APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 20-30033

Filed
June 17, 2021

TONY B. JOBE, ESQUIRE,

Plaintiff—Appellee,

versus

NATIONAL TRANSPORTATION SAFETY BOARD,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-10547

Before CLEMENT, HO, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

Aircraft disasters are investigated by a federal agency called the National Transportation Safety Board (NTSB). The inquiry usually includes representatives from the aircraft's manufacturer or operator, who are uniquely positioned to shed light on what

went wrong. This case, involving the tragic crash of a sightseeing helicopter in Hawaii, asks whether communications between the NTSB and such outside consultants must be disclosed to the public under the Freedom of Information Act (FOIA).

Answering that question turns on the scope of FOIA's "Exemption 5," which shields privileged "intra-agency" documents from disclosure. *See* 5 U.S.C. § 552(b)(5). Several circuits, including ours, read Exemption 5 to protect communications not only among an agency's employees, but also with some non-agency experts whose input the agency has solicited. This is known as the "consultant corollary." *See Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1137-38 (5th Cir. 1980); *Wu v. Nat'l Endowment for Humans.*, 460 F.2d 1030, 1032 (5th Cir. 1972). The district court ruled the corollary did not apply to documents the NTSB exchanged during its investigation with representatives from the helicopter's operator and manufacturers. Relying on *Department of the Interior v. Klamath Water Users Protection Association*, 532 U.S. 1 (2001), the court reasoned the corollary does not protect even privileged communications with "self-interested" consultants like those.

The district court erred. *Klamath* does not stand for the broad principle that a consultant's "self-interest" always excludes it from Exemption 5. And, properly applied, the consultant corollary squarely covers the NTSB's communications with the non-agency parties here. By necessity, the NTSB solicits technical input from entities whose aircraft are under investigation. But the process only finds facts and issues

safety recommendations; it does not assign liability or have adverse parties, and its conclusions are not admissible in litigation. Moreover, the agency closely supervises non-agency parties and controls the release of any non-public information. Subjecting the NTSB's communications with consultants to broad public disclosure would inhibit the agency's ability to receive candid technical input from those best positioned to give it.

We therefore conclude that the outside parties solicited by the NTSB qualify as "consultants" under Exemption 5's corollary. That does not end the case, however—deeming documents "intra-agency" is only the first step in a two-part assessment. *See Klamath*, 532 U.S. at 9 ("[T]he first condition of Exemption 5 is no less important than the second"). Exemption 5 does not shield all intra-agency documents from disclosure, only those which are "normally privileged in the civil discovery context." *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). *Cf. U.S. Dep't of Just. v. Julian*, 486 U.S. 1, 14 (1988) (Exemption 5 does not apply to documents that are "routinely available" in discovery). On remand, the district court will need to undertake the second facet of the Exemption 5 inquiry: determining whether the documents at issue are subject to a litigation privilege ordinarily available to a government agency. *See*, *e.g.*, *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 783 (2021) ("Exemption 5 incorporates the privileges available to Government agencies in civil litigation, such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege.").

We reverse the district court's judgment and remand for further proceedings consistent with this opinion.

I.

A.

In 2011, a helicopter crashed while on a sightseeing tour in Hawaii, killing the pilot and all four passengers. The helicopter was operated by a U.S. company, Blue Hawaiian Helicopters. It was manufactured by a French company, Eurocopter, and its engine was manufactured by another French company, Turbomeca.

Aircraft accidents are investigated by the NTSB, which conducts "fact-finding proceedings" to determine probable cause and issue safety recommendations. *See* 49 C.F.R. § 831.4 (2016); 49 U.S.C. § 1131(a)(1)(A).[1] The agency does not assess "rights or liabilities," and its final report cannot be admitted in a civil action. 49 C.F.R. §§ 831.4, 835.2; 49 U.S.C. § 1154(b).[2] Investigations are supervised by an "Investigator in Charge" ("IIC"), 49 C.F.R. § 831.8, who may designate "parties" to the investigation. *Id.* § 831.11(a)(1). A party is an entity "whose employees,

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[1] All citations, unless otherwise noted, are to the 2016 edition of the Code of Federal Regulations, which was the version in effect at the time of the accident, investigation, and Plaintiff's FOIA requests.

[2] As discussed *infra*, the evidentiary bar does not apply to factual reports made at earlier stages of the investigation or the purely factual material reproduced in the final report.

functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation." *Ibid.* Parties are under the NTSB's direct supervision. *Id.* §§ 831.8(b); 831.11(a)(2). Non-agency parties must sign a "Statement of Party Representatives to NTSB Investigation," *id.* § 831.11(b), which commits them not "to prepare for litigation or pursue other self-interests." Parties may not be represented "by any person who also represents claimants or insurers," or "occup[ies] a legal position," *id.* § 831.11(a)(3), nor may they release information obtained during an investigation, subject to specific exceptions, *id.* § 831.13(b).

As part of the helicopter crash investigation, the IIC appointed party representatives from Blue Hawaiian and the Federal Aviation Administration. Under an international convention, a French agency (the "Bureau of Enquiry and Analysis for Civil Aviation Safety," or "BEA") served as an accredited representative. *See* CONVENTION ON INT'L CIVIL AVIATION, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.[3]

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[3] Signatories to this convention, commonly called the "Chicago Convention," *see Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 9 (1986), established the International Civil Aviation Organization ("ICAO"), which adopts uniform standards for international accident investigations. Convention, art. 37(k), 61 Stat. 1180; *see also Earl v. Boeing Co.*, --- F.Supp.3d ---, 2021 WL 274435, at *3 (E.D. Tex. Jan. 27, 2021) (recounting history of the Chicago Convention). Annex 13 provides that accredited representatives from the countries in which the aircraft was operated, designed, and manufactured can participate in the investigation and designate technical advisors to assist. ICAO

The BEA assigned technical advisors from Eurocopter and Turbomeca to assist. The advisors were allowed to inspect the crash site, take notes, discuss accident scenarios with other team members, and perform other investigative activities. Although supervised by the BEA, the advisors were subject to the IIC's control. ICAO Annex 13, § 5.25.

B.

In 2014, after the NTSB finished its investigation, Tony Jobe submitted an information request under 49 C.F.R. § 837.1-4.[4] Jobe is a lawyer who represents the families of the crash victims. Although the NTSB denied Jobe's request because it lacked the required affidavit, *see id.* § 837.4(b)(2), the agency converted it into a FOIA request. The NTSB then searched 13,000 pages for any records related to the crash and disclosed about 4,000 pages to Jobe. Of the 9,000 undisclosed pages, 2,349 were withheld under Exemption

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Annex 13, §§ 5.18-5.20, 5.24. The advisors are supervised by the accredited representatives, § 5.24.1, and any participation is subject to the IIC's control, § 5.25. We note that at least one court has questioned whether annexes to the Chicago Convention have binding legal effect or should even be considered by federal courts. *See Earl*, --- F.Supp.3d ---, 2021 WL 274435, at *4-6. Because neither party here questions the legal import of the annexes and our conclusion does not depend on their validity, we need not weigh in on that debate.

[4] Section 837 provides a process, separate from FOIA, by which parties in litigation not involving the NTSB may request "material"—defined to include "any type of physical or documentary evidence"—that is "contained in NTSB files" or has been "acquired by . . . the NTSB in the performance of [its] official duties." *See* 49 C.F.R. §§ 837.1, 837.2.

5, which exempts "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." 5 U.S.C. § 552(b)(5).

In 2016, Jobe submitted a second FOIA request for eleven specific categories of documents relating to the on-scene phase of the investigation. The NTSB determined it had already disclosed all releasable documents but nonetheless offered to re-review the 2,349 withheld pages. The agency ultimately released another 159 to Jobe.

