

ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC.,

Plaintiff/Appellant,

v.

OFFICE OF MANAGEMENT AND BUDGET,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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November 17, 2008

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**CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND
RELATED CASES UNDER CIRCUIT RULE 28(a)(1)
(INCLUDING F.R.A.P. 26.1 STATEMENT)**

Pursuant to Rule 28(a)(1) of this Court (and Federal Rule of Appellate Procedure 26.1), counsel for Public Citizen, Inc. certifies as follows:

A. Parties and Amici

Public Citizen, Inc. was the plaintiff in the district court and is the appellant in this Court. Public Citizen, Inc. is a non-profit corporation that has no parent company and no subsidiaries or affiliates that have issued shares to the public.

The Office of Management and Budget was the defendant in the district court and is the appellee in this Court.

B. Ruling Under Review

Appellant seeks review of district court Judge Royce C. Lamberth's November 6, 2007, order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. The order appears in the appendix at page 154. The opinion appears in the appendix starting at page 141 and is reported at 520 F. Supp. 2d 149.

C. Related Cases

This case has not previously been before this Court, except on OMB's motion for summary affirmance, which was denied in part and affirmed in part.

This case has not previously been before any other court except the court below.

Counsel for Appellant are not aware of any related cases.

Respectfully submitted,

/s/

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GLOSSARY

BATF	Bureau of Alcohol, Tobacco and Firearms
FOIA	Freedom of Information Act
OMB	Office of Management and Budget
USIP	United States Institute of Peace

STATEMENT OF JURISDICTION

This appeal is from a district court decision granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. The district court had jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The district court's memorandum opinion and order, dated November 6, 2007, disposed of all claims of all parties. (App. 141-154). Plaintiff filed a timely notice of appeal on December 19, 2007. (App. 155). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the requested records listing which agencies are allowed to submit legislative proposals, reports, testimony, and/or budget-related materials to Congress without first submitting them to the Office of Management Budget (OMB) for clearance are exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

STATUTORY PROVISIONS INVOLVED

FOIA, 5 U.S.C. § 552, provides in relevant part:

(a)(3)(A) . . . [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. . . .

(b) This section does not apply to matters that are . . .

(2) related solely to the internal personnel rules and practices of an agency; . . .

(5) 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

STATEMENT OF THE FACTS AND CASE

This FOIA case involves OMB's withholding of records containing its policy on which agencies are allowed to bypass its legislative and/or budgetary clearance processes.

A. Legislative and Budgetary Clearance and Bypass

OMB operates a legislative clearance process under which it requires federal agencies to submit proposed legislation, reports, and testimony to OMB before submitting them to Congress. *See* OMB Circular A-19, *Legislative Coordination and Clearance* (App. 46-60). OMB then advises the agency whether or not the materials are consistent with the President's program. *See id.*, Attachment C (App. 60). After receiving OMB's feedback, agencies must "incorporate the advice received from OMB in their reports and in their letters transmitting proposed legislation to Congress." *Id.* ¶ 8(c)(1) (App. 52). "In the case of proposed legislation, the originating agency shall not submit to Congress any proposal that OMB has advised conflicts with the program of the President or

has asked the agency to reconsider as a result of the coordination process.” *Id.*

¶ 8(c)(3) (App. 52).

OMB operates a similar clearance process for budgetary materials, including budget justifications and oversight materials, testimony and letters to congressional committees, written responses to congressional inquiries or other materials for the record, and materials responding to committee and subcommittee reporting requirements. These materials must be cleared by OMB before being transmitted to congressional committees, individual members of Congress, or congressional staff. OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, available at http://www.whitehouse.gov/omb/circulars/a11/current_year/a_11_2008.pdf; *see also* Declaration of Adina H. Rosenbaum (Rosenbaum Decl.) ¶ 7 (App. 34-35) (describing circular A-11).

Both OMB Circular A-19, which contains legislative clearance requirements, and Circular A-11, which contains budgetary clearance requirements, refer to the fact that some agencies may submit legislative and budgetary materials directly to Congress without first clearing them with OMB. However, neither circular lists which agencies can submit their materials directly to Congress. *Id.* ¶ 6-7 (App. 34-35).

