

## *Trentadue v. Integrity Committee: An Attempt to Reign in the Expansion of the Freedom of Information Act's 5th Exemption*

*A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.*<sup>1</sup>

### *I. Introduction*

The Oklahoma City bombing, an alleged suicide, a battered and beaten corpse, and a grieving brother's search for the truth. It sounds more like a novel than the background of a Freedom of Information Act (FOIA)<sup>2</sup> court battle. But, for the family of Kenneth Trentadue, the FOIA<sup>3</sup> and the recent Tenth Circuit decision in *Trentadue v. Integrity Committee*<sup>4</sup> may be the only hope to shed some truth on the circumstances surrounding his suspicious death. Kenneth Trentadue died under mysterious circumstances while in federal custody and his brother, Jesse Trentadue, filed a FOIA request to gain access to certain documents produced during the government's investigation.<sup>5</sup> The district court initially denied Trentadue's request and found that the documents could be withheld under FOIA Exemptions Five and Seven.<sup>6</sup> Exemption Seven protects information "compiled for law enforcement purposes,"<sup>7</sup> while Exemption Five allows agencies to withhold information "which would not be available by law to a private party in litigation with the agency."<sup>8</sup> The deliberative process privilege of Exemption Five protects an

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON* 337 (Saul K. Padover ed., Harper & Row 1953).

2. 5 U.S.C. § 552(b) (2006).

3. *Id.*

4. 501 F.3d 1215 (10th Cir. 2007).

5. Jesse Trentadue filed a FOIA request to receive a response that Glen Fine, the Department of Justice Inspector General, wrote to the Integrity Committee. *Id.* at 1224. The district court denied Trentadue's request on the basis that most of Fine's response was protected from disclosure by the FOIA's Fifth Exemption. *Id.* at 1225. On appeal, the Tenth Circuit took a narrow view of Exemption Five and ordered the Integrity Committee to turn over most of Fine's response to Trentadue. *Id.* at 1229-31.

6. *Id.* at 1225 (citing 5 U.S.C. § 552(b)(5), (7)).

7. 5 U.S.C. § 552(b).

8. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

agency's advice and opinions, but not the underlying facts.<sup>9</sup> The Tenth Circuit reversed, holding that most of the previously withheld information was factual in nature and therefore disclosable.<sup>10</sup>

The FOIA allows members of the public to access federal agency records.<sup>11</sup> The United States FOIA is the most frequently requested access law in the world.<sup>12</sup> In the year 2000, people in the U.S. made more than two million FOIA requests, and the federal government spent about one dollar per U.S. citizen (\$253 million) administering the law.<sup>13</sup> However, administration of the FOIA presents certain problems as the government tries to weigh its interest in efficiency and privacy against the citizen's right to be free from secret law.<sup>14</sup> The Department of Justice, in its guide to the FOIA, points to tensions between the competing interests of secrecy and disclosure and finds that "their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests—while placing primary emphasis on the most responsible disclosure possible."<sup>15</sup>

This note addresses the Tenth Circuit's opinion in *Trentadue v. Integrity Committee* and its positive step in favor of disclosure under the FOIA by rejecting the Ninth Circuit's functional test and embracing the United States Supreme Court's holding in *EPA v. Mink*.<sup>16</sup> Part II of this note explores the history of the FOIA and the basic concepts underlying Exemption Five. Part III explores the law before *Trentadue*, including the deliberative process privilege exemption and its implications for Exemption Five of the FOIA. Part IV introduces the circumstances surrounding Kenneth Trentadue's death and analyzes the Tenth Circuit's return to a more narrow interpretation of Exemption Five. Part V argues that the *Trentadue* court reached the correct decision by narrowing the scope of the deliberative process privilege because its decision more accurately reflects the rationale and goal of the FOIA. Part V also examines the consequences of the Tenth Circuit's holding and the potential for increased FOIA litigation under Exemption Five. This note concludes in Part VI.

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9. *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

10. *Trentadue*, 501 F.3d at 1231-32.

11. *Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002).

12. Thomas Blanton, *The World's Right to Know*, FOREIGN POL'Y, July-Aug. 2002, at 50.

13. *Id.*

14. *Id.* at 50-52.

15. U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 5-6 (2007), available at [http://www.usdoj.gov/oip/foia\\_guide07.htm](http://www.usdoj.gov/oip/foia_guide07.htm).