Seeking additional disclosures, Jobe filed suit in the Eastern District of Louisiana. *See* 5 U.S.C. § 552(a)(4)(B). In response, the NTSB produced a *Vaughn* index[5] describing 215 withheld documents responsive to the eleven categories in Jobe's second FOIA request. Both parties moved for summary judgment.

The district court rejected Jobe's claims that the *Vaughn* index was incomplete and that the NTSB failed to segregate releasable from nonreleasable material. The court also determined that the NTSB properly invoked Exemption 5 as to several internal documents. (Jobe does not challenge those rulings on appeal.) The court, however, ruled that documents

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[5] A *Vaughn* index describes documents identified as responsive to a FOIA request but not produced and explains why they have been withheld. *See Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety & Health Admin.*, 280 F.3d 539, 544 n.12 (5th Cir. 2002); *see also Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973).

sent among the NTSB, Blue Hawaiian, Eurocopter, and Turbomeca were not "intra-agency" and so did not qualify for withholding under Exemption 5. Specifically, the court declined to apply the "consultant corollary," which deems "intra-agency" certain communications with or materials produced by outside experts who aid in agency decision-making. *See Hoover*, 611 F.2d at 1137-38; *Wu*, 460 F.2d at 1032. The court thus granted Jobe partial summary judgment and ordered the NTSB to produce about 125 pages. The order was stayed pending the agency's appeal.

II.

We review a summary judgment *de novo*. *Digital Drilling Data Sys., L.L.C. v. Petrolink Servs., Inc.*, 965 F.3d 365, 373 (5th Cir. 2020). FOIA exemptions are "exclusive" and "narrowly construed." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citations omitted); *see also Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 398 (5th Cir. 1985) (Because "FOIA is designed to promote the disclosure of information ... [,] exemptions from it are not to be read broadly.") (citations omitted). Disclosure is strongly favored. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Nonetheless, "FOIA expressly recognizes that important interests are served by its exemptions, and those exemptions are as much a part of FOIA's purposes and policies as the statute's disclosure requirement." *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (cleaned up); *see also FBI v. Abramson*, 456 U.S. 615, 630-31 (1982) ("While Congress established that the basic policy of [FOIA] is in favor of disclosure, it recognized the important interests

served by the exemptions."). The government bears the burden to prove that documents fall within an exemption. *U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 141 n.3 (1989); *Batton v. Evers*, 598 F.3d 169, 175 (5th Cir. 2010); *see also* 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action.").

III.

The district court concluded that neither the helicopter's French manufacturers (Eurocopter and Turbomeca), nor the American company leasing the helicopter at the time of the crash (Blue Hawaiian), qualified as "consultants" under the corollary because they were "self-interested." While recognizing those companies' employees were "there to help NTSB's investigation," the court reasoned "they were also undoubtedly there to collect information to prepare for inevitable future litigation." Their participation, the court noted, also conferred a "significant benefit" on the companies: unlike the families of the crash victims, the companies had access to the "investigation file" and "editorial license" over the agency's factual reports and ultimate probable cause determination. The court relied on language from the Supreme Court's opinion in *Klamath*—namely its observation that a consultant typically "does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." 532 U.S. at 11.

On appeal, the NTSB asserts the district court erred in refusing to apply the corollary to communications among non-agency parties to an NTSB

investigation. The agency argues that its investigations are non-adversarial fact-finding proceedings and that non-agency participants are overseen by the NTSB and prohibited from disclosing non-public information absent agency approval. The agency further argues that the district court read *Klamath* too broadly and that the "parties" here are not "self-interested" within the meaning of that decision.

Whether the consultant corollary applies to non-agency participants in NTSB investigations is an issue of first impression in the federal circuit courts. Though a close question, we conclude that Blue Hawaiian, Eurocopter, and Turbomeca qualify as consultants. We therefore reverse the district court's judgment and remand for the court to determine whether the withheld documents are subject to any litigation privilege.

A.

FOIA requires federal agencies to disclose documents within their control upon request, unless the documents fall within one of nine enumerated exceptions. *See* 5 U.S.C. § 552(b)(1)-(9). Exemption 5 protects from disclosure "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 an agency." *Id.* § 552(b)(5). The exemption thus embodies "two conditions: [a document's] 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." *Klamath*, 532 U.S. at 8.[6]

This case involves the first condition and, specifically, the scope of the statutory term "intra-agency." Every circuit to address this issue, including ours, has concluded that intra-agency communications are not limited to those between or among an agency's employees. *See Hoover*, 611 F.2d at 1138 (concluding that an appraisal report, although prepared by an outside expert, was "an intra-agency memorandum within the meaning of Exemption 5" (citing *Wu*, 460 F.2d at 1032)).[7] Rather, "intra-agency" also embraces "records of communications between an agency and outside consultants ... if they have been created for the purpose of aiding the agency's deliberative process." *Pub. Citizen, Inc. v. Dep't of Just.*, 111 F.3d 168, 170 (D.C. Cir. 1997) (cleaned up); *see also Ryan v. Dep't of Just.*, 617 F.2d 781, 789 (D.C. Cir. 1980) (Exemption 5 "was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely

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[6] *See also Sierra Club*, 141 S. Ct. at 783 (listing various litigation privileges incorporated by Exemption 5); *Sears*, 421 U.S. at 148 ("Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency.").

[7] *See also McKinley v. Bd. of Govs. of the Fed. Rsrv. Sys.*, 647 F.3d 331, 336-39 (D.C. Cir. 2011); *Hunton & Williams v. U.S. Dep't of Just.*, 590 F.3d 272, 279-80 (4th Cir. 2010); *Stewart v. U.S. Dep't of the Interior*, 554 F.3d 1236, 1244-45 (10th Cir. 2009); *Tigue v. U.S. Dep't of Just.*, 312 F.3d 70, 77-78 (2d Cir. 2002); *Gov't Land Bank v. Gen. Servs. Admin.*, 671 F.2d 663, 666 (1st Cir. 1982).

to agency decision-makers without fear of publicity.").[8] While the Supreme Court has neither embraced nor rejected this consultant corollary, three Justices (Scalia, joined by White and O'Connor) once called it a "permissible and desirable reading of the statute" because it is

> much more in accord with the purpose of the provision, 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 in a

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[8] No circuit has rejected the consultant corollary. *But see Lucaj v. Fed. Bureau of Investigation*, 852 F.3d 541, 548 (6th Cir. 2017) (casting doubt, in dicta, on the "textual justification" for the corollary in case addressing a related Exemption 5 doctrine). The *en banc* Ninth Circuit recently overturned a panel opinion that had found no textual basis for the corollary. *See Rojas v. FAA*, 989 F.3d 666 (9th Cir. 2021) (*en banc*) (overruling *Rojas v. FAA*, 927 F.3d 1046 (9th Cir. 2019)). Various opinions debated the corollary's textual *bona fides*. *Compare Rojas*, 989 F.3d at 673 (concluding "'intra-agency' in Exemption 5 does not definitively resolve the interpretive question" and therefore considering "the purposes served by Exemption 5"), *and id.* at 678-83 (Collins, J., concurring) (defending this reading of "intra-agency"), *with id.* at 685 (Wardlaw, J., concurring in part and dissenting in part) ("Exemption 5's text is crystal clear: documents or communications exchange with *outside* consultants do not fall within that exemption."), *id.* at 690-91 (Thomas, C.J., concurring in part and dissenting in part) (agreeing with Judge Wardlaw that Exemption 5 does not encompass a "consultant corollary"), *and id.* at 693 (Bumatay, J., concurring in part and dissenting in part) (arguing Exemption 5's "plain text" "leave[s] no room for documents created by those outside of an agency's employment"). Because our circuit precedent accepts the corollary, *see Wu*, 460 F.3d at 1032, we need not enter into this debate.

> governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

Julian, 486 U.S. at 1, 18 n.1 (Scalia, J., dissenting).[9] This explanation tracks our circuit's rationale for adopting the corollary. *See Wu*, 460 F.2d at 1032 ("The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity." (quoting *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971))).

