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# Unfair Disclosure—Adopting a Limited Consultant Corollary for FOIA's Exemption 5 in Attorney Work–Product Cases Preserves Litigation Parity for Agencies Like the FAA

Ellen Smith Yost
*Southern Methodist University, Dedman School of Law*

# UNFAIR DISCLOSURE—ADOPTING A LIMITED CONSULTANT COROLLARY FOR FOIA'S EXEMPTION 5 IN ATTORNEY WORK–PRODUCT CASES PRESERVES LITIGATION PARITY FOR AGENCIES LIKE THE FAA

ELLEN SMITH YOST*

THE FREEDOM OF INFORMATION ACT (FOIA)'s Exemption 5 allows government agencies to withhold requested "inter-agency or intra-agency" documents if a party in litigation with the agency would not be entitled to those documents.[1] The "consultant corollary," a widely used interpretation of Exemption 5, defines documents produced for a government agency by the agency's outside contractor as "intra-agency" documents, widening the exemption's scope.[2] In *Rojas v. Federal Aviation Administration*, the Ninth Circuit rejected the consultant corollary, holding that only documents actually produced by an agency employee are within the text of Exemption 5.[3] While the Ninth Circuit's *Rojas* approach respects FOIA's pro-disclosure purpose and strictly hews to the statute's text, as applied to attorney work–product privilege, it creates a "lopsided loophole" that allows a party in litigation with an agency to unfairly gain privileged information.[4] To avoid this result, courts should instead employ a limited consultant corollary, implicitly approved by the Supreme Court in *Department of the Interior v. Klamath Water Users Protective Association*,[5] extending "intra-agency" status to memoranda produced by an agency's *neutral, hired* consultant in preparation for litigation. This *Klamath*-limited approach to the

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[1] 5 U.S.C. § 552(b)(5) (2018).

[2] *See* Rojas v. Fed. Aviation Admin., 927 F.3d 1046, 1054 (9th Cir. 2019).

[3] *Id.* at 1058.

[4] *See id.* at 1065, 1068 (Christen, J., dissenting).

[5] Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001).

consultant corollary is "textually possible," the Court has indicated, and is necessary to give Exemption 5 its intended effect.[6]

FOIA, a 1966 statute intended to increase public access to government agency documents, was enacted in response to public concern about the growing size, power, and opacity of administrative agencies after the New Deal.[7] FOIA commands that "each agency, upon any request for records . . . shall make the records promptly available to any person."[8] Only if an agency "reasonably foresees that disclosure would harm an interest protected by" one of nine specified exemptions may the agency refuse to release a requested record.[9] FOIA's nine exemptions were carefully crafted by a Congress seeking to balance the public interest in open information with agencies' ability to operate effectively.[10]

FOIA's Exemption 5 allows an agency to withhold "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 . . . ."[11] It is commonly applied in the contexts of the attorney–client, attorney work–product, and deliberative–process privileges.[12] Legislative history shows Congress intended Exemption 5 to incorporate traditional civil discovery privileges, so that a person in litigation with an agency could not use FOIA to unfairly gain the agency's privileged documents.[13] The scope of Exemption 5 is thus tethered to civil discovery law governing the type of privilege claimed by the agency for the requested document.

Discovery limits on attorney work–product privileged documents are defined by Federal Rule of Civil Procedure 26(b)(3)(A) that provides: "[o]rdinarily, a party may not dis-

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[6] *Id.* at 9–10 (quoting Dep't of Justice v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)).

[7] *See generally* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 517–28 (2006).

[8] 5 U.S.C. § 552(a)(3)(A) (2018).

[9] *Id.* § 552(a)(8)(A)(i)(I).

[10] *See* Halstuk & Chamberlin, *supra* note 7, at 511–20.

[11] 5 U.S.C. § 552(b)(5).

[12] *See, e.g.*, Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001). This Casenote considers only the consultant corollary's application in the attorney work–product privilege context.