16. 410 U.S. 73, 80 (1973).

## II. The Freedom of Information Act

### A. General History and Purpose of the FOIA

The FOIA allows members of the public to access federal agency records.<sup>17</sup> The purpose of the FOIA is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>18</sup> Congress created the FOIA with a strong tendency toward disclosure.<sup>19</sup> Nevertheless, the legislature feared total disclosure and therefore reasoned that “something less than 100% disclosure of all government operations was only practical and reasonable.”<sup>20</sup> When Congress passed the FOIA it emphasized that “[i]t is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.”<sup>21</sup> Thus, the courts have long interpreted the Act to be “broadly conceived.”<sup>22</sup> The FOIA should be “broadly construed in favor of disclosure” and information in possession of federal agencies should be disclosed unless they fall within one of the statutory exemptions.<sup>23</sup>

Under the FOIA’s structure, “virtually every document generated by an agency is available to the public in one form or another, unless it [is exempt].”<sup>24</sup> The FOIA lists nine exemptions that Congress included to help protect important governmental interests that require nondisclosure.<sup>25</sup> All

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17. *Herrick v. Garvey*, 298 F.3d 1184, 1189 (10th Cir. 2002).

18. *Anderson v. Dep’t of Health & Human Servs.*, 907 F.2d 936, 941 (10th Cir. 1990) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

19. *Irons & Sears v. Dann*, 606 F.2d 1215, 1219 (D.C. Cir. 1979); *see also* *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (“The clear purpose of the FOIA is to assure that the public has access to all government documents, subject to only nine specific limitations, to be narrowly interpreted, which Congress decided were necessary to protect our national interests and permit the efficient operation of the government.”).

20. *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974).

21. H.R. REP. NO. 89-1497, at 3 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2423.

22. *EPA v. Mink*, 410 U.S. 73, 80 (1973).

23. *Alirez v. NLRB*, 676 F.2d 423, 425 (10th Cir. 1982).

24. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

25. 5 U.S.C. § 552(b) (2006). The exemptions to the FOIA are set out in section (b)(1)-(9):

(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), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B)

exemptions are clearly defined<sup>26</sup> and narrow in scope in order to further the FOIA's goal of disclosure.<sup>27</sup> Most importantly, the exemptions are explicitly exclusive and any document that does not fall within one of the nine exemptions must be disclosed promptly.<sup>28</sup> When applying the exemptions, courts must narrowly circumscribe the exemption in favor of disclosure.<sup>29</sup> The FOIA additionally requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."<sup>30</sup> Documents must be analyzed carefully in order to separate exempt information from non-exempt, disclosable

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establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(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 which would not be available by law to a party other than an agency in litigation with the agency;

(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 a 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.

*Id.* § 552(b)(1-9).

26. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 150 (1989).

27. FBI v. Abramson, 456 U.S. 615, 616 (1982).

28. *Tax Analysts*, 492 U.S. at 151; *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978); Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976); FAA Adm'r v. Robertson, 422 U.S. 255, 262 (1975).

29. *Alirez v. NLRB*, 676 F.2d 423, 425 (10th Cir. 1982).

30. 5 U.S.C. § 552(b).

information.<sup>31</sup> Any information not falling within one of the nine exemptions must be separated and disclosed.<sup>32</sup>

Congress reinforced these *ex ante* protections with a *post hoc* procedural shift. In keeping with the policy of disclosure, any agency sued for failure to disclose bears the burden of justifying nondisclosure.<sup>33</sup> Thus, unlike the traditional American lawsuit in which the plaintiff bears the burden of proof, in FOIA suits the defendant must justify its reason for nondisclosure.<sup>34</sup> Because of the nature of the dispute and the fact that the plaintiff does not know the content of the disputed documents, courts have held that it is more reasonable for the burden to be borne by the agency involved.<sup>35</sup> Such structural protections for FOIA requests reflect Congress' intent that FOIA disputes be weighed in favor of disclosure.