B.

In finding the consultant corollary inapplicable because of the companies' "self-interest," the district court relied principally on *Klamath*. The court read that decision too broadly, however.

Klamath involved documents exchanged between the Department of the Interior and Indian tribes

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[9] The *Julian* majority did not address this issue "because it concluded that the documents [at issue] would be routinely discoverable in civil litigation and therefore would not be covered by Exemption 5 in any event." *Klamath*, 532 U.S. at 10 n.2 (citing *Julian*, 486 U.S. at 11-14); *see also Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting) (explaining that the "Court does not reach the issue" of whether the communications in question qualified as "'intra-agency memorandums' within the meaning of Exemption 5").

regarding water allocation from Oregon's Klamath River Basin. 532 U.S. at 5. The Department was consulting with the tribes during a planning project and also representing one tribe in related litigation. *Ibid.* When competing water-users FOIA'd[10] these documents, the Department withheld them under Exemption 5. *Id.* at 6. The Supreme Court held the exemption inapplicable, however. *Id.* at 14-16. While noting some circuits had extended the exemption to "outside consultants," *id.* at 10, the Court observed that "in the typical cases ... the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *Id.* at 11. The tribes, by contrast, "necessarily communicate[d] with the [Department] with their own, albeit entirely legitimate, interests in mind." *Id.* at 12. Moreover, the tribes were "self-advocates at the expense of others seeking benefits"—a share of the water—"inadequate to satisfy everyone." *Ibid.* The Court found this latter point "dispositive": the tribes sought "a decision by [the Department] to support a claim … necessarily adverse to the interests of competitors." *Id.* at 14; *see also*, *e.g.*, *McKinley v. Bd. of Govs. of the Fed. Rsrv. Sys.*, 647 F.3d 331, 337 (D.C. Cir. 2011) (identifying

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[10] "To have 'FOIA'd' information is to have submitted a request for the information under the [Freedom of Information] Act." Spenser Hsu, *Uncovering Forensic Flaws: An Outside Perspective*, 34 GA. ST. U.L. Rev. 1221, 1224 n.2 (2018); *see also* Brian G. Brooks, *Adventures in Cyber-Space: Computer Technology and the Arkansas Freedom of Information Act*, 17 U. ARK. LITTLE ROCK L.J. 417, 418 n.7 (1995) (noting FOIA "can also be a verb referring to the act of requesting access" and so "one may 'FOIA' the County Clerk, who will then state that he has been 'FOIA'd.'").

the tribes' "necessarily adverse" position as the "dispositive point" of *Klamath*). Thus, the tribes were not "enough like the agency's own personnel to justify calling their communications 'intra-agency'" under Exemption 5. *Klamath*, 532 U.S. at 12.

Klamath is distinguishable from the present case on multiple grounds. Principally, Blue Hawaiian, Eurocopter, and Turbomeca are not making "claims" that are "necessarily adverse" to those of the crash victims' families. *Id.* at 14; *see also id.* at 12 n.4 ("[T]he intra-agency condition excludes, at the least, communications to or from an interested party *seeking a Government benefit at the expense of other applicants*.") (emphasis added). Rather, their employees are participating in an investigation that is a "fact-finding proceeding[] with no adverse parties," one that is "not conducted for the purpose of determining the rights and liabilities of any person." 49 C.F.R. § 831.4. Indeed, "[n]o part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. § 1154(b); *see also Curry v. Chevron*, USA, 779 F.2d 272, 274 (5th Cir. 1985) (expert's probable-cause testimony could not rely on NTSB report because "Congress has determined that these reports shall not be used as evidence at trial").[11] The

[11] The NTSB has clarified that it "does not object to, and there is no statutory bar to, admission in litigation of *factual accident reports*," which the agency defines as "the report containing the results of the investigator's investigation of the accident." 49 C.F.R. § 835.2 (emphasis added); *cf. ibid.* (defining "board

companies' role in the agency investigation thus stands in sharp contrast with *Klamath*, where the tribes were lobbying the agency during a planning project to obtain their desired share of a river basin's resources, in zero-sum competition with other water-users.

Furthermore, all parties to NTSB investigations—including companies like Eurocopter and Turbomeca appointed pursuant to an international convention—are under the control of the agency-appointed IIC. *See* 49 C.F.R. §§ 831.8; 831.11(a)(2); *see also* ICAO Annex 13, § 5.25. For instance, the IIC supervises a party's ability to disclose information obtained during an investigation, including within the

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accident report" as the report "containing the [NTSB's] determinations, including the probable cause of an accident," which is expressly prohibited from being admitted as evidence). As the agency stressed at oral argument, "the final fact report that NTSB puts out, with all of its supporting documentation, photographs, data … becomes one hundred percent public and is admissible in court." Tr. of Oral Arg. at 39:10-39:40; *see also Curry*, 779 F.2d at 274 (distinguishing admissibility of "factual portions of the report" from "conclusory statements in the … reports"). This distinction (between factual material and the Board's conclusions and recommendations) might affect the second part of the Exemption 5 assessment—whether a document falls within any "privileges available to Government agencies in civil litigation." *Sierra Club*, 141 S. Ct. at 783; *see also Klamath*, 532 U.S. at 8. Because we reverse only the district court's conclusion regarding the first part of the Exemption 5 analysis, however, we do not resolve this question. The district court is free to consider the pertinence of this distinction, if any, on remand.

party's own organization. *See* 49 C.F.R. § 831.13(b).[12] And a party must sign a "Statement of Party Representatives," emphasizing its role is only "to facilitate the NTSB's investigation and ultimate goal of advancing transportation safety, [and] not … to prepare for litigation or pursue other self-interests." *Id.* § 831.11(b).[13] The IIC may suspend or revoke party status if a party fails to follow instructions or acts "in a manner prejudicial or disruptive to the investigation." *Id.* § 831.11(a)(2). Contrast this degree of agency control over non-agency parties with the situation in *Klamath*, where nothing suggested that the Department supervised the tribes, circumscribed their role in the planning process, or limited their ability to use information they obtained to further their own claims.[14]

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[12] The only exception in the 2016 regulation was for information "necessary for purposes of preventive or remedial action." *Id.* § 831.13(b).

[13] Reinforcing this point, the regulations specify that "party status" is reserved for organizations "who can provide suitable qualified technical personnel actively to assist in the investigation." *Id.* § 831.11(a)(1). A subsequent amendment to this section has clarified that while the organization's employees or products will necessarily have been "involved in the accident," "[t]o the extent practicable," the organization's representative "may not be a person who had direct involvement in the accident under investigation." 49 C.F.R. § 831.11(a)(1) (2017).

[14] *Cf. Klamath*, 532 U.S. at 5-6 (explaining that the Indian tribes had their "own lawyers" who "independently submitted claims on [their] own behalf" in the pending water rights litigation, supplementing claims submitted by the United States); *see also id.* at 13-14 (describing the "function" of the documents in

The district court also placed particular weight on the fact NTSB investigations do not usually (and did not in this case) include representatives of victims' families. The court's concern reflects commendable sympathy for these families, but it is ultimately misplaced. The NTSB does not invite victims' representatives to participate in investigations because they are typically not experts who can "provide suitable qualified technical personnel to actively assist." 49 C.F.R. § 831.11(a)(1); *see also* 82 Fed. Reg. 29,670, 29,681 (June 29, 2017) (explaining, in response to comments advocating inclusion of family representatives, that "we disagree … that representatives from family-member organizations … should be considered technical experts as that term is understood in our investigations").[15] The agency's focus on technical expertise is logical given its mandate: it conducts non-adversarial, forward-looking investigations intended to "ascertain measures that would best tend to

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question as "quite apparently to support the tribal claims" and further noting that the tribes were "pressing [their] own view of [their] own interest in [their] communications").