B. Plaintiff's FOIA Request and the Agency's Response

Because OMB's circulars do not list which agencies can bypass the legislative and budgetary clearance processes, Public Citizen sent OMB a FOIA request to learn OMB's policy on which agencies can transmit records to Congress without first submitting them to OMB. In particular, Public Citizen requested:

- 1) All records listing agencies that may directly submit legislative proposals, reports, or testimony to Congress without receiving OMB clearance;
- 2) All records listing agencies that may directly submit budget-related materials to Congress without receiving OMB clearance; and
- 3) All records explaining that agencies or an agency may directly submit legislative or budget-related materials to Congress without receiving OMB clearance or providing statutory authority for agencies or an agency to directly submit legislative or budget-related materials to Congress without receiving OMB clearance. (App. 37).

On January 10, 2007, OMB denied Public Citizen's request. (App. 30). The denial letter stated that OMB had found two documents that were "potentially responsive" to the request, but that it had decided those records were exempt from disclosure under FOIA Exemptions 2 and 5, 5 U.S.C. §§ 552(b)(2) & (5). Instead of releasing its policy on which agencies can bypass the legislative and budgetary clearance processes, OMB included in its letter a list of statutes that address the direct submission of legislative materials and the agency concerned and a list of

statutes that address the direct submission of budgetary materials and the agency concerned. (App. 32).

Public Citizen appealed OMB's denial, explaining that the responsive records could not be withheld under either Exemption 2 or Exemption 5. (App. 40). It also questioned the adequacy of OMB's search for responsive records, noting that it had requested "*any* record that explains that *any* agency can submit legislative or budget-related materials to Congress without receiving OMB clearance," and that it is "difficult to believe that an adequate search for records responsive to the request would turn up only two records relating to agencies being permitted to bypass the legislative or budgetary clearance processes." (App. 41). After OMB denied Public Citizen's appeal, Public Citizen filed this lawsuit, seeking disclosure of the requested records.

C. The Withheld Records

According to its *Vaughn* Index, which it filed with its motion for summary judgment, OMB withheld 22 records responsive to Public Citizen's request. (App. 21-29). Fourteen of those records—records 1-14 in the *Vaughn* Index—are at issue in this appeal. Thirteen of the records (records 1 and 3-14) contain a one or two page (or both) memorandum from the OMB Assistant Director for Legislative Reference to OMB policy officials or OMB's legislative reference staff. *See*

Vaughn Index ¶¶ 1, 3-14 (App. 21-27). The memorandum contains unspecified “information about Federal agencies with legislative and budget ‘bypass’ authorities.” Attached to the memorandum is a longer memorandum providing background on bypass authorities, listing the agencies with bypass authority, describing the authority under which each agency can bypass the clearance process, and explaining the relationship between bypass authority and the Inspector General Act. *Id.* The first record listed in the *Vaughn* Index, dated February 20, 2001, is the version of the memorandum that “currently appli[es] and [is] utilized by OMB employees,” Declaration of James Jukes (Jukes Decl.) ¶ 17 (App. 17); the other 12 memoranda are “obsolete prior issuances” of the same memorandum. *Id.* ¶ 18 (App. 18).

The fourteenth record (record 2 in the *Vaughn* Index) is a two-page record entitled “Agencies Exempt from the Legislative Clearance Process” that is part of a larger document on “OMB Roles and Responsibilities.” *Vaughn* Index ¶ 2 (App. 21). This record “currently appli[es] and [is] utilized by OMB employees.” Jukes Decl. ¶ 17 (App. 17).

Although OMB’s declarant originally claimed that none of the responsive records was segregable, after Public Citizen filed its cross-motion for summary judgment, OMB released redacted versions of records 1-14. The released portions

of the records, together with the *Vaughn* Index and OMB's declarations, provide insight into what is included in the withheld portions of the records.