### *B. Exemption Five*

Exemption Five encompasses "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>36</sup> Essentially, any document that a party could withhold during civil litigation under a common law privilege can be withheld by the government from a FOIA request. Courts have held that Exemption Five can reasonably be read to incorporate all privileges that apply in civil litigation, including, among others, the attorney-client privilege, the executive privilege and the deliberative process privilege.<sup>37</sup>

In the year 2007, 178,756 FOIA requests were made to the Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Justice, Department of Labor, and Department of State, and of those requests, the departments invoked Exemption Five 8779 times, or almost 5% of the time.<sup>38</sup> Most litigation under Exemption Five of the FOIA

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31. *Id.*

32. *Id.*

33. *Casad v. U.S. Dep't of Health & Human Servs.*, 301 F.3d 1247, 1251 (10th Cir. 2002).

34. *Id.*

35. *Mead Data Cent., Inc., v. U.S. Dep't of the Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977); *see also Vaughn v. Rosen*, 484 F.2d 820, 824-25 (D.C. Cir. 1973).

36. 5 U.S.C. § 552(b)(5).

37. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."); *see also Sterling Drug v. FTC*, 450 F.2d 698, 704 (D.C. Cir. 1971). The deliberative process privilege protects an agency's decision making process by exempting from disclosure documents that are predecisional and deliberative. *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

38. The author derived these results by combining statistics from several governmental reports. *See U.S. DEP'T OF COMMERCE, ANNUAL FOIA REPORT FY 2007*, at 11-13 (2007),

centers upon the deliberative process privilege because of the subjective and document specific nature of the issue.<sup>39</sup> Therefore, in order to determine the scope of Exemption Five, courts first had to determine the boundaries and limitations of the deliberative process privilege as it occurs in the common law.

### *III. Law Leading up to the Trentadue Case*

#### *A. The Deliberative Process Privilege Emerges*

Support for the privacy of governmental communications originated in English common law under the crown privilege.<sup>40</sup> The crown privilege covered such information as parliamentary deliberations and communications by public officials.<sup>41</sup> Specifically, five categories of information could be withheld including state secrets,<sup>42</sup> official information,<sup>43</sup> criminal proceedings,<sup>44</sup> civil proceedings with the crown as plaintiff,<sup>45</sup> and civil proceedings with the crown as defendant.<sup>46</sup> The crown privilege protected official information in order to protect the internal functioning of the government in the same way that Exemption Five now protects the deliberative process.<sup>47</sup>

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available at <http://www.osec.doc.gov/omo/FOIA/foiarptFY07dept.pdf>; U.S. DEP'T OF DEFENSE, FREEDOM OF INFORMATION ACT REPORT FOR FISCAL YEAR 2007, at 12-13 (2007), available at <http://www.dod.mil/pubs/foi/dfoipo/docs/FY2007report.pdf>; U.S. DEP'T OF EDUC., THE SECRETARY'S ANNUAL FREEDOM OF INFORMATION ACT REPORT FISCAL YEAR 2007, at 11-12 (2007), available at <http://www.ed.gov/about/reports/annual/foia/foiafy07.pdf>; U.S. DEP'T OF ENERGY, 2007 ANNUAL REPORT 7-10 (2007), available at <http://management.energy.gov/documents/FOIA-AnnualReport2007.pdf>; U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2007, at 1-3 (2007), available at [http://www.usdoj.gov/oip/annual\\_report/2007/07foiapg5.pdf](http://www.usdoj.gov/oip/annual_report/2007/07foiapg5.pdf); U.S. DEP'T OF LABOR, FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2007 (2007), available at <http://www.dol.gov/sol/foia/2008anrpt.htm>; U.S. DEP'T OF STATE, FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2007, at 6-8 (2007), available at <http://www.state.gov/documents/organization/100129.pdf>.

39. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

40. JOHN BUZZARD ET AL., *PHIPSONS ON EVIDENCE* § 14-04 (13th ed. 1982).

41. *Id.*

42. Bernard Schwartz, *Estoppel and Crown Privilege in English Administrative Law*, 55 MICH. L. REV. 27, 45 (1956).

43. *Id.* at 51.

44. *Id.* at 52.

45. *Id.* at 54.

46. *Id.* at 55.

47. *Id.* at 51.