[15] That is not to say the NTSB ignores "the needs of victims and their families for information following an accident." 82 Fed. Reg. at 29,681. To the contrary, "[t]he agency has a division whose responsibility is to ensure victims and family members are aware of factual developments in investigations, the overall status of the investigation, and other relevant information." *Ibid*; *see* National Transportation Safety Board, *Information for Families, Friends and Survivors*, https://www.ntsb.gov/tda/family/Pages/default.aspx (last visited June 16, 2021) (explaining "[t]he NTSB Transportation Disaster Assistance Division … provides information and assistance for family members and friends of accident victims and survivors in the immediate aftermath of an accident and in the months and years following").

prevent similar accidents or incidents in the future." 49 C.F.R. § 831.4. In other words, the NTSB's responsibility is to probe the technical causes of aircraft accidents in order to advise regulators and lawmakers; it is not an adjudicatory entity designed to mete out justice. The exclusion of victims' family members from investigations, then, has no bearing on whether outside entities with whom the agency does communicate are "akin to … agency employee[s]," *Stewart*, 554 F.3d at 1245, and thus fall within the consultant corollary.

We therefore respectfully disagree with the district court that, under *Klamath*, Blue Hawaiian, Eurocopter, and Turbomeca's "self-interest" disqualifies them as consultants for purposes of Exemption 5. To be sure, *Klamath* contains language suggesting that self-interest of some kind may prevent outside experts from being deemed consultants. *See*, *e.g.*, *Klamath*, 532 U.S. at 10-11 (while an outside consultant need not "be devoid of a definite point of view," it "typical[ly] ... does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it"). Whatever that threshold might be, however, it has not been reached here. This case, in contrast to *Klamath*, involves technical personnel who participated in an agency fact-finding investigation—a process that was designed solely to issue safety recommendations, that does not adjudicate liability, and that was controlled by the agency itself. Moreover, the non-agency participants here are the kind of experts typically accorded consultant status under Exemption 5: "outside consultants" positioned by their technical knowledge to inform an "agency's

deliberative process." *Pub. Citizen*, 111 F.3d at 170.[16] Thus, given the overall context of the agency process, the companies were "enough like the [NTSB's] own personnel to justify calling their communications 'intra-agency'" under Exemption 5. *Klamath*, 532 U.S. at 12. As a result, they "should be able to give their judgments freely [to the agency] without fear of publicity." *Wu*, 460 F.2d at 1032 (citation omitted).

Of course, determining whether documents are intra-agency is only the first step in applying Exemption 5. A document must also "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8. Exemption 5 incorporates the various privileges which commonly shield government documents (most commonly, but not always, predecisional and/or deliberative in character) from disclosure during litigation. *See Fish & Wildlife Serv*, 141 S. Ct. at 783; *see*, *e.g.*, *Jud. Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (examining invocation of the deliberative process privilege in an Exemption 5 case and explaining that the privilege "protects agency documents that are both predecisional and deliberative"). Predecisional documents include those "'generated before the

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[16] *See also*, *e.g.*, *Nat'l Inst. of Mil. Just. v. U.S. Dep't of Def.*, 512 F.3d 677, 679 (D.C. Cir. 2008) (consultant corollary shielded recommendations of "non-government lawyers" including "former high ranking government officials" and "academics" about the structure of a proposed military commission); *Hoover*, 611 F.2d at 1135, 1138 (corollary applied to appraisal by a "nongovernment appraiser with expertise in cave properties" obtained by federal agency considering acquisition of such a property).

adoption of an agency policy.'" *Jud. Watch*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Deliberative ones "'reflect[] the give-and-take of the consultative process.'" *Ibid.*

The district court suggested some of the documents at issue here would "normally ... be exempt from disclosure." Others it did not address. Because both facets must be satisfied for the exemption to apply, the district court should address this issue on remand. Of course, as the Supreme Court very recently reiterated, the scope of Exemption 5 is not confined to the boundaries of the deliberative process privilege. *Fish & Wildlife Serv*, 141 S. Ct. at 783. The district court is free on remand to consider any potentially pertinent privilege and to assess the applicability of any such privilege under the relevant test or standard that normally governs its invocation. *See*, *e.g.*, *Kent Corp. v. N.L.R.B.*, 530 F.2d 612, 618, 622-24 (5th Cir. 1976) (applying prevailing standard for attorney work product privilege and finding documents shielded from disclosure by Exemption 5).

IV.

In sum, the district court erred in concluding the documents at issue were not "intra-agency" under Exemption 5. We therefore REVERSE the court's judgment and REMAND for further proceedings consistent with this opinion.

REVERSED and REMANDED.

JAMES C. HO, *Circuit Judge*, dissenting:

This appeal concerns the proper interpretation of the Freedom of Information Act ("FOIA")—specifically, the scope of Exemption 5, which exempts certain "inter-agency or intra-agency" communications from public disclosure. 5 U.S.C. § 552(b)(5).

If the terms "inter-agency" and "intra-agency" exclude anything, I would think they exclude government communications with employees of the very entity the government is trying to regulate.

No court has ever applied Exemption 5 to such communications. I have found no such case. Nor has the majority or the NTSB.

And for good reason. A communication between the regulator and the regulated—between parties with conflicting public versus private interests— is the very opposite of an internal government communication. That makes it hard to square this case with the plain text of Exemption 5. I have trouble seeing how an exchange between a government agency and the employee of a company with an interest in the outcome of that agency's actions can possibly constitute an "inter-agency or intra-agency" communication.

Indeed, the Supreme Court found precisely the opposite in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). There the Court assumed, without deciding, that Exemption 5 would apply to a bona fide government consultant—but pointedly noted that a "consultant does not represent an interest of its own." *Id.* at 11. "Its only obligations

are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.*

Communications involving an interested party, by contrast, would not be subject to Exemption 5, according to *Klamath*. As the Court observed, "this fact alone"—that is, the fact that the purported consultant has its "*own*, albeit entirely legitimate, interests in mind"—"distinguishes [such] communications from the consultants' examples recognized by several Courts of Appeals." *Id.* at 12 (emphasis added).[1]

That same logic readily applies here. Eurocopter and Turbomeca are private companies with a clear interest in the NTSB conducting its investigation in a manner favorable to their private corporate interests. They have an interest, for example, in steering the NTSB away from making any statements or reaching any conclusions that might support litigants who are either currently adverse to the companies, or may

[1] In a footnote, the Court acknowledged the existence of two circuit rulings that "arguably extend beyond what we have characterized as the typical examples." *Id.* at 12n.4 (citing *Pub. Citizen, Inc. v. Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997), and *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980). But as the Court observed, those cases involved communications with former Presidents and sitting U.S. Senators, respectively. Whatever one may think about characterizing correspondence with former executive branch officials, or with officials in a different branch of government, as "inter-agency" communications, I have no difficulty concluding that those cases present categorically different concerns from the private regulated parties in this case.

someday be in the future—such as the families of the crash victims represented by Jobe, the requestor here.

Tellingly, in the case cited by the NTSB as the most supportive of its position, the court concluded that the private party there had no interest separate and apart from the agency, and was therefore subject to Exemption 5. *See McKinley v. Bd. of Governors of Fed. Reserve*, 647 F.3d 331, 337 (D.C. Cir. 2011) (quoting *Klamath*, 532 U.S. at 11) ("[T]he [Federal Reserve Bank of New York] '[did] not represent an interest of its own, or the interest of any other client, when it advise[d] the [Board]' on the Bear Stearns loan."). Not surprisingly, the majority does not rely on *McKinley*.

The NTSB also points out, and the majority agrees, that it is not technically a regulator—it merely investigates and reports its findings to other agencies. But as the NTSB itself acknowledges, the whole purpose of its work is to help regulators like the FAA determine how best to regulate companies to ensure public safety. No one disputes that the NTSB's findings can have a meaningful impact on the companies, and that the companies therefore have a genuine interest in the content of the agency's findings.

