



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF SCIENCE AND TECHNOLOGY POLICY  
WASHINGTON, D.C. 20502

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**Re: OSTP-FOIA # 22-043**

Dear Mr. Pizarda:

This letter is in final response to a Freedom of Information Act (henceforth “FOIA”)<sup>1</sup> request submitted to the Office of Science and Technology Policy (hereinafter “OSTP”) on February 16, 2022. Subsequently, the date range was modified to cover June 1, 2021 through October 24, 2022. The request specifically sought:

- “All communications between OSTP and domain names ending in @amd.com; @nvidia.com; @intel.com; @tsmc.com regarding the U.S. Innovation and Competition Act and/or CHIPS and/or subsidies (please note the email may not explicitly mention the act/CHIPS for America but could just be discussing "subsidies" for the aforementioned companies under the ambit of these bills/act. The pertinent date range is June 1, 2021 through February 15, 2022.”

Upon receipt of the requests, OSTP performed a search of its database and located potentially responsive records that are being produced on a rolling basis.

### **INTERIM PRODUCTION**

OSTP released records totaling 223 pages for the first interim production.<sup>2</sup>

### **FINAL PRODUCTION**

OSTP is now producing records totaling 106 pages as part of the final production. Six of those pages originated with the Department of Energy

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> The initial production was released to requestor on October 24, 2022 after several unsuccessful attempts to produce the records on October 21, 2022.



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(henceforth “DOE”) and have been designated in the records as “Referred to Another Agency.” Those six pages will be referred to the DOE pursuant to OSTP regulation, 32 C.F.R. § 2402.5(f)(2)(i)-(iii). DOE will release the records directly to you upon completion of its review. DOE’s contact information is available below:

U.S. Department of Energy  
FOIA Requester Service Center  
1000 Independence Avenue, SW  
Mail Stop MA-46  
Washington, D.C. 20585  
Telephone: 202-586-5955  
Email: alexander.morris@hq.doe.gov.

OSTP determined that the remaining 100 pages originating with our Office should be released, in part, with certain information withheld pursuant to Exemptions Five and Six.<sup>3</sup> The explanations regarding the claimed exemptions are provided below.

### **EXEMPTION FIVE**

Exemption Five of the FOIA permits the withholding of “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.”<sup>4</sup> Accordingly, Exemption Five traditionally incorporates the civil discovery privileges: the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege, among others.<sup>5</sup> In this instance, the information being withheld under Exemption Five is protected from disclosure by the deliberative process privilege.

In order to qualify for the deliberative process privilege, the information must meet three requirements. First, it must be internal to the executive branch agencies.<sup>6</sup> Second, the information must be pre-decisional, meaning it was prepared prior to an agency decision.<sup>7</sup> Third, it must constitute a direct part of the deliberative process by offering recommendations or expressing opinions on legal or policy matters.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 552 (b)(5) and (b)(6).

<sup>4</sup> 5 U.S.C. § 552(b)(5).

<sup>5</sup> *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984).

<sup>6</sup> *See* 5 U.S.C. § 552(b)(5).

<sup>7</sup> *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Schell v. Health and Human Serv.’s*, 843 F.2d 933, 941 (6th Cir. 1988).

<sup>8</sup> *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991).



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Furthermore, while factual information is not usually considered deliberative, when the “facts themselves reflect the agency’s deliberative process” it may also qualify for withholding.<sup>9</sup> Such a situation exists in cases where agency personnel “exercis[e] their judgment” in compiling factual summaries and use discretion to differentiate between significant and non-significant facts.<sup>10</sup>

In this case, intra-agency communications subject to the deliberative process privilege are being withheld.

**DELIBERATIVE PROCESS PRIVILEGE/ PRE-DECISIONAL DOCUMENTS:**

Some of the documents subject to this privilege are:

- Internal, deliberative and/ or pre-decisional, working drafts related to PCAST programs.

The requirements of Exemption Five are satisfied in this case for the following reasons:

First, the information was internal to the executive branch agencies.

Second, that the communications refer to agency actions that had not yet taken place demonstrate that they were pre-decisional.

Last, they were deliberative, in that, they contain recommendations on potential courses of action on non-final decisions pending before the agency. Release of this information would chill internal debate and inhibit the free-flow of ideas among Federal employees and/or consultants retained by it, thereby violating the interests protected by Exemption Five.<sup>11</sup>

**CONSULTANT COROLLARY DOCTRINE**

Note: certain communications between OSTP, PCAST members and/ or retained consultants are being protected pursuant to Exemption Five. This is in accordance with the Consultant Corollary Doctrine.