1. Lists of Agencies With Non-Statutory Bypass Authority

The released portions of records 1 and 3-11 start with three lists, all under the general heading "Bypass Agencies": a list of "Agencies with Statutorily-Based Budgetary and Legislative 'Bypass' Provisions," a list of "Agencies with Statutorily-Based Budgetary 'Bypass' Provisions Only," and a list of "Agencies with Statutorily-Based Legislative 'Bypass' Provisions Only." (App. 108, 121, 131). There is then a redaction. Record 1, in which the text was redacted by blacking it out, provides the best indication of what was redacted.¹ From the shape of the blacked-out text, it can be deduced that the text contains an additional list heading, followed by approximately 15 lines of text that presumably contain the items on the list. (App. 109). Because this list, like the three preceding it, comes under the general heading "bypass agencies," it is presumably a list of agencies that OMB allows to bypass the legislative and/or budgetary clearance

¹In records 3-6 and 10-11, instead of blacking out the text, the agency removed the page containing the text it wished to redact. The redaction can be discerned in those records by looking at the page numbers, which skip from 6 to 8. Records 7-9 contain no page numbers, and therefore no indication of a redaction, but if they follow the same pattern as the other records, they are redacted in the same manner. Supplemental Declaration of Adina H. Rosenbaum (Supp. Rosenbaum Decl.) ¶ 3 (App. 105).

processes. And because the previous lists specify that they contain agencies with statutory bypass authority, it seems likely that this list contains agencies with *non*-statutory bypass authority. In his Amended Declaration, James Jukes, head of OMB's Legislative Reference Division, indicates that there are, indeed, agencies that are allowed to bypass OMB clearance even though no statute permits them to do so. *See* Amended Declaration of James Jukes (Am. Jukes Decl.) ¶ 26 (App. 73) (mentioning bypass based on "prior agency and OMB practice").

Similarly, record 2, entitled "Agencies Exempt from the Legislative Clearance Process," contains a list of "Agencies with Statutorily-Based Legislative Bypass Provisions," and a list of "Agencies with Conditional Statutorily-Based Legislative 'Bypass' Provisions" (App. 119), followed by a page that was withheld. Given that the record appears to consist solely of lists of bypass agencies, it seems likely that the withheld page includes a list of agencies with *non*-statutorily-based legislative bypass authority, *i.e.* a list of agencies that OMB allows to bypass the legislative clearance process even though no statute so authorizes.

2. Factual Descriptions of Agencies' Interpretations of their Statutory Bypass Provisions

The released portions of records 1 and 3-14 contain a summary description, for each agency with statutory bypass authority, of the statutory authority under which the agency is allowed to bypass the clearance process. Supp. Rosenbaum Decl. ¶ 4 (App. 105). OMB generally redacted portions of the descriptions for four agencies: the Federal Aviation Administration, the Legal Services Corporation, the United States Institute of Peace (USIP), and the Small Business Administration. *Id.* However, in record 4, OMB did not redact the description of USIP. Where, in the other records, the description of USIP is redacted, record 4 contains the following statement:

There is no explicit provision contained in P.L. 98-525 stating the USIP is outside the regular budget process; however, USIP has so interpreted Sec. 1709(a) of P.L. 98-525, 22 USCA Sec. 4608(a), which states that “[n]othing in this title may be construed as limiting the authority of the Office of Management and Budget to review and submit comments on the Institute’s budget request at the time it is transmitted to Congress.” (App. 136).

The size and shape of this text is approximately the same as the redactions in the paragraphs on USIP in records 1, 3, and 5-11 (records 12-14 do not contain paragraphs on USIP at all). *Compare* App. 136 (released portion of record 4) *with* App. 115 (released portion of record 1) *and* App. 126 (released portion of record

3); *see also* Supp. Rosenbaum Decl. ¶ 4 (App. 105). Thus, it appears that what OMB is redacting from the descriptions of the statutory bypass provisions is descriptions of how agencies have interpreted those provisions.

3. Cover Memoranda and Large Portions of the Attached Memoranda

The *Vaughn* Index says that records 1 and 3-14 each contain a one- or two-page memorandum (or both), with an attached, longer document. (App. 21-27). Although OMB released portions of the attached documents, it did not release any of the one- or two-page cover memoranda. OMB has also redacted approximately half of each of the attached memoranda. Supp. Rosenbaum Decl. ¶¶ 5, 6 (App. 2-3). Given that the released portions of the records provide a summary factual description of why each agency with *statutory* bypass authority has that authority, it seems likely that the redacted portions would contain a summary factual description of why each agency with *non-statutory* bypass authority is provided that authority, such as a description of the “prior agency and OMB practice” on which the bypass authority is based. *See* Am. Jukes Decl. ¶ 26 (App. 73).

