd.*, 421 U.S. at 150. Materials that are both “predecisional and deliberative” are protected under this privilege. *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). As the Supreme Court has explained:

The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance “the quality of agency decisions” by protecting open and frank discussion among those who make them within the Government.

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (quotations and citation omitted). “[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988).

The Appeal claims that the deliberative process privilege does not apply to certain documents related to the Bureau's use of focus groups because these documents purportedly contain only “‘raw research data’ and methodology information not within the Exemption's purview.” Appeal, at 3 (citing *Sw. Ctr. for Biological Diversity v. U.S.D.A.*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000)). This characterization of the scope and application of Exemption 5 regarding factual information is inaccurate. Although courts acknowledge the difference between fact and opinion for purposes of Exemption 5, courts cannot “mechanically apply” this distinction and instead “must examine the information requested in light of the policies and goals that underlie the deliberative process privilege.” *Wolfe*, 839 F.2d at 774. In evaluating whether material is deliberative or instead purely factual, a court “should focus on whether the document in question is a part of the



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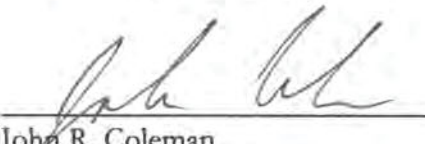
deliberative process.” *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 39 (5th Cir. 1982). For example, summaries of voluminous factual information used as part of an agency’s deliberative process may be properly withheld under Exemption 5. *Montrone Chem. Corp. of California v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

Although information regarding the Bureau’s use of focus groups and methodology related to their selection may have contained factual material, this information reflected the Bureau’s deliberative process in researching and drafting the Report. Disclosure of such documents “would harm the deliberative process” used in creating the Report, and such documents therefore were properly withheld under Exemption 5. *See Wolfe*, 839 F.2d at 774.

The fact that information responsive to the Request may have been produced by a contractor of the Bureau does not alter this conclusion. The deliberative process privilege extends to temporary consultants and contractors of agencies, as federal agencies often have a “special need for the opinions and recommendations of temporary consultants.” *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). As the Supreme Court has recognized, documents submitted to agencies by such consultants play “essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done.” *Klamath*, 532 U.S. at 10.

I find that the Bureau’s Exemption 5 determinations were proper. Because the documents in question were properly withheld on this basis alone, consideration of other exemptions noted in your Appeal is not necessary. I therefore deny your appeal of the Bureau’s determinations.

If you are dissatisfied with the Bureau’s final appellate determination, you may contact the Office of Government Information Services (OGIS), which offers mediation services to resolve disputes between FOIA requesters and Federal agencies pursuant to 5 U.S.C. § 552(h)(3). Using OGIS services does not affect your right to pursue litigation. Under 5 U.S.C. § 552(a)(4)(B), you may also seek judicial review of this appeal denial in the U.S. District Court where you reside, in the district where the documents are located, or in the District of Columbia.



 John R. Coleman
 Assistant General Counsel for Litigation
 Consumer Financial Protection Bureau