The Doctrine is widely recognized amongst various judicial circuits, including the United States Supreme Court (*see DOI v Klamath Water Users Protective Ass’n*, 532

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<sup>9</sup> *Am. Whitewater Affiliation v. FERC*, 1986 U.S. Dist. LEXIS 17067 (D.D.C. Dec. 1, 1986) (*citing Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38-39 (5<sup>th</sup> Cir. 1992)); *see also Mapother*, 3 F.3d at 1538.

<sup>10</sup> *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 67-68 (D.C. Cir. 1974).

<sup>11</sup> *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).



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U.S. 1 (2001)). The important question, as noted by the Court in the preceding case, is whether the third party is acting in the agency's interest or its own interest. If the third party is acting in the agency's interest, then communications and work performed by the third party would be subject to Exemption Five protection.

In this case, PCAST members provide their expertise to OSTP on different matters pending before the agency. Research and communications that are deliberative in nature are treated as intra-agency research or communications for purposes of Exemption Five. Thus, application of the Exemption to certain communications in the records are properly applied.

### **EXEMPTION SIX**

Exemption Six of the FOIA protects the privacy interests of individuals.<sup>12</sup> It permits an agency to protect information within "personal and medical files and similar files" if disclosure "would constitute a clearly unwarranted invasion of personal privacy."<sup>13</sup> To determine whether information may be withheld under Exemption Six, an agency must undertake a three-step analysis.

First, the agency must determine whether a protectable privacy interest would be compromised by the disclosure of the record.<sup>14</sup> If no privacy interest is identified, the information may not be withheld pursuant to the exemption.<sup>15</sup>

Second, the agency must determine whether the release of the document would further the public interest by shedding light on the operations and activities of the government.<sup>16</sup> In cases where no public interest exists, "even a modest privacy interest," will outweigh it every time.<sup>17</sup>

Finally, the agency must balance the identified privacy interests against the public interest in disclosure.<sup>18</sup>

Here, OSTP is withholding the following pursuant to Exemption 6:

- Direct lines and cellular phone numbers.
- Personal address of public comment submitters.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

<sup>18</sup> *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994).



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- E-mail addresses. And,
- Any identifiable information of job applicants who have not been selected and/ or PCAST members under consideration is being withheld.

Individuals, including OSTP employees and other agencies, have a protectable privacy interest in maintaining the confidentiality of their direct lines, cellular phone numbers, and email addresses as their release could potentially subject them to undue harassment by members of the public. Additionally, releasing the names of prospective job applicants who were not selected could adversely impact the agency's recruitment efforts as release of such information could deter individuals from applying for positions with the agency. Furthermore, release of this information could also adversely impact the applicant's current employment, if their employer were to become aware of the job search. Thus, limiting the agency's employment pool.

Additionally, release of this information does not shed light on the operations of the Federal government. Accordingly, the privacy interests inherent in the withheld information outweighs the public interest in release, and the information may be withheld pursuant to Exemption Six.<sup>19</sup>

Review of the potentially responsive records has now been completed. Accordingly, OSTP now considers this matter closed.

In accordance with the FOIA and OSTP regulations, a requestor may appeal an agency's decision.<sup>20</sup> Any appeal related to the processing of this request must be sent either (1) via email to [OSTPFOIA@ostp.eop.gov](mailto:OSTPFOIA@ostp.eop.gov); or (2) by mail to Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue, NW, Washington, D.C 20504.<sup>21</sup> In the appeal letter, please specify OSTP-FOIA Control #: **22-043**. Any appeal must be sent to one of the above listed addresses no later than ninety (90) calendar days after the date of this letter."<sup>22</sup>

Please note that requestors have the right to seek dispute resolution services regarding their requests from OSTP's FOIA Public Liaison or the Office of Government Information Services (hereafter "OGIS"). To employ these services, please contact Rachel Wallace via telephone at (202) 456-4444 or by e-mail at [OSTPFOIA@ostp.eop.gov](mailto:OSTPFOIA@ostp.eop.gov). To contact OGIS, please use the following contact information:

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<sup>19</sup> *Id.*

<sup>20</sup> 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 32 C.F.R. § 2402.8(a).

<sup>21</sup> 32 C.F.R. § 2402.8(b)(2).

<sup>22</sup> 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); *Id.* at § 2402.8(b)(1).



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If you have any questions, please do not hesitate to contact me via telephone or e-mail.

Sincerely,

Rachel Wallace  
Deputy General Counsel