D. The District Court’s Decision

In the court below, both defendant and plaintiff moved for summary judgment. After conducting an *in camera* review of the withheld records, the

district court granted summary judgment to OMB, holding that records 1-14 are exempt from disclosure under FOIA Exemption 2, 5 U.S.C. § 552(b)(2), which exempts records that are “related solely to the internal personnel rules and practices of an agency.” The district court explained that OMB had to show that the withheld records are “predominantly internal” and that disclosure “significantly risks circumvention of agency regulations or statutes.” (App. 147). The court found that the records were predominantly internal because there was no evidence that they had been circulated to or relied on by individuals outside the agency and because they served as “guidance to OMB officials regarding other agencies’ ability to bypass presidential review of those agencies’ budgetary and/or legislative recommendations.” *Id.*

The court then turned to whether release of the records would significantly risk circumvention of agency regulations or statutes. Stating that “potential circumventors from whom the information is being protected need not be outside of the government,” the court found that records were exempt because they might cause *other federal agencies* to circumvent the law. (App. 148). According to the court, “if other agencies knew OMB’s beliefs concerning its views or the views of sister agencies, they could use this information to impede and frustrate legislative clearance requirements.” *Id.* The court did not elaborate on how knowing which

agencies are permitted to bypass the clearance processes, or any of the other information in the withheld records, could help agencies circumvent clearance requirements.

Because it held that the records were exempt under Exemption 2, the court did not discuss whether they could be withheld under Exemption 5. (App. 150).

SUMMARY OF ARGUMENT

The records withheld in this case are memoranda from the OMB Assistant Director for Legislative Reference that are issued regularly, updated when the law changes, and circulated to OMB officials and the Legislative Reference Division staff. The first two records “currently apply” and are “actively used” by OMB staff, while the other twelve records are “obsolete” versions of the first record. In other words, the withheld records contain the current and outdated versions of OMB’s policy on which agencies can bypass the clearance processes, a policy OMB staff applies in its dealings with other agencies.

These records are not exempt from disclosure under FOIA Exemption 2. Because the withheld records effectively regulate whether agencies must submit materials to OMB for clearance, they are not predominantly internal, as required for Exemption 2 to apply. And OMB’s Exemption 2 argument relies on the claim that other federal agencies might circumvent clearance requirements if the records

are released, but the government cannot withhold records by contending that it *itself* might break the law if the records are released. Potential government wrongdoing is a reason to *increase* government transparency, not to deny the public information about the government's activities.

In any event, disclosure of the records would *not* help any agency circumvent the law. Knowing which agencies are allowed to bypass the clearance processes would not, for example, give any agency guidance in how to bypass the processes itself. Although agencies may become jealous if they learn that other agencies can bypass the clearance processes, OMB cannot withhold records just to keep other agency officials from becoming upset.

The requested records also cannot be withheld under the deliberative process privilege incorporated in FOIA Exemption 5. As the policy used to determine whether agencies are required to clear material by OMB, the requested records are neither predecisional nor deliberative. Moreover, at least some of the information withheld from the records, such as the full list of bypass agencies, is factual information, which is not covered by the deliberative process privilege. At the very least, that information must be released

The case law on both Exemptions 2 and 5 makes clear that the exemptions do not allow the creation of secret law. Here, Public Citizen is seeking access to

the law OMB applies in determining whether agencies must clear their legislative and budgetary materials by OMB before submitting them to Congress. FOIA's exemptions do not apply to these records, and they must be released.

STANDARD OF REVIEW

When a district court decides a FOIA case at summary judgment, this Court reviews the decision de novo. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007); *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 998 (D.C. Cir. 1998).

ARGUMENT

FOIA reflects the “strong policy” that “the public is entitled to know what its government is doing and why.” *Coastal States Gas Corp. v Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). Because it was designed “to open agency action to the light of public scrutiny,” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), FOIA requires agency records to be disclosed unless they are subject to one of the limited exemptions provided in 5 U.S.C. § 552(b). These exemptions are construed narrowly and “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* FOIA’s “strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *U.S. Dep’t of State v. Ray*,

502 U.S. 164, 173 (1991); *see also* 5 U.S.C. § 552(a)(4)(B). If the government does not “carry its burden of convincing the court that one of the statutory exemptions apply,” the requested records must be disclosed. *Goldberg v. U.S. Dep’t of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). Here, the government has not demonstrated that the requested records fall within any of the exemptions, and the records must be released.