Finally, I do not question the sincerity of the NTSB when it says it designates certain employees of regulated companies to serve the public interest, in a kind of secondment to the agency—and not to further the private interest of their employers. I acknowledge the various steps the agency takes to insulate itself from being captured by industry interests as a result of its investigatory methods. I agree with the majority

that these party representatives may be bound by all manner of regulatory strictures.

But that just proves my point: Those regulations and restrictions are necessary precisely because these employees remain on the payroll of the regulated companies and expect to return to their employers when their secondments are completed. So they obviously have an interest in the agency's work. It would be pure fiction for a government agency like the NTSB to expect these designated private employees to ignore their sense of loyalty and duty to their employers. To the contrary, that's why the agency needs regulations to try to mitigate the impact of the employees' contrary interests. But of course, those regulations don't actually eliminate those interests. Because they can't—nothing can change the fact that the employees work for interested companies. And nothing in FOIA directs courts to pretend otherwise.

What's more, as the NTSB acknowledges, company experts are seconded to the agency, not to work on safety issues *generally*, but to work on safety incidents *specifically* involving their companies. Indeed, that's precisely why the NTSB wants their expertise—they are chosen for the very reason that they work for companies involved in the safety incidents the agency is investigating.

To be sure, the NTSB may well have a strong argument that designated experts employed by interested companies like Eurocopter and Turbomeca *should* be exempt from FOIA. The agency may be right that such an exemption would help maximize

the quantity and quality of the information available to the agency about a safety incident like the tragic helicopter crash at issue in this appeal.

But that is a policy decision for Congress to make, not this court. Under the plain text of Exemption 5, I see no basis for extending the consultant corollary to the interested regulated entities who participate in an NTSB investigation. Nor am I aware of any judicial decision that would warrant such an extension here.

* * *

Open government is a founding principle of our country. As James Madison, the father of our Constitution, once wrote, "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE JAMES MADISON PAPERS AT THE LIBRARY OF CONGRESS, 1723-1859: Series 1, General Correspondence.[2]

It was this spirit that gave rise to the adoption of FOIA on July 4, 1966. *See* Pub. L. No. 89-487, 80 Stat. 250 (1966). FOIA offers every American one simple promise: the right to know what your government is doing. "[A]s Justice Brandeis said, sunlight is the best disinfectant." 162 CONG. REC. S1495 (daily ed. Mar. 15, 2016) (statement of Sen. Cornyn during debate over 2016 amendments to FOIA).

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[2] This letter has been made available online by the Library of Congress. *See* http://hdl.loc.gov/loc.mss/mjm.20_0155_0159.

Accordingly, the Supreme Court has repeatedly held that exemptions under FOIA are exclusive and must be narrowly construed. *See*, *e.g.*, *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). "Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). *See also FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed.").

Applying this established principle of interpretation to the plain meaning of "intra-agency" communications, I would hold that government communications with the employees of regulated parties fall squarely outside of Exemption 5, and therefore subject to the disclosure mandates of FOIA. I agree with the district court that Exemption 5 does not apply to the documents at issue in this appeal and would therefore affirm. The majority disagrees. Accordingly, I very respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TONY B. JOBE	CIVIL ACTION
VERSUS	NO. 18-10547
NATIONAL TRANSPORTATION SAFETY BOARD	SECTION "A" (3)

ORDER AND REASONS

Before the Court is a **Motion for Summary Judgment (Rec. Doc. 28)** filed by the Defendant National Transportation Safety Board ("NTSB") and a **Cross Motion for Summary Judgment (Rec. Doc. 48)** filed by the Plaintiff Tony Jobe. These two motions, set for submission on October 16, 2019, are before the Court on the briefs without oral argument.

I. BACKGROUND

Jobe's complaint seeks relief under the Freedom of Information Act, 5 U.S.C. § 552 ("the FOIA") and the Administrative Procedure Act 5 U.S.C. § 706(1) ("the APA") and asks this Court to order the NTSB to disclose the records it withheld that relate to the fact-finding phase of its investigation of an EC130 B4 helicopter's ("the Helicopter") crash on the Island of Molokai, Hawaii, on November 10, 2011. (Rec. Doc. 48-1, p. 6, Jobe's Memorandum in Support). The crash

killed the pilot, Nathan Cline, and his four passengers. *Id.* Plaintiff Jobe is an attorney who represents at least one of the families of the victims to the helicopter crash. *Id.*

The Helicopter was manufactured by Airbus Helicopters, SAS, a French manufacturing company. *Id.* Airbus Helicopters then sold the Helicopter to Nevada Helicopter Leasing, LLC, who subsequently leased it to Helicopter Consultants of Maui, d/b/a Blue Hawaiian Helicopters ("Blue Hawaiian"). *Id.* Blue Hawaiian is a company that conducts aerial tours of the Hawaiian Islands, including Molokai. *Id.* 6-7.

During its investigation, the NTSB authorized representatives from Airbus, Blue Hawaiian, and Turbomecca (the French engine manufacturer) to participate as "parties" to its investigation. *Id.* at 7. As parties to the investigation, the NTSB allowed Airbus, Blue Hawaiian, and Turbomecca to inspect the crash site, take field notes, discuss possible accident scenarios with other team members, and perform other investigative activities. (Rec. Doc. 28-1, p. 5-6, The NTSB's Memorandum in Support). Further, pursuant to Annex 13,[1] the French Government designated accident investigators, reconstructionists, engineers, and scientists as parties to the NTSB's

[1] Under Annex 13 to the Convention on International Civil Aviation, Aircraft Accident and Incident Investigation, the States of the aircraft's operator, designer, and manufacture have the right to appoint an accredited representative to participate in the investigation, as well as technical advisors to assist the accredited representative. (Rec. Doc. 28-1, p. 3, the NTSB's Memorandum in Support).

investigation. (Rec. Doc. 48-1, p. 7, Jobe's Memorandum in Support). However, the NTSB never appointed representatives for the victims of the crash nor did it allow the victims' families to participate in its investigation. *Id.*

After the NTSB completed its investigation, Jobe submitted a request for information under 49 C.F.R. Part 837 seeking 24 different types of documents. (Rec. Doc. 28-5, p. 17, Jobe's 837 Release Request). After reviewing this request, the NTSB informed Jobe that his request lacked an affidavit that needed to contain: the information sought, its relevance to the proceeding, and a certification stating that the material was not available from another source. (Rec. Doc. 28-1, p. 6, The NTSB's Memorandum in Support). However, despite these deficiencies, the NTSB decided to convert Jobe's Part 837 request into a FOIA request. *Id.* This decision was made in part by the fact that the NTSB had coincidently received a separate FOIA request from a different entity a few days before Jobe's Part 837 request. *Id.* This separate request asked for "any and all records" relating to the Crash. *Id.* Thus, the NTSB applied the same "any and all records" scope to both the unnamed entity's request and to Jobe's request. *Id.* To complete these two requests, the NTSB searched through over 13,000 pages but chose to disclose only around 4,000 of these pages to Jobe.[2] *Id.* Of the 8,000 pages withheld by the NTSB,

[2] Interestingly, the Court notes that the NTSB produced over 3,000 documents for the other FOIA request relating to the unnamed entity. (Rec. Doc. 28-1, p. 6, the NTSB's Memorandum in Support). However, the NTSB claims that these documents

2,349 of these pages were withheld pursuant to Exemption 5. *Id.* at 7.