[13] *See* Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975) (citing legislative history showing Congress's intent to incorporate common law discovery rules in Exemption 5). *See generally* John C. Brinkerhoff, *FOIA's Common Law*, 36 YALE J. ON REG. 575 (2019).

cover documents . . . prepared in anticipation of litigation . . . by or for another party *or its representative* (including the other party's attorney, *consultant*, . . . or agent)."[14] So, looking to traditional discovery limits, in an attorney work–product case, Exemption 5 would exempt from FOIA disclosure documents prepared by a consultant, at the request of agency lawyers, in anticipation of litigation.[15]

However, the presence of the words "inter-agency and intra-agency" in Exemption 5's text complicates analysis of the exemption's proper scope.[16] Strictly read, these words mean no contractor-prepared memorandum can be withheld under Exemption 5.[17] Some have argued Congress well understood traditional discovery privilege law when enacting Exemption 5 and nonetheless added the "inter- or intra-agency" language to *further* limit agencies' ability to withhold documents, favoring FOIA's purpose of disclosure over an agency's privilege.[18]

Thus, Exemption 5 sets up a conflict for courts—how to give effect to each of these conflicting congressional goals without rendering the other meaningless. Strictly interpreting the "inter- or intra-agency" text of Exemption 5 undermines the exemption's purpose because it means sensitive documents created by an agency's consultant must be provided to a requestor even when they would be privileged from discovery as attorney work product under Rule 26.[19] Yet, interpreting Exemption 5 too liberally impermissibly ignores the "inter- or intra-agency" limitation established by Congress and increases the exemption's

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[14] Fed. R. Civ. P. 26(b)(3)(A) (emphasis added).

[15] *See, e.g.*, Fed. Trade Comm'n v. Grolier Inc., 462 U.S. 19, 25–27 (1983) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and *case law* in the pretrial discovery context." (quoting Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975))). One difference to note in the standards applicable to FOIA litigation and non-FOIA litigation is that FOIA exemptions are absolute while litigation privileges are qualified. *See* U.S. Dep't of Justice, Department of Justice Guide to the Freedom of Information Act: Exemption 5, at 2–3 (Aug. 26, 2019), https://www.justice.gov/oip/page/file/1197816/download [https://perma.cc/S285-U3YT]. This difference is beyond the scope of this Casenote but is another factor to consider in preserving parity for agency and non-agency litigants.

[16] *See* 5 U.S.C. § 522(b)(5) (2018).

[17] *See* Fed. R. Civ. P. 26(b)(3)(A).

[18] *See, e.g.*, Rojas v. Fed. Aviation Admin., 927 F.3d 1046, 1055–56 (9th Cir. 2019).

[19] *See Grolier*, 462 U.S. at 25–28.

scope, undermining FOIA's overall purpose of disclosure.[20] The consultant corollary is one way courts have sought to resolve this difficulty—by massaging the meaning of the term "intra-agency."

The consultant corollary interprets many documents produced by outside parties, at an agency's request, as within the definition of "intra-agency."[21] The corollary was developed soon after FOIA's enactment, when the D.C. Circuit opined that a document generated by an outside consultant for the purpose of improving an agency's informed decision-making should "be treated as an intra-agency memorandum of the agency which solicited it" and thus as within the scope of Exemption 5.[22] The corollary has been adopted by the First, Second, Fourth, Fifth, Eighth, Tenth, and D.C. Circuits, and rejected by the Sixth and (after *Rojas*) Ninth Circuits.[23]

Perhaps in response to some circuits' overbroad application of the consultant corollary, the Supreme Court discussed and limited the corollary in *Department of the Interior v. Klamath Water Users Protective Association*.[24] In *Klamath*, the Department of the Interior sought input from a Native American tribe on the impacts a proposed water rights allocation plan would have on the tribe's lands and activities.[25] When an association representing other water rights claimants filed FOIA requests for memoranda produced by the tribe for the agency, the agency claimed they were protected under Exemption 5.[26] Focusing on the fact that the tribe was an *interested party* providing its analysis to the agency, the Court held the consultant corollary did not apply and the memoranda could not be withheld as "intra-agency" documents under Exemption 5.[27]

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[20] *See* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12, 16 (2001).