I. Exemption Two Does Not Apply to the Withheld Records.

Records may be withheld under Exemption 2 only if they are “predominantly internal,” *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc), and if either “the material relates to trivial administrative matters of no genuine public interest,” or “disclosure may risk circumvention of agency regulation.” *Schwaner v. Dep’t of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990) (citations omitted); *see also Morley v. CIA*, 508 F.3d 1108, 1124-25 (D.C. Cir. 2007). OMB fails both parts of this test.

A. The Withheld Records Are Not “Predominantly Internal.”

For Exemption 2 to apply to records, they must meet “the threshold test of predominant internality.” *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). As this Court has explained, the “word ‘internal’ in Exemption 2 plainly limits the exemption to those rules and practices that affect the internal workings of an

agency.” *Crooker*, 670 F.2d at 1056. Records are not predominantly internal if they “regulate the public” or “embody any ‘secret law’ of the agency.” *Id.* at 1073; *see also Dep’t of Air Force v. Rose*, 425 U.S. at 369.

Here, thirteen of the withheld records are memoranda containing a list of agencies that OMB permits to bypass the legislative and/or budgetary clearance processes and an explanation for why agencies are on that list. The memoranda are issued regularly by the Assistant Director for Legislative Reference, updated when the law changes, and circulated to OMB officials and legislative reference staff, who, in turn, “actively use[.]” the records. Am. Jukes Decl. § 20 (App. 70); *see also* Jukes Decl. § 17 (App. 17) (explaining that records 1 and 2 “currently apply and are utilized by OMB employees”). The fourteenth record is a list of agencies with bypass authority that is included in a larger document on “OMB Roles and Responsibilities” and that is also “actively used by OMB employees.” *See* Am. Vaughn Index ¶ 2 (App. 82); Am. Jukes Decl. § 20 (App. 70). As the government’s own statements show, these records do not just “establish rules and practices for agency personnel.” *Crooker*, 670 F.2d at 1073. They govern the relationship between OMB and outside agencies, determining which agencies can bypass OMB’s legislative and/or budgetary clearance processes. Accordingly, Exemption 2 does not apply.

The district court provided two explanations for its determination that the records were predominantly internal: 1) that they “offer guidance to OMB officials regarding other agencies’ ability to bypass presidential review of those agencies’ budgetary and/or legislative recommendations”; and 2) that they are “plainly intended for internal use only” and there is “no evidence the documents have ever been circulated to (or relied upon by) individuals outside of the Agency.” (App. 147). Neither rationale supports the district court’s conclusion.

First, that records guide the employees who apply them does not make those records predominantly internal. In *Crooker*, this Court distinguished between two types of guidance: instructions to agency personnel about how to regulate the public, such as the prosecutorial guidelines in *Jordan v. United States Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978), and instructions to agency personnel that make “no attempt to modify or regulate public behavior[,] only to observe it,” such as the Bureau of Alcohol, Tobacco and Firearms (BATF) manual at issue in *Crooker*. 670 F.3d at 1075. The latter records are predominantly internal, while the former are not. *Id*; see also *Windels, Marx, Davies & Ives v. Dep’t of Commerce*, 576 F. Supp. 405, 412 (D.D.C. 1983) (recognizing “distinction between instructions concerned with *detecting* illegal activity disguised as legal activity, and guidelines which *define* a violation—and are therefore disclosable as

‘secret law’ which affects the public”) (emphasis in original). Here, the withheld records are like the prosecutorial guidelines in *Jordan* rather than the manual in *Crooker*: They provide guidance to agency employees on which other agencies to allow to bypass the clearance processes. Because they contain instructions to agency personnel about what to require of people outside of OMB, they are not predominantly internal.²