In an attempt to receive more of the documents that were withheld from him, Jobe thereafter submitted a second FOIA request in 2016 that specifically asked for eleven different categories of documents that only related to the NTSB's "on-scene" phase of its investigation. *Id.* at 8. These eleven categories were as follows:

> 1) A copy of the Attendance Roster from the Organizational Meeting of the parties to the investigation;
>
> 2) A copy of the Outline of the Issues Utilized in the Organization Meeting of the parties to the investigation;
>
> 3) A copy of the On-Scene Organizational Chart, including designation of the on-site commander during the on-scene phase of the investigation;
>
> 4) A copy of all State of Party Representatives to the NTSB forms signed by any representative, technical advisor, or agent of Airbus Helicopters, S.A.S. (the manufacturer of the crash helicopter);

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were "inadvertently" never sent to Jobe. *Id.* Because those documents are not related to the NTSB's "on-scene" investigations, the Court will not address that discrepancy. *Id.*

> 5) A list of all persons given badges or other authority for access to the crash site;
>
> 6) A copy of the field notes for each work group for each day of the on-site phase of the investigation;
>
> 7) A copy of all field notes approved by the Investigator-in-Charge ("IIC") for follow-up work to remove wreckage from the crash site;
>
> 8) A copy of all IIC authorizations to remove wreckage from Molokai between November 10, 2011 and January 1, 2012 including but not limited to November 11, 2011; November 12, 2011; November 13, 2011, November 23, 2011; November 25, 2011; and December 22, 2011;
>
> 9) A copy of Attendance Rosters for all progress meetings;
>
> 10) A copy of all of the IIC's notes for all progress meetings; and
>
> 11) A copy of all of the on-scene phase of the investigation status reports prepared by the IIC.[3]

While the scope of Jobe's first request was all encompassing and asked for "any and all records" that related to the accident, Jobe's second request only

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[3] (Rec. Doc. 28-1, p. 8, the NTSB's Memorandum in Support).

sought documents that related to the "on-scene" phase of the NTSB's investigation. (Rec. Doc. 28-3, p. 16-17, April 26, 2017 Correspondence with Jobe). Accordingly, the NTSB answered his second request by informing him that it had previously disclosed to him all the releasable documents through his first request.[4] *Id.*

Jobe was again displeased with the NTSB's response to his request, so the NTSB, in an attempt to prevent litigation, offered to re-review the 2,349 records that it previously withheld from him under Exemption 5 in his first request. (Rec. Doc. 53-1, p. 3, the NTSB's Reply). However, the NTSB also informed Jobe that it would only produce the records that were responsive to the eleven categories that Jobe listed in his second FOIA request (i.e., only the records that related to the NTSB's on-scene investigations). (Rec. Doc. 28-5, p. 38, January 31, 2018 Correspondence with Jobe) ("In several telephone calls, you and I clarified the scope of your request, and as a result, we broadened the scope of your request to include any records related to the on-scene phase of the investigation."). Ultimately, out of the 2,349 records that the NTSB re-reviewed, it ultimately only released 159 of these documents to Jobe. (Rec. Doc. 28-5, p. 8-13, Mathew McKenzie's Declaration). The NTSB claimed that the remaining documents were either properly exempt from disclosure under Exemption 5 or were

[4] The Court notes that the NTSB disclosed to Jobe an additional 333 of 393 documents to Jobe which originated from an outside source. (Rec. Doc. 28-3, p. 16-17, April 26, 2017 Correspondence with Jobe). However, those documents are not the subject of this case.

non-responsive to the 11 categories Jobe listed in his second FOIA request. *Id.*

After the NTSB completed its re-reviewal process, Jobe subsequently filed this suit and specifically requested the following categories of documents:

> (a) All field notes from the investigation which contain relevant factual information developed by the investigators during the ***on-scene phase*** of the investigation;
>
> (b) All notes from ***on-scene*** investigation progress meetings, required to be attended by all investigation party coordinators, that address investigative issues that require coordination, changes to the investigative plan, need for additional investigative support, or an evaluation of whether urgent safety recommendations are needed; and
>
> (c) All status reports generated by the NTSB's Investigator-In-Charge during the ***on-scene phase*** of the investigation.[5]

Thus, through his complaint, Jobe again restricted the scope to only the documents relating from the "on-scene" phase of the NTSB's investigation. This is in stark contrast to the breadth of documents he originally asked for in his first FOIA request (i.e., ""any and all records" related to the crash) and the documents he seemingly requested in his Memorandum in Support of Summary Judgment. (Rec. Doc. 56, p. 8,

[5] (Rec. Doc. 1, p. 3, Jobe's Complaint) (emphasis added).

Jobe's Response) ("Given the NTSB's December 29, 2017 agreement relative to [Jobe's second FOIA request], Plaintiff seeks the NTSB's release of all of the 2,349 pages of records arising out of [the Crash] and withheld by the NTSB on a claim of FOIA Exemption 5."). Accordingly, based on the limited scope of this case, the NTSB filed a *Vaughn* index which only listed the 215 documents that were withheld and were responsive to the 11 categories listed in Jobe's 2016 FOIA request. (Rec. Doc. 28, p. 1-4, Index of Withheld Records).

In this motion for summary judgment, Jobe requests three specific things. First, Jobe seeks the NTSB to release all 2,349 records relating to the Crash that it withheld under Exemption 5, instead of just the 215 items it found responsive to Jobe's 2016 FOIA request. (Rec. Doc. 56-1, p. 8, Jobe's Response). Second, if the Court finds that the *Vaughn* index should be limited to only 215 documents, Jobe requests that the NTSB conduct a segregability analysis and release all 215 documents with proper redactions. *Id*. at 10. Third, Jobe seeks the NTSB to provide a more detailed *Vaughn* index that sufficiently describes the applicability of Exemption 5 to each withheld record. *Id*. at 11.

Conversely, the NTSB asks this Court to dismiss this case by granting summary judgment in its favor.

The following will discuss the merits of both side's positions.

II. STANDARD OF REVIEW

The FOIA requires a federal agency, upon request, to disclose records in its possession, unless the requested documents are clearly exempt from disclosure by statute. 5 U.S.C. § 552(a)-(b); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). The exemptions are exclusive and should be narrowly construed. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C.Cir.1973). Furthermore, there is a strong presumption in favor of disclosure. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (citing Rose, 425 U.S. at 361). Accordingly, the government bears the burden of proving that the documents withheld fall within an enumerated exemption. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 141 n. 2 (1989); *see also* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"). The agency may satisfy its burden of proof through the submission of affidavits that identify the documents at issue and explain why they fall under the claimed exemption. *Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety & Health Admin.*, 280 F.3d 539, 543 (5th Cir. 2002). These affidavits must be clear, specific, and reasonably detailed while describing the withheld information in a factual and nonconclusory manner. *Id*. Lastly, "FOIA cases typically are resolved on a motion for summary judgment." *Ortiz v. U.S. Dep't of Justice*, 67 F. Supp. 3d 109, 116 (D.D.C. 2014); *see Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009).

III. DISCUSSION

A. Scope of the *Vaughn* Index Provided by the NTSB

Although Jobe demands a *Vaughn* index of the 2,349 records that the NTSB withheld under Exemption 5, the NTSB submitted an index of only the 215 documents it deemed responsive to Jobe's 2016 FOIA request. (Rec. Doc. 28-6). The Court finds this limitation of scope to be appropriate. As the Magistrate Judge noted when ruling on Jobe's Motion to Compel the *Vaughn* index, "[a]t issue in the instant dispute is Jobe's November 1, 2016 request pursuant to the FOIA to the National Transportation Safety Board ("NTSB" or "defendant") for specific documents related to the crash investigation conducted by the agency." (Rec. Doc. 25, p. 1, Magistrate's Decision on Jobe's Motion to Compel). Accordingly, this case focuses on Jobe's second FOIA request which was limited in scope to only "on-scene" phase of the NTSB's investigation. Conversely, this suit does not concern Jobe's 2014 FOIA request which effectively asked for "any and all records" related to the Crash. Thus, the Court declines to expand the scope of the *Vaughn* index to include the 2,349 originally withheld documents.