[21] *See* Brinkerhoff, *supra* note 13, at 583.

[22] *See* Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *see also* Brinkerhoff, *supra* note 13, at 583 & n.53. The corollary was developed in the deliberative–process privilege context but has also been applied in the context of attorney work–product and attorney–client privilege. Further discussion of this is beyond the scope of this Casenote. *See Klamath*, 532 U.S. at 8–9.

[23] *See Rojas*, 927 F.3d at 1065–67 (Christen, J., dissenting). Prior to *Rojas*, the Ninth Circuit had implicitly employed the consultant corollary. *See id.* at 1054 n.4 (majority opinion).

[24] *See Klamath*, 532 U.S. at 7–10; *see also* Brinkerhoff, *supra* note 13, at 583.

[25] *Klamath*, 532 U.S. at 5.

[26] *Id.* at 6.

[27] *See id.* at 12 n.4.

*Klamath* establishes a two-step analysis for Exemption 5.[28] Step one considers whether the document's source is a government agency—it is in this step that the consultant corollary would be applied.[29] Step two, if reached, looks to traditional litigation privilege and thus is specific to the type of privilege asserted.[30] Step one, the *Klamath* Court noted, "is no less important than [step two]; the communication must be 'inter-agency or intra-agency.'"[31]

As the Court noted, at step one, the "most natural" reading of "inter- or intra-agency" documents is documents produced by agency employees.[32] Certainly, the Court concluded, "intra-agency" may not be read as a "purely conclusory term" that extends Exemption 5 protections to *any* document the agency wishes to protect.[33] However, the Court continued, quoting a prior opinion by Justice Scalia, it is "textually possible and . . . in accord with the purpose of [Exemption 5], to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting . . . [as a] consultant to the agency . . . ."[34] Such a "consultant does not represent an interest of its own, or the interest of any other client," but merely "advises the agency that hire[d] it . . . as an employee would be expected to do."[35]

Because the tribe in *Klamath* was neither disinterested nor hired, but an unpaid interested party standing to benefit from the agency's allocation of water rights, the Court held that the corollary could not be applied.[36] Not finding it necessary to decide the correctness of the corollary in its purer, more common form—applied to a neutral, hired contractor—where such facts were not present, the Court went no further.[37] However, by approvingly discussing the consultant corollary as applied to a neutral, hired contractor, the Court arguably implied its approval of

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[28] *See id.* at 8.

[29] *Id.* at 8–9.

[30] *See id.*

[31] *Id.* at 9.

[32] *Id.* at 9–10 (quoting Dep't of Justice v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)).

[33] *Id.* at 12.

[34] *Id.* at 9–10 (quoting *Julian*, 486 U.S. at 18 n.1).

[35] *Id.* at 11.

[36] *Id.* at 12.

[37] *Id.* at 12 & n.3.

a *Klamath*-limited consultant corollary where such facts were present.[38]

As its facts show, *Rojas* was such a case.[39] In 2015, Jorge Rojas applied for an Air Traffic Control Specialist position with the Federal Aviation Administration (FAA).[40] The hiring process largely depended on his performance on a "biographical assessment," developed for the FAA by an outside consultant.[41] After the FAA rejected Rojas for the position based on his assessment performance, he filed a FOIA request seeking the assessment's validation data.[42] In response, the FAA identified but declined to release (citing FOIA Exemption 5) three memoranda summarizing the assessment, prepared by the consultant at the request of agency attorneys in anticipation of a class action lawsuit already filed by other rejected applicants.[43] Notably, the attorney actively representing the class action plaintiffs was Rojas's FOIA attorney.[44] Implicitly relying on the consultant corollary, the district court upheld the FAA's right to withhold the consultant's memos as intra-agency attorney work product.[45]

