

# **EXHIBIT C**

EDF's Appeal (December 24, 2018)



December 24, 2018

**SUBMITTED ELECTRONICALLY TO HQ.FOIA@EPA.GOV**

U.S. Environmental Protection Agency  
National FOIA Office  
1200 Pennsylvania Avenue, N.W. (2310A)  
Washington, DC 20460

**Re: FREEDOM OF INFORMATION ACT APPEAL, Request No. EPA-HQ-2017-010055**

Dear FOIA Appeals Officer:

Environmental Defense Fund (“EDF”) respectfully appeals Environmental Protection Agency’s (“EPA’s” or “the Agency’s”) decision to redact certain portions of its production made pursuant to Freedom of Information Act (“FOIA”) request number EPA-HQ-2017-010055. This request, submitted August 1, 2017, seeks correspondence among various EPA employees relating to a potential red team/blue team review of climate science. EPA’s final response letter is dated September 27, 2018. EDF now timely files this appeal within the 90 days afforded by 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

In its final response letter, EPA stated that the documents meant to fulfill our request “were withheld in part pursuant to FOIA Exemption 5, which protects the deliberative process.” But several of the deliberative process redactions within the document titled “NRDC 5.14.18 Production FOR RELEASE” cannot meet the legal standard for that exemption. Specifically:

- The redacted portion of Steve Koonin’s prospectus elaborating on his vision for a red team/blue team exercise, sent to Ryan Jackson on May 3, 2017 at 9:57 AM. NRDC 5.14.18 Production FOR RELEASE at 6-8 (“RBE Prospectus”);
- All redacted communications among Liz Bowman, Richard Yamada, and Steve Koonin sent on September 7, 2017 between 1:31 PM and 1:45 PM. *Id.* at 381-82 (“Climate

Science Emails”);

- All redacted communication among Ryan Jackson, Liz Bowman, William Happer, and Steve Koonin regarding EPA’s red team/blue team press release, sent on November 4, 2017 between 12:53 PM and 5:01 PM. *Id.* at 477-79 (“Red Team Release Email”); and
- The redacted email from William Happer to various EPA staff and Steve Koonin on December 8, 2017 at 6:28 PM. *Id.* at 554 (“Happer Email”).

EDF now requests that EPA provide these particular pages in unredacted form, except that EDF is not appealing the redactions of Dr. Koonin’s personal email address under Exemption 6.

### **I. Legal Requirements for Exemption 5**

FOIA’s Exemption 5 covers “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 . . . .”<sup>1</sup> A document qualifies for Exemption 5 protection against disclosure *only if* it satisfies two independent conditions: “its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

The first condition typically forecloses the applicability of Exemption 5 to agency communications with non-agency entities. But courts have recognized a narrow exception under the consultant corollary to the deliberative process privilege, which provides that “records exchanged between an agency and outside consultants qualify as intra-agency for purposes of Exemption 5 if (1) the agency solicited the records from the non-agency party or there exists some indicia of a consultant relationship between the outsider and the agency, and (2) the records were created for the purpose of aiding the agency’s deliberative process.” *Judicial Watch, Inc. v. U.S. Dep’t of State*, 306 F. Supp. 3d 97, 106 (D.D.C. 2018); *see also Klamath*, 532 U.S. at 9-11. Importantly, an outside party cannot be said to be acting as a consultant for the purposes of Exemption 5 when it “represent[s] an interest of its own.” *Klamath*, 532 U.S. at 10-11.

Regarding the second condition, a document falls under the deliberative process privilege only if it is both “predecisional” and “deliberative.” To be predecisional, the document in question must be “generated before the adoption of an agency policy.” *McKinley v. FDIC*, 744 F. Supp. 2d 128, 138 (D.D.C. 2010). To be deliberative, a document must “reflect the give-and-take of the consultative process.” *Judicial Watch*, 306 F. Supp. 3d at 110. Here, EPA bears the burden of “establish[ing] what deliberative process is involved, and the role played by the documents in issue

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<sup>1</sup> 5 U.S.C. § 552(b)(5).

in the course of that process.” *Senate of the Commonwealth of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574, 585-586 (D.C. Cir. 1987).