In America, the earliest cases that emerged for the purpose of protecting information within the government developed an executive privilege that covered deliberations of the President and other high level officials.<sup>48</sup> By the early twentieth century, the Supreme Court extended the rule protecting the mental processes of government officials beyond just the President when it held that “it was not the function of the court to probe the mental processes of the Secretary [of Agriculture] in reaching his conclusions.”<sup>49</sup> Later, *Kaiser Aluminum & Chemical Corp. v. United States* further developed the deliberative process privilege when the Court of Claims recognized that “the integrity of the administrative process must be equally respected” when considering whether internal government documents must be discoverable.<sup>50</sup> *Kaiser* paved the way for the modern application of the deliberative process privilege under Exemption Five of the FOIA, which would later encompass pre-decisional and deliberative inter- and intra-agency documents. Based upon the legislative history of the FOIA, the Court, in *NLRB v. Sears, Roebuck & Co.*, determined that Congress had the executive privilege in mind when it adopted Exemption Five.<sup>51</sup> Additionally, cases show that the privilege rests on the “policy of protecting the ‘decision making processes of government agencies.’”<sup>52</sup>

*B. Two-step Analysis to Determine if a Document Is Exempt From Disclosure Under the Deliberative Process Privilege*

Following the passage of the FOIA in 1966, courts were faced with how to interpret common law privileges within the context of the FOIA. Exemption Five “is cast in terms of discovery law,” and allows government agencies to withhold documents that “would not be available by law to a private party in litigation.”<sup>53</sup> While the FOIA refers to discovery laws, the Supreme Court has stated that discovery rules should only be applied to FOIA cases “by way of rough analogies.”<sup>54</sup> The Supreme Court combined the rough analogy of discovery principles with the narrow construction intended by Congress when determining the extent of FOIA exemptions.<sup>55</sup>

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48. *See Wertheim v. Cont’l Ry. & Trust Co.*, 15 F. 716, 724 (C.C.S.D.N.Y. 1883); Appeal of Hartanft, 85 Pa. 433, 447 (1877).

49. *Morgan v. United States*, 304 U.S. 1, 18 (1938).

50. 157 F. Supp. 939, 946 (Ct. Cl. 1958) (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)).

51. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

52. *Id.* (quoting *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972)).

53. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

54. *EPA v. Mink*, 410 U.S. 73, 86 (1973).

55. *Id.*

In order to determine the scope of Exemption Five, courts had to balance the competing interests of disclosure against the need for governmental secrecy, while embracing the rationale surrounding the creation of the privilege. While the FOIA allows public access to documents in order to prevent the creation of secret law, Congress also intended to protect the decision making process by keeping it free from damaging scrutiny and by promoting the free flow of ideas.<sup>56</sup> For the deliberative process privilege, courts recognized the importance of allowing subordinates to make recommendations to their superiors without fear of public criticism or ridicule.<sup>57</sup> The courts emphasized that “officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.”<sup>58</sup> On the other hand, the FOIA is “a fundamental cornerstone of our modern democratic system of government,”<sup>59</sup> and all exemptions must be narrowly construed in favor of disclosure.<sup>60</sup>

As a result of these competing interests, the general rule regarding the application of the deliberative process privilege under Exemption Five is that it protects documents that are both pre-decisional and deliberative because documents fitting those classifications have a greater risk of stifling candid communication within agencies.<sup>61</sup> Whether a document is pre-decisional revolves around the timeline of when the document was created,<sup>62</sup> while the deliberative element centers on the actual content of the information.<sup>63</sup> The pre-decisional requirement of the deliberative process privilege can usually be easily determined by an examination of the document itself and the circumstances surrounding its creation.<sup>64</sup> The most difficult part of applying Exemption Five is classifying a document as deliberative because of the document-specific nature of the inquiry.<sup>65</sup>

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56. *Schlefer v. United States*, 702 F.2d 233, 237 (D.C. Cir. 1983).

57. *Id.*

58. *Casad v. U.S. Dep't of Health & Human Servs.*, 301 F.3d 1247, 1251 (10th Cir. 2002).

59. ALBERTO GONZALES, ATT'Y GEN., IMPROVING AGENCY DISCLOSURE OF INFORMATION (2006), available at [http://www.usdoj.gov/oip/ag\\_report\\_to\\_president\\_13392.pdf](http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf).

60. *Alirez v. NLRB*, 676 F.2d 423, 425 (10th Cir. 1982); see also *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361-62 (1976).

61. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

62. *Id.* at 867.

63. *Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 948 (11th Cir. 1992).

64. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 153 n.19 (1975).

65. *Coastal States*, 617 F.2d at 867.