On appeal, the Ninth Circuit reversed that decision, holding that documents produced by a hired contractor were not "intra-agency memos."[46] The court wholly, not contextually, rejected the consultant corollary, finding it textually incompatible with step one of a *Klamath* analysis.[47] A third-party consultant, the *Rojas* court emphasized, "is not an agency."[48]

One judge strongly dissented from the court's rejection of the consultant corollary, arguing the *Klamath* Court had implicitly blessed the corollary's use in situations such as the one in *Rojas.*[49] Moreover, the dissent noted the Supreme Court had "consistently rejected" the idea that "parties in litigation with the government" can use FOIA to circumvent discovery limitations

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[38] *See id.*

[39] *See* Rojas v. Fed. Aviation Admin., 927 F.3d 1046, 1051 (9th Cir. 2019).

[40] *Id.*

[41] *Id.* at 1050–51.

[42] *Id.* at 1051.

[43] *Id.* at 1060–61 (Christen, J., dissenting).

[44] *Id.* at 1060.

[45] *Id.* at 1052, 1054 (majority opinion).

[46] *Id.* at 1058.

[47] *Id.* at 1054–56.

[48] *Id.* at 1055.

[49] *Id.* at 1067 (Christen, J., dissenting) (noting that "*Klamath* is more a benediction of the consultant corollary than an indictment").

and obtain information they otherwise could not.[50] This, the dissent noted, was precisely the situation the Ninth Circuit was approving in *Rojas*.[51]

This unfair effect on agency litigants, coupled with *Klamath*, shows that the Ninth Circuit erred by rejecting the consultant corollary in *Rojas* for three reasons. First, the Court's deep and lengthy analysis of the consultant corollary in *Klamath*, and its ultimate narrow rejection of the corollary only as applied in that case, strongly implies the Court's approval of a limited version of the corollary—where there is a neutral, hired consultant.[52] Second, the circumstances in *Rojas* were those the Court implicitly approved in *Klamath*.[53] And third, only by employing a limited consultant corollary in attorney work–product cases can courts achieve proper balance between Exemption 5 and FOIA generally, fulfilling Congress's intent for the statute and its exemption.

First, the unanimous *Klamath* Court's lengthy and serious consideration of the consultant corollary, and its subsequent narrow rejection of only a highly distinguishable variant of the doctrine (as applied to an *interested* party), implies approval of the corollary in its purer form.[54] In *Klamath*, eight pages of a twelve page opinion are dedicated to discussing the consultant corollary and distinguishing most corollary cases from the facts at hand.[55] If, after such thorough consideration, the Court had believed total rejection of the corollary was clearly required by Exemption 5's text and FOIA's purpose (as the *Rojas* court concluded),[56] it surely would have said so. Instead, the Court analyzed the text's "apparent plainness."[57] This use of the word "apparent" to qualify the word "plainness" in describing Exemption 5's text shows the Court regarded "intra-agency" *not* as plain but as potentially amenable to limited interpretation. The key "constant" in pure consultant corollary cases, the Court emphasized, was that "the consultant does not represent an interest of its own, or the inter-

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[50] *Id.* at 1062 (quoting United States v. Weber Aircraft Corp., 465 U.S. 792, 801 (1984)).

[51] *Id.* at 1060–61.

[52] *See id.* at 1067–68 (citing the Tenth Circuit's reading of *Klamath* in Stewart v. Dep't of Interior, 554 F.3d 1236, 1244 (10th Cir. 2009)).

[53] *See* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10–11 (2001).

[54] *See Rojas*, 927 F.3d at 1067–68 (Christen, J., dissenting).

[55] *See Klamath*, 532 U.S. at 8–16.

[56] *See Rojas*, 927 F.3d at 1058 (majority opinion).

[57] *Klamath*, 532 U.S. at 9.

est of any other client," in advising the agency that hired it.[58] Under these pure, limited circumstances, *Klamath* therefore implies the consultant corollary may be used in step one of an Exemption 5 analysis.