²OMB argued below that records were predominantly internal unless they regulated the public at large. Although cases on internality do discuss regulating the “public,” the important distinction is not between those inside and outside government agencies, but between those inside and outside the specific government agency at issue, here OMB. Unlike Exemption 5, which exempts certain *inter*-agency communications, Exemption 2 only applies to *intra*-agency records. The “word ‘internal’ in Exemption 2 plainly limits the exemption to those rules and practices that affect the internal workings of *an* agency.” *Crooker*, 670 F.2d at 1056 (emphasis added); *see also* 5 U.S.C. § 552(b)(2) (exempting matters “related solely to the internal personnel rules and practices of *an* agency”) (emphasis added). Indeed, the opinion that coined the term “predominantly internal” went on to state that Civil Service Commission personnel management reports were not predominantly internal because they were “not evaluations of the Commission’s own personnel practices,” but were instead concerned with evaluating “government-wide personnel practices.” *Vaughn v. Rosen*, 523 F.2d 1136, 1151 (D.C. Cir. 1975) (Leventhal, J., concurring); *see also id.* (noting that Exemption 2 was “not couched in terms that broadly exempt government wide personnel policies and practices from disclosure”). In other words, the fact that the records related to agencies outside the Civil Service Commission meant they were not predominantly internal. Similarly, here, because the withheld records relate to agencies outside OMB, they are not predominantly internal and are not exempt under Exemption 2.

Second, that the records were intended to be internal and have not been circulated outside the agency does not make them “predominantly internal” for the purposes of Exemption 2. Were that the case, an agency could avoid disclosing its policies simply by being secretive about them. As this Court recently explained, Exemption 2 “does not shield information on the sole basis that it is designed for internal agency use.” *Morley*, 508 F.3d at 1125 (D.C. Cir. 2007) (internal quotation marks and citations omitted). That withheld records are not circulated does not mean that they are not being used to determine which agencies are permitted to bypass the clearance processes, thereby affecting entities besides OMB. And that the agency has failed to make public its policy about which agencies are permitted to bypass the legislative and/or budgetary clearance processes in the past does not justify permitting it to keep its policy secret going forward.

B. Release of the Records Would Not Risk Circumvention of Agency Statutes or Regulations.

Even if OMB could prove that the records were predominantly internal, it still would not be able to withhold the requested records. For records to be exempt under Exemption 2, they must either be related “to trivial administrative matters of no genuine interests” (often called the “low 2” exemption), or their

disclosure must “risk circumvention of agency regulation” (often called the “high 2” exemption). *Schiller*, 964 F.2d at 1207. Here, the district court held that the records were exempt under the high 2 exemption because their disclosure would risk circumvention of law “by agencies that do not currently possess bypass authority.” (App. 148). But the high 2 exemption is designed to prevent the public, not the government itself, from circumventing the law. And even if the exemption could be invoked based on the risk that federal agencies will break the law, neither OMB nor the court below has explained how release of the particular records at issue here “significantly risks circumvention of agency regulations or statutes.” *Crooker*, 670 F.2d at 1074.

1. The federal government cannot withhold records based on the argument that there is a significant risk the government itself would circumvent the law if the records were released. “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA’s goal of using openness to stem government corruption would be undermined if an executive branch agency were allowed to withhold records on the ground that there was a

significant risk that other executive branch agencies would break the law if the records were released.

In support of its claim that “the potential circumventors from whom the information is being protected need not be outside of the government,” (App. 148), the district court cited *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 166 (D.D.C. 2004) (Lamberth, J.), which held that “guidelines for internal audits of Commerce expenses and travel vouchers” were exempt because their release “could enable Commerce employees to evade the law when preparing expenses for audit.” Even assuming that *Judicial Watch* was correctly decided, however, the claim that rogue individual employees might evade the law to promote their *personal* interests over the interests of their governmental employer is a far cry from the claim here that government agencies might break the law to further the *agencies’* interests. The public should be able to trust that federal agencies, acting in their official capacity, will abide by the law even if they are discontented with whether or not they are permitted to bypass the legislative and budgetary clearance processes. The federal government should not be rewarded for its inability to live up to that trust.

2. Even if OMB could base its assertion that the records are exempt under the high 2 exemption on a claim that their release is likely to cause the federal

government itself to circumvent the law, the records still would not be exempt from disclosure because their disclosure would *not* “risk circumvention of agency statutes and regulations.” *Schiller*, 964 F.2d at 1207. Neither OMB nor the court below has explained how release of the particular records at issue here could cause such a risk.

For example, release of the full list of agencies that are allowed to bypass the legislative and/or budgetary clearance processes would not aid any agency in circumventing the law. If an agency is on the list of agencies allowed to bypass the legislative and/or budgetary clearance processes, then knowing it is on the list would not help it evade clearance requirements, because it is already exempt from those requirements. And if the agency is not on the list, knowing which agencies *are* on the list still would not help it evade clearance requirements, because its own clearance process would be unaffected.