### *1. Pre-decisional*

The Supreme Court in *Sears, Roebuck & Co.* acknowledged that a bright line cannot be drawn that easily distinguishes between pre- and post-decisional documents.<sup>66</sup> It set the standard that final opinions are generally post-decisional because they look back on and explain decisions that have already been made or policies that have already been adopted by the agency.<sup>67</sup> The disclosure of documents that look back on adopted policies pose little risk of inhibiting advice within agencies.<sup>68</sup> Therefore, they do not create the same risk as pre-decisional documents.<sup>69</sup> Post-decisional opinions will explain decisions that have been made or provide guidance for how similar problems will be solved in the future based upon past decisions. Most importantly, such documents look back at decisions already made and have a miniscule risk of inhibiting future advice within agencies. Conversely, pre-decisional documents make recommendations and offer opinions on the future course of the agency.<sup>70</sup> If exposure of the document to public scrutiny will likely lead to a temperance in future recommendations, it is most likely pre-decisional.<sup>71</sup>

The D.C. Circuit differentiated between pre- and post-decisional documents by characterizing pre-decisional documents as those that “reflect the agency ‘give-and-take’ leading up to a decision that is characteristic of the deliberative process . . . .”<sup>72</sup> Post-decisional documents are those that explain an agency’s position on a subject or represent their position on an issue and therefore are the “working law” of an agency.<sup>73</sup> Additionally, according to the D.C. Circuit, a document can lose its pre-decisional nature if the agency adopts the document “formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”<sup>74</sup> Accordingly, Exemption Five will not apply to any memorandum that is “adopted or incorporated by reference in a nonexempt ‘final opinion.’”<sup>75</sup>

Once a document has been classified as pre-decisional, it must also be deliberative to be exempt from disclosure.<sup>76</sup> Pre-decisional documents must

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66. *Sears, Roebuck & Co.*, 421 U.S. at 153 n.19.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 152.

72. *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981).

73. *Id.*

74. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also Sears, Roebuck & Co.*, 421 U.S. at 161; *Taxation*, 646 F.2d at 678.

75. *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 24 n.11 (D.C. Cir. 1978).

76. *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

be part of the “agency give-and-take—of the deliberative process—by which the decision itself is made” in order to be exempt under Exemption Five.<sup>77</sup>

## 2. *Deliberative*

While documents must be pre-decisional to even trigger the deliberative process privilege, a document is not exempt from disclosure simply because it is pre-decisional; it must also be part of the deliberative process.<sup>78</sup> The deliberative aspect of a document remains even harder for courts to define because “the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.”<sup>79</sup> To further the confusion, there has been only one Supreme Court opinion interpreting what qualifies as deliberative. In *EPA v. Mink*, the Supreme Court attempted to create a loose fact or opinion test for determining whether a document is deliberative.<sup>80</sup> Following *Mink*, some circuits have broadened the application of this test to expand Exemption Five, but the Supreme Court has yet to determine whether these broader tests satisfy the legislative intent of the FOIA.

## C. *Differing Approaches to Determining if Information is Deliberative*

### 1. *Fact or Opinion Test Created by EPA v. Mink*

The *Mink* court looked to the history of the common law deliberative process privilege and the purpose of such privilege, finding that Exemption Five “requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.”<sup>81</sup> In doing so, the court devised the fact or opinion test under which materials reflecting policy-making processes are exempt, including “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer.”<sup>82</sup> The Court looked back to its desire in *Kaiser* to exempt those documents “injurious to the consultative functions of government that the privilege of non-disclosure protects” when creating the fact or opinion test.<sup>83</sup>

The Court found a basis for the fact or opinion test by examining the original language used in the bill that would later become the Freedom of

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77. *Id.*

78. *Taxation*, 646 F.2d at 678; *see also* *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977); *Vaughn*, 523 F.2d at 1144.

79. *Coastal States*, 617 F.2d at 867.

80. *EPA v. Mink*, 410 U.S. 73 (1973).

81. *Id.* at 89.

82. *Coastal States*, 617 F.2d at 866.

83. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).