To summarize, if EPA wishes to assert the consultant corollary to the deliberative process privilege for any of the claims of exemption listed above, it must show that: (1) the agency solicited the records or there exists some indicia of a consultant relationship between the outsider and the agency; (2) the records were created for the purpose of aiding EPA’s deliberative process; (3) the non-agency parties were not acting out of self-interest; (4) the document in question was generated before the adoption of an agency policy; and (5) the document reflects the give and take of the consultative process. For the reasons stated below, EPA cannot make such a showing.

## **II. The Consultant Corollary Does Not Apply**

As a threshold matter, the deliberative process exemptions claimed by EPA all fail because neither Steve Koonin nor William Happer qualify as government consultants. For the consultant corollary to apply, EPA would first have to show that Dr. Koonin and Dr. Happer were brought on by the agency to effectively function as agency employees. *Klamath*, 532 U.S. at 10 (“[T]he consultant functions just as an employee would be expected to do.”). Yet EPA has thus far neglected to provide any information about its relationships with Dr. Koonin and Dr. Happer.

EPA would then have to show that Dr. Koonin and Dr. Happer were not “represent[ing] an interest of [their] own” in their dealings with the Agency. *Klamath*, 532 U.S. at 10-11. The D.C. District Court, for example, recently held that a professor advising an agency with respect to a scientific theory could not be considered a government consultant for the purposes of Exemption 5 because she was the “originator and chief proponent” of that theory, and therefore “had a professional and reputational stake in [the agency’s] decisions.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 134 (D.D.C.), *modified*, 185 F. Supp. 3d 26 (D.D.C. 2016).

That case settles this one. Dr. Koonin was the “originator and chief proponent” of the idea to convene a red team/blue team exercise for climate science. *See* Steven Koonin, *A ‘Red Team’ Exercise Would Strengthen Climate Science*, *The Wall Street Journal* (Apr. 20, 2017). Moreover, Dr. Koonin has written extensively to question climate science, which would have been the precise purpose of a red team/blue team exercise. *See, e.g.*, Steven E. Koonin, *Climate Science Is Not Settled*, *The Wall Street Journal* (Sept. 19, 2014) (arguing that there is no scientific consensus as to how Earth’s climate will respond to human influence); Steven E. Koonin, *A Deceptive New Report on Climate*, *The Wall Street Journal* (Nov. 2, 2017) (calling the government’s Climate Science Special Report “alarm[ist],” “mislead[ing],” and “incomplete,” and renewing his public call for a government-conducted red team/blue team exercise); Steven E. Koonin, *The Climate Won’t Crash the Economy*, *The Wall Street Journal* (Nov. 26, 2018) (arguing that, contrary to the consensus scientific view, “the overall economic impact of human-caused climate change is expected to be quite small”). These examples illustrate quite clearly that Dr. Koonin “had a professional and reputational stake in” seeing his proposed exercise conducted by EPA.

*Competitive Enter. Inst.*, 161 F. Supp. 3d at 134. He therefore “cannot be likened to a government employee,” *id.*, and cannot be said to have been acting as a consultant for the purposes of Exemption 5. *See Klamath*, 532 U.S. at 10-11 (“[T]he consultant does not represent an interest of its own . . . when it advises the agency that hires it.”).