B. Overview of Exemption 5 Law

Next, the FOIA requires federal agencies to disclose records upon request unless the records fall within one or more enumerated exemptions. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see* 5 U.S.C. § 552. The exemptions

are narrowly construed so as not to "'obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Klamath*, 532 U.S. at 8 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). The relevant exemption here is Exemption 5, which allows an agency to withhold disclosure if the document meets two requirements: (1) it is an "inter-agency or intra-agency memorandum" that (2) "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). Thus, if a document is not an "agency document," an agency may not withhold it even if it reflects the agency's deliberative process. Similarly, an agency must disclose documents that would otherwise be protected under Exemption 5 if that agency waives that right by voluntarily sharing the document with third parties. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 253 (D.C.Cir.1977).

i. Requirement One - Inter-Agency or Intra-Agency

First, to receive protection under Exemption 5, the record in question must be an inter-agency or intra-agency document. This type of protection is normally used to cover typical communications between agency employees. However, the Fifth Circuit has extended this protection to certain communications between agency employees and outside consultants. *Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980). As the D.C. Court of Appeals explained in *Public Citizen v. Department of Justice*: "records of communications between an agency and

outside consultants qualify as intra-agency for [the] purposes of Exemption 5 if they have been created for the purpose of aiding the agency's deliberative process." 111 F.3d 168, 170 (D.C. Cir. 1997) (citations and internal quotation marks omitted); *see also Ryan v. DOJ*, 617 F.2d 781, 789–90 (D.C. Cir. 1981) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum."). Under what has come to be known as the "consultant corollary," it is irrelevant whether the author of the document is a regular agency employee or a temporary consultant. Public Citizen, 111 F.3d at 170.

ii. Requirement Two - Deliberative Process Privilege

The second requirement for receiving protection under Exemption 5 is that the document must not be normally "discoverable by a private party in the course of civil litigation with the agency." *Jordan v. Department of Justice*, 591 F.2d 753, 772 (D.C.Cir.1978). Among the privileges that fall within this classification is the deliberative process privilege. *Id*. This privilege shields from disclosure "all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *Arthur Andersen & Co. v. I.R.S.*, 679 F.2d 254, 257 (D.C.Cir.1982) (citation and internal quotation marks omitted). To determine whether a document is covered by this privilege, courts must look at two factors. First, courts ask whether the

document is "predecisional," that is, whether the document was prepared in order to assist the decisionmaker in making a decision. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). These types of documents include things like proposals, draft documents, and other subjective documents that reflect the writer's opinions rather than an agency policy. *Id.* "To ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir.1983)).

The second factor of the deliberative process privilege requires the court to determine if the document is "deliberative." That is, a court must decide whether the document "reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting Coastal States, 617 F.2d at 866). Further, the document must be such that its public disclosure would not "expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). The burden is on the agency to "establish[] what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States, 617 F.2d at 868. Conclusory assertions that merely parrot the language of the exemption do not suffice. *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary*

Comm. v. U.S. Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (citing *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (noting that the government must show "by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.")).

C. Applying Exemption 5 to this Case

i. Documents Prepared by Representatives and the Fact Witness

In this case, the Helicopter's manufacturers, Eurocopter and Turbomeca, prepared Documents 175-179 and Documents 180-206, but the NTSB claimed that Exemption 5 applied to these documents by saying, "[t]he advice provided to the NTSB by [Eurocopter and Turbomeca] are intra-agency communications covered by the consultant corollary to Exemption 5." (Rec. Doc. 28-1, p. 23, NTSB's Memorandum in Support). More specifically, "[t]he NTSB sought the outside advice, the advice was not adverse to government interests, and in providing their expertise, the consultants effectively functioned as agency employees." *Id*. Further, the NTSB attempted to refute the notion that Eurocopter and Turbomeca were "disinterested" parties by saying, "[f]irst, NTSB investigations are fact-finding proceedings that do not assign liability or adjudicate rights, with no adverse parties." *Id*. at 24. "Second, legal professionals, claimant or insurer representatives, and to the extent practicable, individuals directly involved in an accident are not permitted to be party representatives." *Id*. "Third, party participation is subject to the [Investigator in Charge's]

control and direction, and to the terms of the 'Statement of Party Representative to NTSB Investigation' to ensure that parties are serving the needs of the NTSB investigation, and not any litigation purpose." *Id*.

Here, the Court finds the NTSB's arguments unpersuasive. As participants in the NTSB's investigation, Eurocopter and Turbomeca demonstrate the epitome of "self-interested" individuals. Although these entities were there to help the NTSB's investigation, they also were undoubtedly there to collect information to prepare for inevitable future litigation. Further, the NTSB relies on *Electronic Privacy Information Center (EPIC) v. DHS*, 892 F. Supp. 2d 28, 45-46 (D.D.C. 2012) which appears to misread *Klamath* as requiring actual adversity between the consultant and the agency before the communications lose protection. However, *Klamath* does not require adversity, and the Court finds EPIC's reasoning unpersuasive. *Klamath*, 532 U.S. at 12 ("The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples … the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.") (emphasis added).

Instead, *Klamath* requires the agency's consultant to be disinterested and not "represent[ing] an interest of its own, or the interest of any other client, when it advises the agency that hires it." *Klamath*, 532 U.S. at 12, n.4. An agency's consultant has an

obligation to be obedient "to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id*. Thus, as the United Supreme Court has noted, "the intra-agency condition excludes, at the least, communications to or from an interested party seeking a Government benefit at the expense of other applicants." *Id*.

Both Eurocopter and Turbomeca received a significant benefit here. As Jobe stated in his Memorandum in Support, "throughout the NTSB's entire investigative process, the manufacturer and operator defendants in civil litigation were welcome to the entire government investigation file and were given editorial license to the NTSB's draft and official 'factual' reports and draft final reports of the agency's determination of the probable cause(s) of the crash." (Rec. Doc. 48-1, p. 7, Jobe's Memorandum in Support). "The accident victims and their families were not." *Id*. Thus, the Court finds that Eurocopter and Turbomeca were not "consultants" under the "consultant corollary." Accordingly, Documents 175-179 from Eurocopter and Documents 180-206 from Turbomeca are not "agency documents" and must be disclosed to Jobe. (Rec. Doc. 28-6, p. 3, The NTSB's Index of Withheld Records).

Under the same reasoning, the NTSB must also disclose the email sent by the fact witness pilot to the NTSB. *Id*. This email was not prepared by the agency nor did the NTSB hire this fact witness to serve as an agency consultant. Therefore, the Court also finds

that the NTSB must release Documents 165-166 from the fact witness pilot to Jobe.

ii. Documents Prepared by NTSB and Sent Only to NTSB Staff

Next, after conducting an *in camera* inspection of Documents 62-87, 88-92, 93, 94-104, 105-119, 120-122, 167-174, and 207-215, the Court confirmed that these documents were all internally produced by NTSB personnel and were only shared with NTSB staff. Accordingly, these documents satisfy the Deliberative Process Privilege's two criteria. Coastal States Gas Corp., 617 F.2d at 866. First, these documents are "predecisional" because they were drafted before the NTSB made its final conclusions on the crash. (Rec. Doc. 28-6, The NTSB's Index of Withheld Records). Second, these documents are "deliberative" because the disclosure of these documents would unjustly expose the NTSB's decision-making process. *Id.* Thus, the Court finds that the NTSB properly withheld these documents from disclosure under Exemption 5.

iii. Documents Prepared by NTSB and Sent to Outside Representatives

Lastly, Documents 1-61, 123-124, and 125-156 were prepared by NTSB personnel but then were distributed to other NTSB personnel and outside representatives, such as the plane's manufacturers and the plane's leasing company. (Rec. Doc. 28-6, The NTSB's Index of Withheld Records). Normally, these documents would be exempt for disclosure because they were both "predecisional" and "deliberative." *Coastal*

States Gas Corp., 617 F.2d at 866. However, for the purposes of the inter-agency requirement under Exemption 5, the Supreme Court has noted that the term "agency" means "each authority of the Government of the United States, § 551(1), and includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government … or any independent regulatory agency[.]" *Klamath* Water Users, 532 U.S. at 9 (internal quotations omitted). In general, this definition establishes that communications between agencies and outside parties are not protected under the deliberative process privilege. *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002). As seen through the analysis above, entities like the plane's manufacturers and the plane's leasing company are considered outside parties because they do not constitute "disinterested" consultants under the "consultant corollary." Thus, by sharing its agency documents with non-agency entities (i.e., the plane's manufacturers and the plane's leasing company), the NTSB waived the deliberative process privilege under Exemption 5. Accordingly, the Court concludes that the NTSB must disclose Documents 1-61, 123-124, and 125-156 to Jobe.