Information Act.<sup>84</sup> Originally the language exempted “inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy.”<sup>85</sup> Congress modified the language that would later become Exemption Five in order to permit “[a]ll *factual* material in Government records . . . to be made available to the public.”<sup>86</sup> The language changed because the proposed exemption would allow the disclosure of documents with a mixture of fact and opinions merely because they did not deal “solely with matters of law or policy.”<sup>87</sup> The Court characterized the original language as putting forth a “wooden” test with little practicality.<sup>88</sup>

The *Mink* court aptly stressed the original legislative intent when attempting to derive a “common-sense” approach to Exemption Five.<sup>89</sup> Under *Mink*, any facts that are reasonably segregable from the policies and opinions within a document must be separated and disclosed.<sup>90</sup> The D.C. Circuit lauded the decision, noting that the fact or opinion distinction “offers a quick, clear, and predictable rule of decision.”<sup>91</sup> By analyzing Exemption Five from both a historical and legislative intent perspective, the fact and opinion test espoused in *Mink* seems most in line with the FOIA’s policy of broad disclosure and narrowly drawn exemptions.

*2. A Small Retreat from the Pro-Disclosure Fact or Opinion Test: Not All Factual Information Must Be Disclosed*

Following *Mink*, several courts took issue with the simplicity of the fact or opinion test and shifted towards creating a broader exemption. Some courts warned they could not “mechanically apply the fact/opinion test”<sup>92</sup> and cautioned that “courts must be careful not to become victims of their own semantics.”<sup>93</sup> Because the exemption seeks to protect the *deliberative process* and not just deliberative materials, these courts worried that even factual material could expose the deliberative process and should therefore be covered under the exemption.<sup>94</sup> For instance, the D.C. Circuit in *Montrose Chemical*

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84. *Mink*, 410 U.S. at 89-90.

85. *Id.* at 90 (quoting *Hearings on S. 1160, S. 1336, S. 1758, S. 1879 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 89th Cong. 7 (1965)).

86. *Id.* (quoting S. REP. NO. 88-1219 (1964)).

87. *Id.*

88. *Id.* at 91.

89. *Id.*

90. *Id.*

91. *Mead Data Cent., Inc., v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

92. *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988).

93. *Mead*, 566 F.2d at 256.

94. *Wolfe*, 839 F.2d at 774.

found that summaries of purely factual information prepared by an agency for use in the decision making process would be exempt from disclosure because merely a summary of facts would expose the deliberative process.<sup>95</sup> The *Montrose* court did not completely reject the fact or opinion test, but instead “recognize[d] that in some cases selection of facts or summaries may reflect a *deliberative process* which exemption 5 was intended to shelter.”<sup>96</sup>

Nevertheless, not all jurists agreed with the expansion of the fact or opinion test, and one dissent warned that such expansion “betokens a dangerous departure from past Exemption Five law and certainly does not construe the exception as ‘narrowly as consistent with efficient Government operation.’”<sup>97</sup> Unfortunately, courts continued to expand Exemption Five, chipping away at its effectiveness with the “functional” test.<sup>98</sup> This dilution of FOIA protection is pronounced under the case of *National Wildlife Federation v. United States Forest Service*.<sup>99</sup>

### 3. A Larger Retreat from the Policy of Disclosure: The Functional Test of *National Wildlife Federation v. U.S. Forest Service*

In *National Wildlife Federation v. United States Forest Service*, the National Wildlife Federation sought copies of internal documents from the United States Forest Service through a FOIA request.<sup>100</sup> The requested

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95. *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

96. *Id.*

97. *Wolfe*, 839 F.2d at 778 (Edwards, J., dissenting) (quoting S. REP. NO. 89-913 (1965)).

98. *See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988) (“When a court must decide whether exemption 5 applies in a complicated case, we believe a better analytical tool than merely determining whether the material itself was essentially deliberative or factual should be used: we should focus on whether the document in question is a part of the *deliberative process*.”); *Wolfe*, 839 F.2d at 774 (“In some circumstances, even material that could be characterized as ‘factual’ would so expose the deliberative process that it must be covered by the [deliberative process] privilege.”) (citing *Mead*, 566 F.2d at 256); *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (“Courts soon came to realize, however, that use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases. . . . Courts therefore began to focus less on the nature of the materials sought and more on the effect of the materials’ release . . . .”); *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980) (requiring disclosure of facts only if they “do not reveal the deliberative process and are not intertwined with the policymaking process); *Montrose Chem.*, 491 F.2d at 68 (“If the exemption is intended to protect only deliberative *materials*, then a factual summary of evidence on the record would not be exempt from disclosure. But if the exemption is to be interpreted to protect the agency’s *deliberative process*, then a factual summary prepared to aid an administrator in resolution of a difficult, complex question would be within the scope of the exemption.”).