Neither does Dr. Happer fall within the consultant corollary given his “professional and reputational stake” in having EPA conduct a public debate meant to question the scientific bases of climate change. *Competitive Enter. Inst.*, 161 F. Supp. 3d at 134 (D.D.C. 2016). Dr. Happer has a well-established record of attempting to undermine prevailing climate science. *See, e.g.*, William Happer, *The Truth About Greenhouse Gases: The Dubious Science of the Climate Crusaders*, First Things (Jun. 2011) (stating that “[t]he climate crusade is . . . all based on contested science and dubious claims”); William Happer, *Global Warming Models Are Wrong Again*, The Wall Street Journal (Mar. 27, 2012) (arguing that global temperature is unresponsive to increases in atmospheric concentrations of CO<sub>2</sub>); Harrison H. Schmitt & William Happer, *In Defense of Carbon Dioxide*, The Wall Street Journal (May 8, 2013) (lamenting the “demonization” of carbon dioxide and arguing that it “has little correlation with global temperature”). Happer is also a co-founder of the CO<sub>2</sub> Coalition, which advocates that increased CO<sub>2</sub> is beneficial and critiques the way that “the debate about global warming and climate change” is conducted. *See* CO<sub>2</sub> Coalition (last visited Dec. 23, 2018), available at <https://co2coalition.org/co2-fundamentals/>. Influencing or otherwise offering input on an EPA red team/blue team exercise would have advanced Dr. Happer’s established professional interests and the interests of an organization that he co-founded. Like Dr. Koonin, then, Dr. Happer “cannot be likened to a government employee,” and cannot be covered by the consultant corollary. *Competitive Enter. Inst.*, 161 F. Supp. 3d at 134 (citing *Klamath*, 532 U.S. at 10-11).

### III. The Communications Fail Other Requirements of Exemption 5

Moreover, EPA must contend with several other attributes of the redacted documents that defeat any claim that these documents merit Exemption 5 status.<sup>2</sup> With respect to the RBE Prospectus, for example, EPA must provide evidence that Dr. Koonin’s prospectus was *solicited* by EPA, and that it was *created for the purpose of aiding* EPA’s deliberative process. *Judicial Watch*, 306 F. Supp. 3d at 106-07. Regarding the Climate Science Emails, EPA must provide evidence that these emails played a role in the formulation of an agency policy. *See Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865 (D.C. Cir. 2010) (explaining that, in order to qualify under Exemption 5, a document must “be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters”). And regarding the Happer Email, EPA must explain how this email “reflect[s] the give-and-take of the consultative process,”

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<sup>2</sup> We note that these examples are not exhaustive, but are merely offered as a sampling of the myriad and insurmountable hurdles EPA faces in claiming that these communications fall under Exemption 5.

given that it was apparently unsolicited and given that there was apparently no response. *Coastal States*, 617 F.2d at 866.

#### **IV. Conclusion**

The exemptions granted under FOIA are “limited” and “narrow,” and “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Klamath*, 532 U.S. at 7-8. The deliberative process exemption, therefore, is not “just a label to be placed on any document [EPA] would find it valuable to keep confidential.” *Id.* at 12. To the contrary, EPA must show “by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.” *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). Since EPA has not met that threshold, EDF requests that the Agency produce the unredacted versions of the documents referenced above.

Attached to this appeal letter are EDF’s FOIA request, EPA’s final response letter, and a PDF compiling the redactions that EDF is appealing. If you have any questions about this appeal, please contact me by telephone at (202) 572-3346 or by email at [lbowman@edf.org](mailto:lbowman@edf.org).

Respectfully submitted,

Lance C. Bowman

This file accompanies Environmental Defense Fund's ("EDF's") appeal of EPA's response to FOIA request EPA-HQ-2017-010055. Specifically, EDF appeals certain redactions in the file "NRDC 5.14.18 Production FOR RELEASE." In order to help EPA identify precisely which redactions EDF is appealing, we have excerpted the relevant passages and attached them here.

The first excerpt, which EDF calls "RBE Prospectus" in its appeal letter, corresponds to pages 5-8 of the file "NRDC 5.14.18 Production FOR RELEASE."

**To:** Bolen, Brittany[bolen.brittany@epa.gov]  
**Cc:** Dravis, Samantha[dravis.samantha@epa.gov]  
**From:** Jackson, Ryan  
**Sent:** Wed 5/3/2017 3:18:04 PM  
**Subject:** FW: Climate Red-Blue Prospectus  
[Climate Red-Blue Prospectus.pdf](#)

Brittany, want to read over this and we can talk when you get time?

