U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

April 20, 2021

Via ECF
Honorable Analisa Torres
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Knight First Amendment Inst. v. Centers for Disease Control & Prevention, et al.*, 20 Civ. 02761 (AT)

Dear Judge Torres:

This Office represents the Centers for Disease Control & Prevention ("CDC") and the Department of Health and Human Services ("HHS"), the defendants in the above-referenced Freedom of Information Act case brought by plaintiff Knight First Amendment Institute at Columbia University ("Plaintiff"). I write respectfully to respond to Plaintiff's supplemental authority letter, dated April 13, 2021. *See* ECF No. 49.

Plaintiff suggests that the Supreme Court's recent decision in *United States Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021), supports its contention that the CDC's withholding of a draft Communication and Media Strategy for the Coronavirus Disease 2019 Response (Document 12 on CDC's *Vaughn* index) is unjustified. *See* ECF No. 49 at 1. To the contrary—here, the strategy document at issue was never finalized, and instead is one of many drafts that were revised and circulated to help frame ongoing deliberative discussions within CDC for anticipated consideration by CDC decisionmakers. *See* ECF No. 34 ¶ 20. This is entirely consistent with the Court's recognition that in deliberations "some ideas are discarded or simply languish. Yet documents discussing such dead-end ideas can hardly be described as reflecting the agency's chosen course." 141 S. Ct. at 786.

In *Sierra Club*, the Court analyzed whether the deliberative process privilege protects drafts of documents that "proved to be the agencies' last word about a proposal's potential threat to endangered species." *Id.* at 783. The U.S. Fish and Wildlife Service and National Marine Fisheries Service (together, "Services") are tasked with drafting biological opinions analyzing an EPA proposed rule to determine whether such proposal will jeopardize threatened or endangered species. Given that the documents at issue reflected the Services' "preliminary thinking about a problem, as opposed to its final decision about it," the Court found the draft opinions to be non-final and protected by the deliberative process privilege. *Id.* at 785.

In conceding that it is not always self-evident whether a document represents an agency's final decision, the Court made "one thing clear: A document is not final solely because nothing else follows it." *Id.* at 786. In other words, proposals that "die[] on the vine" by discussing "dead-end ideas" never to be published cannot be deemed to reflect the agency's chosen course

of action. *Id.* Instead, "to decide whether a document communicates the agency's settled position, courts must consider whether the agency treats the document as its final view on the matter." *Id.*

CDC's draft strategy document, like the biological opinions at issue in *Sierra Club*, was not a final decision, let alone an "operative" policy, and cannot now be treated as such. In reaching its conclusion in *Sierra Club*, the Supreme Court determined that a number of factors with a striking similarity to this case demonstrated the draft biological opinions to be non-final and protected by the deliberative process privilege. In *Sierra Club*, the Supreme Court noted that sometimes a proposal "dies on the vine" because, during deliberations, some "ideas are discarded or simply languish." *Id.* at 786. Here, the CDC withheld the draft strategy because it was never finalized due to the evolving and rapid nature of the pandemic. *See* Dkt. 42 ¶¶ 19-22. Given the nature of the pandemic, such ideas had to be discarded before becoming finalized and, thus, "died on the vine." Unable to rebut the CDC's declaration that the draft policy was never finalized, Plaintiff instead asserts, without support, that "a constantly changing policy is still final in each of its iterations." *See* Dkt. 49 at 2. However, in *Sierra Club*, the Court distinguished between changes made during the consultation or deliberation process—before an action is considered final—and changes made that alter a final operative decision. 141 S. Ct. at 787-88. A finding that "any email or memorandum that has the effect of changing an agency's course constitutes a final administrative decision" would "gut the deliberative process privilege" and must be rejected. *Id.* at 788.

In *Sierra Club*, the Services identified three documents as "drafts." Since the label "draft" is not determinative, the Court analyzed the documents "in the context of the administrative process which generated them" to determine whether the documents were properly labeled. *Id.* at 787 (defining draft as "a preliminary version of a piece of writing subject to feedback and change") (internal quotations omitted). The evidence failed to establish that the Services were hiding a "functionally final" decision in draft form because the drafting process "specifically contemplated further review by the agency after receipt of the draft [biological opinion]." *Id.* Finding that the biological opinions must be sent to and be approved by the EPA before a final opinion may be issued as well as that the regulatory process "allows for the possibility of changes to the biological opinions *after* the Services send the agency the draft," the Court held that the Services were not simply hiding behind the word "draft." *Id.* at 786. Here, the CDC drafts were prepared and exchanged prior to any finalized policy (which was never in fact finalized). Akin to the draft biological opinions in *Sierra Club*, CDC policy drafts go through a series of revisions and circulations within CDC before they are to be considered by CDC decisionmakers; this process specifically allows for changes to the draft policy and contemplates further review by the agency before it may be finalized. *See* Dkt. No. 34 ¶ 20. As highlighted above, such opportunity for revision was a key aspect of the Court's finding that the deliberative process privilege protected the drafts at issue in *Sierra Club*. *See Sierra Club*, 141 S. Ct. at 786.

We thank the Court for its consideration of this submission.

Respectfully submitted,

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cc: Counsel of record (via ECF)