

## FEDERAL AGENCIES

# Supreme Court records ruling spurs FOIA reform push

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A Supreme Court ruling blocking disclosure of a draft Endangered Species Act analysis has groups calling for Congress to amend the Freedom of Information Act. The Supreme Court is pictured. Francis Chung/E&E News

Some environmental groups are urging Congress to make changes to the Freedom of Information Act in response to a Supreme Court ruling yesterday that allows the government to withhold certain draft records from public disclosure.

The decision — blocking access to a draft document that detailed the harm a proposed EPA rule could pose to vulnerable species — was "a severe blow" to transparent government, said one environmental group that had pressed the high court to require disclosure.

"This decision will make it easier for political appointees to meddle secretly in scientific decisions, gut protections for our air and water, and push more of our wildlife toward extinction," said Brett Hartl, government affairs director at the Center for Biological Diversity, in a statement yesterday. "Now more than ever, Congress must step in and end the abuse of the deliberative process privilege or we'll have an unaccountable executive branch."

The center was among the groups that had supported the Sierra Club in its legal battle to gain access to a 2013 draft biological opinion related to a 2014 EPA rule for cooling water intake structures at power plants. The Fish and Wildlife Service and NOAA Fisheries found in their draft opinion that a proposed version of the EPA rule could jeopardize plants and animals protected under the Endangered Species Act.

EPA later released a revised final rule for which the services issued a "no jeopardy" opinion.

The Sierra Club argued in court that it had the right to know what changed. The 9th U.S. Circuit Court of Appeals agreed, but in a 7-2 opinion yesterday led by Justice Amy Coney Barrett, the Supreme Court reversed ([\*Greenwire\*](#), March 4).

Environmental groups weren't alone in their battle. Free press advocates, civil rights groups and even industry associations that typically oppose the Sierra Club in court filed friend of the court briefs in support of the group's call for disclosure.

"Members of the regulated community rely on the information sought here to make reasoned decisions about their businesses, programs, and livelihoods. Disclosure furthers this purpose," the American Forest Resource Council and other industry groups wrote in their [\*amicus brief\*](#).

Not a single group wrote a brief in favor of the government's position.

FWS declined to comment. An EPA spokesman acknowledged a request for comment from E&E News for this story but didn't respond further.

FOIA experts said they fear that the Supreme Court's decision could lead to fewer FOIA disclosures.

"It is not a landmark FOIA decision, but rest assured, it will be cited by agencies that want to keep public records from seeing the light of day under FOIA," said Alex Hontos, a partner at the law firm Dorsey & Whitney.

He added that yesterday's Supreme Court opinion did put some constraints on what can be considered a draft document under FOIA Exemption 5, which protects deliberative and predecisional records.

"If the evidence establishes that an agency has hidden a functionally final decision in draft form, the deliberative process privilege will not apply," Barrett wrote for the majority in *FWS v. Sierra Club*. "The Services, however, did not engage in such a charade here."

Hontos said to expect lots of future litigation over qualifications of draft documents — and a potential inundation of additional FOIA requests.

"It makes the agency's treatment and behavior the touchstone for assessing finality under the exemption, and for a FOIA requester to gain visibility into that will likely mean that the FOIA requester will now need to submit FOIA requests on that specific subject, too — meaning there may be more FOIA requests after *Sierra Club*," he said.

## What can Congress do?

Critics of the Trump administration felt the FOIA process became swamped with politics, with the release of documents frequently slowed after the president's appointees became involved using "awareness reviews" of requests.

Also, both the Department of the Interior and EPA under the prior administration issued new FOIA regulations, which prompted an outcry from environmental groups and bipartisan lawmakers on Capitol Hill.

Congress last approved significant changes to FOIA almost five years ago.

President Obama signed the FOIA Improvement Act just days before the public record law's 50th anniversary ([Greenwire](#), July 1, 2016).

Under the law, agencies have to apply a presumption of openness in response to FOIA requests. It also required the federal government to use a single web portal for FOIA requests — FOIA.gov has gone online since the law passed — and strengthened the Office of Government Information Services, a FOIA watchdog for the government.

The law also touched upon FOIA's deliberative process exemption, which was at the center of yesterday's Supreme Court ruling. Agencies can no longer use that exemption for records created 25 or more years ago.

The law had strong bipartisan support, passing the Senate by unanimous consent and the House by voice vote.

Yet it met fierce opposition from federal agencies, including the Department of Justice, which had voiced worries about the legislation.

Earlier this year, environmental groups called on Congress to strengthen FOIA in a [letter](#) to House and Senate lawmakers. Yet any moves to bolster the public records law again will likely be met with resistance from the government's bureaucracy, which could stall and ultimately block its passage.

"We would recommend that deliberative process only apply narrowly to the final actual deliberations of the top policymaker for the final step of a particular decision, and all other subsidiary considerations occur in 'the fishbowl' for all the public to see," Hartl said.

He added that the Supreme Court recently ruled against a newspaper in its quest to obtain information from the Department of Agriculture about the federal food stamp program. The justices said the data was protected under FOIA Exemption 4, which applies to trade secrets and other proprietary information (*Greenwire*, June 24, 2019).

"It is pretty clear that most federal agencies continue to severely abuse the deliberative process privilege even after the 2016 FOIA Improvement Act," Hartl said, "so it is time for Congress to truly rein in agency gaming of the system."