**From:** Steven Koonin [mailto:**Ex. 6 - Personal Privacy**]  
**Sent:** Wednesday, May 3, 2017 9:57 AM  
**To:** Jackson, Ryan <jackson.ryan@epa.gov>  
**Subject:** Climate Red-Blue Prospectus

Ryan:

Much enjoyed meeting with you and the Administrator last Friday.

As promised, I attach a prospectus for a Climate Science Red-Blue Exercise. As I've watched the media since our meeting, I've become even more convinced that this would be a very good thing to do.

Many of the design choices are deliberate, but perhaps their rationale isn't evident. Would be happy to discuss further – this is only a first draft.

Steve



**Prospectus for a Climate Science Red/Blue Exercise**

**Steven E. Koonin** ( [Steven.Koonin@nyu.edu](mailto:Steven.Koonin@nyu.edu) )

The U.S. Global Change Research Program (USGCRP) issued the congressionally mandated third National Climate Assessment in 2014 (NCA2014) and is scheduled to issue the fourth in 2018. As part of that latter, a Climate Science Special Report (CSSR) has been drafted and reviewed by the National Academies. The CSSR is supposed to be a comprehensive and updated assessment of the state of knowledge on human-induced climate change, including observed and future projected changes in temperatures, precipitation patterns, extreme-weather events, sea-level rise, and ocean acidification, focused primarily on the United States. It is set for release in Fall, 2017 after undergoing an interagency clearance process.

The issuance of the CSSR is an opportunity for the USG to convene an unprecedented Red Team/Blue Team Exercise (RBE) to ensure that certainties and uncertainties in projections of future climates are accurately presented to the public and decision makers. In particular, an RBE would:

# Ex. 5 - Deliberative Process

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The following excerpt, which EDF calls “Climate Science Emails” in its appeal letter, corresponds to pages 381-85 of the file “NRDC 5.14.18 Production FOR RELEASE.”

**To:** Steven Koonin [Ex. 6 - Personal Privacy] Yamada, Richard (Yujiro)[yamada.richard@epa.gov]  
**From:** Bowman, Liz  
**Sent:** Thur 9/7/2017 5:49:03 PM  
**Subject:** RE: Climate science

Awesome, thanks for the quick response.

**From:** Steven Koonin [mailto:Ex. 6 - Personal Privacy]  
**Sent:** Thursday, September 7, 2017 1:45 PM  
**To:** Yamada, Richard (Yujiro) <yamada.richard@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>  
**Subject:** RE: Climate science

## Ex. 5 - Deliberative Process

**From:** Yamada, Richard (Yujiro) [mailto:yamada.richard@epa.gov]  
**Sent:** Thursday, September 7, 2017 1:40 PM  
**To:** Bowman, Liz <Bowman.Liz@epa.gov> [Ex. 6 - Steven Koonin personal email]  
**Subject:** RE: Climate science

Hi Liz,

# Ex. 5 - Deliberative Process

Thanks,

Richard

**From:** Bowman, Liz

**Sent:** Thursday, September 7, 2017 1:31 PM

**To:** Yamada, Richard (Yujiro) <[yamada.richard@epa.gov](mailto:yamada.richard@epa.gov)>;

Ex. 6 - Steven Koonin personal email

**Subject:** FW: Climate science

# Ex. 5 - Deliberative Process

**From:** Devin Henry [<mailto:dhenry@thehill.com>]

**Sent:** Thursday, September 7, 2017 1:28 PM

**To:** Bowman, Liz <[Bowman.Liz@epa.gov](mailto:Bowman.Liz@epa.gov)>

**Subject:** Re: Climate science

Thanks Liz. I may have asked this before, but what research or science is the administrator relying on when he says there are unanswered questions? I'm just wondering where he's coming from when he says the science isn't settled.