To be sure, release of the list of agencies allowed to bypass the clearance processes, or OMB’s and other agencies’ views on whether certain agencies are allowed to bypass the clearance processes, may make agencies that are not allowed to bypass the processes jealous and make them want to be allowed to bypass the processes too. But even if agency decisions were governed by such elementary-school notions of jealousy and fairness, the high 2 test is not whether release of the

records would make people *want* to break the law; it is whether the released records would give them guidance in *how* to evade the law.

The high 2 exemption applies to documents containing procedural guidelines that would be rendered “operationally useless” if they were disclosed. *Nat’l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530 (D.C. Cir. 1986). Thus, for example, in *Crooker*, releasing the manual that contained the “investigative strategy used by BATF agents to detect criminal violators would [have made] that detection more difficult.” *Id.*; see also *Schiller*, 964 F.2d at 1205 (holding that “documents containing guidelines on implementing the Equal Access to Justice Act” were exempt because disclosure ““would quickly render those documents obsolete for the purpose for which they were designed”” (quoting *Nat’l Treasury Employees Union*, 802 F.2d at 530)). Disclosure of the withheld memoranda, however, would not render them obsolete for the purpose for which they were created. The list of agencies permitted to bypass the clearance processes would still be able to serve its function of informing OMB staff which agencies are bypass agencies, even if the list is made public. And whether or not other agencies know an agency’s interpretation of its purported authority to bypass the clearance processes, or understand the various background information OMB claims is in records 1 and 3-14, see *Am. Vaughn Index* ¶¶ 1, 3-14 (App. 82-91),

the records would still perform their role of informing OMB staff of that interpretation and of that background information.

In short, releasing the withheld records would not provide anyone with guidance on how to circumvent the law, and Exemption 2 does not permit an agency to withhold a policy simply because, if the policy were disclosed, the people affected by it would be unhappy and would lobby for its change. Agencies that are discontented with their presence or absence on the list of agencies that can bypass the legislative and budgetary clearance processes have every right to ask OMB, or even Congress, for a new policy. OMB cannot properly invoke Exemption 2 to keep them from doing so, to keep itself from having difficult conversations with other executive branch officials, or to keep its policy and practices secret from the public.

II. Exemption Five Does Not Apply to the Withheld Records.

OMB argued below that the records were also exempt from disclosure under the deliberative process privilege encompassed in Exemption 5, which exempts from disclosure records that are “predecisional” and “deliberative.” *Wolfe v. Dep’t of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). Like its Exemption 2 argument, OMB’s Exemption 5 argument fails.

A. Agency Policies Are Not Predecisional and Deliberative.

It is well-established that an agency cannot rely on the deliberative process privilege to shield its policies from disclosure. As this Court has explained, “an agency will not be permitted to develop a body of ‘secret law,’ used by it in the discharge of its regulatory duties” *Coastal States*, 617 F.2d at 867; *see also*, *e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (“[S]tatements of an agency’s legal position . . . cannot be viewed as predecisional.”); *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (documents that “reflect the working law of the agency,” including “statements of policies” “do not fall within the protection of Exemption 5”); *Schwartz v. IRS*, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (internal memoranda are not protected “if they represent policies, statements or interpretations of law that the agency has actually adopted”). Because the withheld records contain OMB’s policy on which agencies can bypass the legislative and/or budgetary clearance processes, they are not exempt under the deliberative process privilege.

OMB claims that the withheld records are just briefing materials that do not contain its official policy or mandate any decisions. *See* Am. Jukes Decl. ¶ 28 (App. 74). But an agency cannot hide a policy “behind a veil of privilege because it is not designated as ‘formal,’ ‘binding,’ or ‘final.’” *Coastal States*, 617 F.2d at

867; *see also Taxation with Representation Fund v. IRS*, 646 F.2d 666, 679 (D.C. Cir. 1981). Thus, for example, in *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997), the agency was not allowed to withhold field service advice memoranda that contained the national office’s answers to questions posed by personnel in the field because those answers constituted “agency law, even if those conclusions [were] not formally binding.” As the Court explained, “[t]he fact that [the records] are nominally non-binding is no reason for treating them as something other than considered statements of the agency’s legal position.” *Id.* The question is not whether the agency has officially declared the records to be policy, but whether the agency “actually applies” the records as though they were policy. *See Coastal States*, 617 F.2d at 869 (explaining that an agency is not permitted to withhold records “routinely used by agency staff as guidance” and “retained and referred to as precedent” because they constitute “a body of secret law which [the agency] is actually applying in its dealings with the public but which it is attempting to protect behind a label”).