Further supporting this inference of majority Court approval for a limited consultant corollary is the fact that the *Klamath* opinion's language most directly approving the corollary's use where there is a hired, neutral consultant comes from Justice Scalia, who is no proponent of expansive functional interpretations.[59] Justice Scalia, the opinion notes, found it "textually possible and . . . in accord with the purpose of [Exemption 5], to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting . . . [as a] consultant to the agency . . . ."[60] Thus, by the depth and tenor of its discussion, the *Klamath* Court implicitly approved the consultant corollary as applied to an agency-hired, neutral third party who has delivered work product to the agency.

Second, the facts in *Rojas* satisfy *Klamath*'s standard for appropriate application of the consultant corollary.[61] In *Rojas*, the FAA hired a consultant "to review and recommend improvements to the FAA's hiring process" and later to analyze its hiring assessments in preparation for litigation.[62] The consultant was not an interested party.[63] The consultant's work product was not retained by the consultant but delivered to the agency.[64] *Rojas* involved a *neutral* consultant *hired* by the FAA to serve only the agency's interests.[65]

Third, only when a *Klamath*-limited consultant corollary is allowed at step one of an attorney work–product Exemption 5 analysis does Exemption 5 deliver the litigation parity Congress intended it to provide.[66] Strict, textual interpretation of "intra-agency" at step one, as in *Rojas*, destroys litigation parity in step two. This is so because, in an attorney work–product case, rejecting the consultant corollary in step one forces an agency in

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[58] *Id.* at 11.

[59] *See id.* at 9–10.

[60] *Id.* (quoting Dep't of Justice v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)).

[61] *See id.* at 10–11.

[62] Rojas v. Fed. Aviation Admin., 927 F.3d 1046, 1050–51 (9th Cir. 2019).

[63] *See id.*

[64] *Id.* at 1064 (Christen, J., dissenting).

[65] *See id.*

[66] *See supra* text accompanying notes 13, 15.

litigation with a requestor to disclose consultant-generated documents *even though* they would be protected from disclosure under Rule 26 at step two. Only agencies are subject to FOIA, so this allows one-sided circumvention of discovery privilege and is unfair to agency litigants.[67]

As the *Rojas* dissent noted, *Rojas* was a textbook example of using FOIA to circumvent litigation privilege—the precise outcome Congress sought to avoid by creating Exemption 5.[68] In *Rojas*, an attorney *actively representing* plaintiffs suing the FAA was able to gain, via FOIA, FAA memoranda he could not obtain through discovery.[69] Under the precedent set by *Rojas*, litigants have an unfair advantage over agency opponents—at least in the Ninth and Sixth Circuits.[70] This will chill agencies from seeking the outside expert advice they may need to effectively serve the public.[71]

In conclusion, to eliminate the litigation loophole created in *Rojas*,[72] the Court should again take up the consultant corollary and hold what it implied in *Klamath*—that work product of an agency's *disinterested, hired* consultant is within the definition of "intra-agency" for application of Exemption 5.[73] Or, Congress can act to add clarifying language to Exemption 5. Approving a *Klamath*-limited consultant corollary—at least in attorney work–product cases—will unify the circuits' approaches to FOIA's Exemption 5, give effect to Congress's intent for both FOIA and this exemption, and create litigation parity between agencies and their private party opponents—eliminating unfair disclosure.

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[67] *See Rojas*, 927 F.3d at 1064–65, 1068 (Christen, J., dissenting).

[68] *See id.*; *see also supra* text accompanying notes 13, 15.

[69] *See Rojas*, 927 F.3d at 1061 (Christen, J., dissenting).

[70] *See id.* at 1058–60 (majority opinion).

[71] *See* Halstuk & Chamberlin, *supra* note 7, at 517–28.

[72] *See Rojas*, 927 F.3d at 1068 (Christen, J., dissenting).

[73] *See* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10–11 (2001).