Thanks,

Devin

On Thu, Sep 7, 2017 at 1:12 PM, Bowman, Liz <[Bowman.Liz@epa.gov](mailto: Bowman.Liz@epa.gov)> wrote:

Hi Devin -- I would argue we are doing the exact opposite -- we are putting the science front and center, because we believe that Americans deserve a robust, open debate about the science around climate change. This is important to understanding the questions that remain unanswered, so that we can focus our country's resources and taxpayer dollars accordingly. As Administrator Pruitt believes: healthy debate is the lifeblood of American democracy.

**On additional background:** Please note that Cathy **Stepp** is Principal Deputy Regional Administrator in Region 7 (Kansas City).

And, I think it is important to understand that Administrator Pruitt has said that 'healthy debate is the lifeblood of American democracy.' And, that this issue has inspired one of the major policy debates of our time -- a debate that is far from settled. That debate should be encouraged, not silenced.

Thank you for the opportunity to include our voice -- Liz

**From:** Devin Henry [mailto:[dhenry@thehill.com](mailto:dhenry@thehill.com)]  
**Sent:** Thursday, September 7, 2017 10:14 AM

**To:** Bowman, Liz <[Bowman.Liz@epa.gov](mailto: Bowman.Liz@epa.gov)>  
**Subject:** Climate science

Morning Liz,

I'm working on a story about the proliferation of climate change skeptics in the Trump administration. The news peg is the upcoming confirmation fight over Sam Clovis (USDA) and Jim Bridenstine (NASA).

But I'm going to also write about comments and proposals from Scott Pruitt, as well, including his "primary driver" comment, and his red-team-blue-team effort. Will also note Cathy Steep's appointment as deputy administrator and her history of questioning climate science.

Wanted to see if you have a statement that I could attribute to you? Basically: how does the EPA respond to criticism that the administrator and other agency officials are downplaying the science of climate change and working to raise questions about the scientific consensus on this issue? What is the agency's strategy on the issue of climate change science?

Deadline is 4:30 today. Give me a call on my cell if you want to chat. Thanks.

-Devin

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Devin Henry

Staff Writer, The Hill

P: [\(202\) 349-8127](tel:(202)349-8127)

C: [\(952\) 913-7254](tel:(952)913-7254)



Twitter: [@dhenry](#)

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Devin Henry

Staff Writer, The Hill

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The following excerpt, which EDF calls “Red Team Release Email” in its appeal letter, corresponds to pages 477-79 of the file “NRDC 5.14.18 Production FOR RELEASE.”

To: Bowman, Liz[Bowman.Liz@epa.gov]; Happer@princeton.edu[Happer@princeton.edu]; Steve Koonin[Ex. 6 - Personal Privacy]  
Cc: Dravis, Samantha[dravis.samantha@epa.gov]  
From: Jackson, Ryan  
Sent: Sat 11/4/2017 5:01:27 PM  
Subject: Re: For Review: Red Team Release

## Ex. 5 - Deliberative Process

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Ryan Jackson  
Chief of Staff  
U.S. EPA  
(202) 564-6999

On Nov 4, 2017, at 12:53 PM, Bowman, Liz <[Bowman.Liz@epa.gov](mailto:Bowman.Liz@epa.gov)> wrote:

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Liz Bowman

U.S. Environmental Protection Agency (EPA)

Office: 202-564-3293

The following excerpt, which EDF calls “Happer Email” in its appeal letter, corresponds to page 554 of the file “NRDC 5.14.18 Production FOR RELEASE.”

**To:** Dickerson, Aaron[dickerson.aaron@epa.gov]; 'Steven E Koonin'[sek9@nyu.edu]; Jackson, Ryan[jackson.ryan@epa.gov]  
**Cc:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** William Happer  
**Sent:** Fri 12/8/2017 6:28:36 PM  
**Subject:** RE: Red Team Blue Team

Dear Bill, Ryan et al.,

# Ex. 5 - Deliberative Process

Best wishes,

Will