Here, the withheld records all contain a list of agencies that are allowed to bypass the legislative and/or budgetary clearance processes. Record 2 includes this list in a document entitled “OMB Roles and Responsibilities.” Am. *Vaughn* Index ¶ 2 (App. 82). Records 1 and 3-14 include the list in memoranda written by

the Assistant Director for Legislative Reference and given by him to his staff. *Id.* ¶¶ 1, 3-14 (App. 82-91). Despite OMB's claims that these records are just briefing materials that inform OMB staff about issues that might arise in the legislative clearance process, *see* Am. Jukes Decl. ¶ 28 (App. 74), it is unimaginable that a member of the Legislative Reference Division staff, upon receiving these records from the Assistant Director (that is, from his or her boss), would consider them non-binding documents simply intended to give the staff person background while he or she made an independent decision about whether to require an agency to submit legislative or budgetary materials for clearance. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991) (“[A document] moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take.”); *Coastal States*, 617 F.2d at 868 (“[A] document moving [from superior official to subordinate] is more likely to contain instructions to staff explaining the reasons for a decision already made.”). A staff person looking at a list of agencies labeled “bypass agencies,” given to the staff person by his or her supervisor, is going to assume that the boss's list of “bypass agencies” is, in fact, the list of agencies the staff person must allow to bypass the legislative and/or budgetary clearance processes and will treat the list as the agency's policy.

Because they contain the policy actually followed by OMB, either now or in the past, the records are “neither ‘predecisional’ nor ‘deliberative’” *Jordan*, 591 F.2d at 774, and cannot be withheld under the deliberative process privilege in Exemption 5.

B. The Contents of the Records Are Not Deliberative.

In addition to being releasable as agency policy, the records are not exempt under Exemption 5 because they contain non-deliberative material. For example, although OMB describes the records as containing “internal-OMB perspectives and views,” Am. Jukes Decl. ¶ 26 (App. 73), the list of bypass agencies does not contain the perspectives or views of agency officials; it is just a factual list of agencies that OMB allows to submit materials to Congress without going through the clearance processes. Similarly, the statement that USIP has interpreted Section 1709(a) of Pub. L. No. 98-525 as putting it outside the normal budgetary process is not “the views and perspectives of OMB officials’ interpretations of the views of certain agencies regarding legislative clearance requirements.” Am. *Vaughn* Index ¶¶ 1, 3-14 (App. 82-91). It is just a factual description of how USIP has already interpreted the statute. OMB cannot make a record deliberative just by tacking the words “views and perspectives” before its description of the record in

its *Vaughn* Index; it cannot transform a final policy into a deliberative document just by labeling it the policy-maker's views and perspectives on what the policy is.

To the extent that the memoranda may contain any material that could be considered deliberative in some circumstances, here that information is not exempt because it has been incorporated into a final policy. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). These materials are attached to the list of bypass agencies used by OMB staff and presumably explain why particular agencies are on the list. Even if materials contain a description of multiple possible viewpoints the agency could have taken, and therefore are said by the agency to contain a "discussion" of the issue, *see Am. Vaughn Index* ¶¶ 1, 3-14 (App. 82-91), materials are not predecisional and deliberative if the purpose of the "discussion" is to explain a policy already adopted. *See Access Reports*, 926 F.2d at 1194.

Finally, even if this Court decides that OMB has met its burden of demonstrating that the records contain some predecisional and deliberative material, OMB has not met its burden of demonstrating that such information is not segregable from the rest of the records. *See Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). The list of agencies with non-statutory bypass authority, for

example, would not shed any light on any deliberative process. At the very least, the full list of agencies with authority to bypass the legislative and/or budgetary clearance processes should be released.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and order OMB to release records 1-14.

Respectfully submitted,

/s/

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RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 6,543 words.

/s/
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, November 17, 2008, I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for Defendant/Appellee as follows:

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