D. Segregability Analysis

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after [the] deletion of the portions which are exempt." 5 U.S.C. § 552(b). Therefore, once an agency identifies a document that it

believes qualifies for a FOIA exemption, "it must undertake a segregability analysis, in which it separates the exempt from the non-exempt portions of the document, and produce[] the relevant non-exempt information." *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 108 (D.D.C. 2005) (citing *Vaughn*, 484 F.2d at 825). To prevail in a motion for summary judgment, the agency must demonstrate that it has satisfied its segregability analysis obligation, which it may do through its *Vaughn* index in conjunction with an agency declaration. *See e.g.*, *Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Protection*, No. 04-377, 2005 WL 3274073, at *3 (D.D.C. Sept. 22, 2005). Under Fifth Circuit law, "[i]t is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Batton v. Evers*, 598 F.3d 169, 178 (5th Cir. 2010) (citing *Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C. Cir. 1992)).

Here, the Court finds that the *Vaughn* index submitted by the NTSB, combined with the NTSB's declaration that no further segregation is possible (Rec. Doc. 28-3, p. 6, Declaration by Melba Moye), demonstrates that withheld Documents 62-122, 157-164, and 207-215 are not segregable. *See Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot.*, No. CIV.A. 04-00377 JDB, 2005 WL 3274073, at *3 (D.D.C. Sept. 22, 2005) ("[T]he combination of a comprehensive, reasonably-detailed *Vaughn* index and an affidavit confirming that a line-by-line review of each document determined that no redacted information could be disclosed will satisfy

the agency's obligation."). Further, this determination was bolstered by the Court's *in camera* review of the corresponding documents. Thus, Jobe's claim relating to segregability of the withheld documents has no merit.

D. Adequacy of the *Vaughn* Index Descriptions

Jobe lastly requested this Court to order "the NTSB to provide a full and complete *Vaughn* index, sufficient for this Court to determine the applicability of Exemption 5 to each of the records withheld." However, the Court now finds this argument moot after it completed an *in camera* inspection of all 215 documents on the *Vaughn* index. (Rec. Doc. 28-6).

Accordingly;

IT IS ORDERED that the **Motion for Summary Judgment (Rec. Doc. 28)** filed by the NTSB and the **Cross Motion for Summary Judgment (Rec. Doc. 48)** filed by Jobe are **GRANTED IN PART AND DENIED IN PART** as follows: the NTSB must release to Jobe Documents 1-61, 123-156, and 165-206 on the *Vaughn* index submitted by the NTSB. (Rec. Doc. 28-6). Jobe's request for the NTSB to produce Documents 62-122, 157-164, and 207-215 is denied.

November 18, 2019 /s/ Jay C. Zainey
JUDGE JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

INDEX OF WITHHELD RECORDS

***Tony B. Jobe v. NTSB*, Case No. 2:18-cv-10547-JCZ-DEK (E.D. La.)**

NTSB accident ID WPR12MA034

FOIA request 2017-00066

Accident date: November 10, 2011

Page(s)	Description	Exemption
001-061	Emails, dated December 14, 2011 and November 29, 2012, from Dennis Hogenson, NTSB Investigator in Charge (IIC), to NTSB employees transmitting for review a draft Operations/Witness Group Chairman's Factual Report and a draft Airworthiness Field Notes report. Group Field Notes are circulated among NTSB employees and party representatives for input, and signatures are requested to acknowledge consensus about the preliminary information gathered. Field Notes represent a preliminary consensus about the circumstances surrounding an	5 Deliberative process privilege

Page(s)	Description	Exemption
	accident. They help determine what additional steps to take and serve as the starting point for developing factual reports that are released in the public docket. Thus, though mostly factual in nature, they are an important part of the NTSB's deliberative process.	
062-087	A draft Operations/Witness Group Chairman's Factual Report, dated December 19, 2012.	5 Deliberative process privilege
088-092	Email, dated January 4, 2013, from Dennis Hogenson, NTSB IIC, to NTSB investigators regarding the use of wreckage diagram in factual reports, attaching the diagram. Final attachment produced, but a draft version of the wreckage diagram withheld.	5 Deliberative process privilege
093	Email, dated November 10, 2011, from Joshua Cawthra, NTSB Aviation Accident Investigator, to Dennis Hogenson, NTSB IIC, transmitting draft first paragraph of accident summary.	5 Deliberative process privilege

Page(s)	Description	Exemption
094-104	Emails, dated November 12-19, 2011, July 19, 2012, and August 24-27, 2012, within NTSB regarding the status of accident investigation and initial facts about the accident, citing a task list Excel spreadsheet (no attachment), and discussing the next steps in the investigation.	5 Deliberative process privilege
105-119	Emails, dated January 23-26, 2012, February 1-2, 2012, March 2, and August 28 (no years given) within NTSB regarding a work planning meeting for the accident, including the meeting agenda.	5 Deliberative process privilege
120-122	Emails, dated November 19, 2011, within NTSB providing an update on the accident investigation, including comments on factual information found to date.	5 Deliberative process privilege
123-124	Emails, dated November 29, 2011, from NTSB to FAA and party representative, Blue Hawaiian Helicopters, seeking comments on draft field interview notes, and providing FAA's comments on the notes.	5 Deliberative process privilege

Page(s)	Description	Exemption
125-156	Emails, dated November 14 and 29, 2011, among NTSB, accredited representative, France's Bureau of Enquiry and Analysis for Civil Aviation Safety (BEA-France), and the Federal Aviation Administration (FAA) transmitting for review an Airworthiness Field Notes report and an Operations/Witness Group Chairman's Factual Report. Group Field Notes are circulated among party representatives for input, and signatures are requested to acknowledge consensus about the preliminary information gathered. Field Notes represent a preliminary consensus about the circumstances surrounding an accident. They help determine what additional steps to take, and serve as the starting point for developing factual reports that are released in the public docket. Thus, though mostly factual in nature, they are an important part of the NTSB's deliberative process.	5 Deliberative process privilege

Page(s)	Description	Exemption
157-166	Emails, dated November 21, 2011, December 15, 2011, and January 12, 2012, within NTSB and from a pilot flying in the area of the accident to the NTSB transmitting pilot interview notes. The interview notes were used in developing the Operations/Witness Group Chairman's Factual Report.	5 Deliberative process privilege
167-174	Undated draft witness interview notes. The interview notes were used in developing the Operations/Witness Group Chairman's Factual Report.	5 Deliberative process privilege
175-179	Undated draft Field Notes from technical advisor, Eurocopter, regarding the accident and accident aircraft.	5 Deliberative process privilege
180-206	Undated On-Site Examination Report from technical advisor, Turbomeca, summarizing examination of accident site and the aircraft.	5 Deliberative process privilege
207-215	Draft NTSB Meteorology Group Field Notes report, dated November 19, 2011,	5 Deliberative

Page(s)	Description	Exemption
	drafted by Michael Richards, NTSB Meteorologist.	process privilege

APPENDIX D

5 U.S.C. § 552

Public information; agency rules, opinions, orders, records, and proceedings

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

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

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

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) 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, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a

confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

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