

## **Exhibit 5**

U.S. Department of  
Homeland Security

United States  
Coast Guard



Office of the Chief Administrative Law Judge  
United States Coast Guard

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June 11, 2020

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(347) 356-2936

RE: DHS FOIA APPEAL NUMBER 2020-HQAP-00123; FOIA REQUEST NUMBER  
2018-HQFO-01354

Dear Mr. Tempey:

This letter responds to your April 7, 2020 appeal of the response of the Department of Homeland Security (DHS) Privacy Office (PRIV) to your FOIA request (Request No. 2018-HQFO-01354) for records related to a February 15, 2018 DHS press release titled "We Must Secure the Border and Build the Wall to Make America Safe Again."

Pursuant to a memorandum of agreement, the United States Coast Guard Office of the Chief Administrative Law Judge is reviewing the FOIA appeals for the Department of Homeland Security General Counsel's office. Therefore, the Office of the Chief Administrative Law Judge will be rendering the official appeal decision on behalf of the Department of Homeland Security.

In your initial request, made by email on August 9, 2018, you sought

- All documentation used in formulating the press release, including program announcements, records generated at meetings, events, press conferences and/or interviews, and any other significant documentation used in formulating the release.
- Background material including background papers, news clippings, documents on program activities, reports on program and policy developments, news releases, fact sheets, and other reference material used in formulating the press release.
- All messages from senior leadership of the public affairs office to public affairs employees announcing new policies and revisions to existing policies from January 1, 2018 to the present.
- All correspondence between public affairs employees and reporters regarding the press release dated February 15, 2018 and located at this URL <https://www.dhs.gov/news/2018/02/15/we-must-secure-border-and-build-wall-make-america-safe-again>, from February 1, 2018 to the present.

On March 27, 2020, PRIV issued its final response, stating the documents you sought could be found online by any member of the public at <https://www.dhs.gov/publication/documents-related-february-2018-press-release-regarding-border-wall> and thus PRIV need not provide the documents to you in response

to your FOIA request. The link takes you to a PDF document consisting of 24 pages which contain redactions under FOIA Exemptions 5 and 6.<sup>1</sup>

In your appeal, you challenged DHS' withholding of portions the record, arguing 1) DHS failed to produce one of the categories of documents you requested, i.e., correspondence between the agency and reporters, 2) DHS must provide an index of the portions of the documents that have been withheld and describe them in detail, along with DHS' legal justification for redaction, 3) DHS failed to determine whether any portions of the redacted material were "segregable," and 4) DHS applied Exemption 6 too broadly and did not state any privacy interest at stake.

Regarding your request for an index and detailed description of the redacted material, the information redacted pursuant to Exemption 6 are work email addresses, and in some instances (at pp. 3, 10-12, 14, 20) the names of federal government employees. It is unclear from the appeal record what information was redacted pursuant to Exemption 6 on page 1. The information redacted pursuant to Exemption 5 on pages 7-14, 16-17, and 19-24 consist of drafts of the press release, with comments and suggested changes, transmitted between executive branch employees. It is unclear from the appeal record what information was redacted pursuant to Exemption 5 on pages 2-5.

### **FOIA Exemption 5**

PRIV properly redacted the information contained in pages 7-14, 16-17, and 19-24 of the PDF document located at <https://www.dhs.gov/publication/documents-related-february-2018-press-release-regarding-border-wall>. FOIA Exemption 5 permits an agency to withhold "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). Courts have interpreted this Exemption to cover documents that are traditionally protected by evidentiary privileges in civil discovery, including the attorney-client privilege, the attorney-work product privilege, and the deliberative process privilege. *Dow Jones & Co., Inc. v. Dept. of Justice*, 917 F.2d 571, 573 (1990) (internal citations omitted). The edits and comments contained in the redacted portions reflect recommendations and opinions on policy matters communicated among DHS employees and employees at the Executive Office of the President. Such recommendations and opinions are exactly the type of deliberative material that Exemption 5 was designed to protect, and Exemption 5 extends to materials drafted by an agency for the President. *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); *Berman v. C.I.A.*, 378 F.Supp.2d 1209, 1219-1220 (E.D. Cal. 2005), *aff'd*, 501 F.3d 1136 (9th Cir. 2007).

### **Remand Regarding FOIA Exemption 6**

FOIA Exemption 6 allows an agency to withhold material from "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Some courts have found that this Exemption does not extend to work email addresses of government employees in documents that do not otherwise contain sensitive personnel or medical information. *Families for Freedom v. U.S. Customs and Border Protection*, 837 F.Supp.2d 287, 301 (S.D.N.Y. 2011) ("The emails at issue here are nothing like personnel or medical files. They are mundane interoffice communications that do not contain any detailed personal information...Some of the emails include the email addresses of senders or recipients of the messages; some do not. Because these emails can in no way be construed as similar to personnel or

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<sup>1</sup> Codified at 5 U.S.C. §§ 552(b)(5) and (6).

medical files, my inquiry stops at step one. There is no need to go to the second step and balance the public's interest in disclosure against the privacy interests of the government employees"). Therefore, I am remanding this case to PRIV to review their justification for withholding the work email addresses and some names of government employees.

**Remand for More Information Regarding Search Parameters and Information Redacted in Pages 1-5**

You requested that PRIV produce records of correspondence between public affairs employees and reporters regarding the press release, and you argue on appeal that no such documents were provided to you. It is unclear from the appeal record what attempt was made to locate any such documents. Therefore, I am remanding the case to the agency for further information. I am also remanding the case because the appeal record does not clearly show what information was withheld on pages 1-5 of the PDF.

PRIV has 30 days to respond to my remand and either send an amended response to you or confer with my office regarding a decision to continue to withhold the information. Accordingly, you may receive another letter from PRIV within the next 30 days. Whether you receive another letter from PRIV regarding your FOIA request, you will receive another letter from my office stating the outcome of the remand.

Notwithstanding the above decision, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at [ogis@nara.gov](mailto:ogis@nara.gov) or call 1-877-684-6448.

Sincerely,



Sarah M. Grabenstein  
Attorney Advisor  
United States Coast Guard

Copy : DHS Privacy Office Director of FOIA Appeals and Litigation

Sent *via* first class mail to the above address