99. *Nat'l Wildlife Fed'n*, 861 F.2d at 1114.

100. *Id.* at 1115.

documents included working drafts of several forest plans, drafts of an environmental impact statement related to the forest plans, and previews of drafts containing comments and recommendations made by the Land Management Office in the District of Columbia.<sup>101</sup> The Forest Service denied the FOIA request under Exemption Five's deliberative process privilege.<sup>102</sup> The United States District Court for the District of Oregon ordered the Forest Service to release those portions of the documents containing factual materials that could be segregated from the deliberative materials.<sup>103</sup>

On appeal, the Ninth Circuit moved away from the fact or opinion dichotomy—used as a litmus test by many courts—and advocated instead for a functional test.<sup>104</sup> Under the Ninth Circuit's functional test, a court “should focus on whether the document in question is a part of the *deliberative process*.”<sup>105</sup> Because “[d]ecisions of government agencies are not made in a vacuum,”<sup>106</sup> the Ninth Circuit held that “[f]actual materials . . . would likewise be exempt from disclosure to the extent that they reveal the mental processes of decisionmakers.”<sup>107</sup> The Ninth Circuit pointed to the possibility that the revelation of mere facts can in some ways reflect the deliberative process because “[e]ach opinion as to which of the great constellation of facts are relevant and important and each assessment of the implications of those facts suggests a different course of action by the agency.”<sup>108</sup>

The Ninth Circuit then analyzed the requested documents under its new functional test, finding that the draft forest plans reflected the deliberative process of the Forest Service and therefore could be withheld under Exemption Five.<sup>109</sup> The functional test required the court to independently assess each factual document to determine whether or not they exposed the agency's deliberative process. The threshold for exempting factual documents under the functional test required only that disclosure “would 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.”<sup>110</sup> By adopting this threshold, the Ninth Circuit took an even

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1118.

105. *Id.*

106. *Id.* at 1120.

107. *Id.* at 1119.

108. *Id.* at 1120 (citing *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (9th Cir. 1987); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 85-86 (2d Cir. 1979); *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 67-68 (D.C. Cir. 1974)).

109. *Id.* at 1121.

110. *Quarles v. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *Dudman*,

broader approach than previously advocated by other circuits and extended the scope of Exemption Five to the point that nearly every imaginable document would be exempt.

#### IV. Trentadue v. Integrity Committee: A Brother's Attempt to Uncover the Truth

##### A. Factual Background

###### 1. An Unfortunate Death and an Even More Unfortunate Cover-up

Police officers made contact with Kenneth Trentadue for a driving violation in California.<sup>111</sup> They arrested him on a parole violation and eventually transferred him to the Federal Transfer Center (FTC) in Oklahoma City for his hearing with the parole board.<sup>112</sup> While in protective custody, he made several calls to his family. During each phone call he appeared normal, making small talk and mentioning his new wife and baby.<sup>113</sup> Two days after Kenneth arrived at the FTC and only a few hours after being moved to solitary confinement, Kenneth's body was found hanging in his cell.<sup>114</sup> A prison official phoned Kenneth's mother to inform her that her son had committed suicide and to offer to cremate the body.<sup>115</sup> While shocked by the news, Wilma Trentadue retained the presence of mind to refuse permission to cremate her son.<sup>116</sup> Not until his battered and bruised body reached the Trentadue family did the full extent of the violence of Kenneth's death become evident.<sup>117</sup>

Kenneth Trentadue's body bore numerous marks that the medical examiner said could not have been self-inflicted.<sup>118</sup> Jesse Trentadue documented the

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815 F.2d at 1568); *see also* *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991) (examining whether disclosure of the document would "discourage candid discussion within the agency") (quoting *Dudman*, 815 F.2d at 1567-68); *Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1123 (D.C. Cir. 1989) (concluding that the opinion-fact distinction does not matter so much as the "effect of the materials' release" on deliberative process) (quoting *Dudman*, 815 F.2d at 1568).

111. *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 847 (10th Cir. 2005); *see* Mary Fischer, *A Case of Homicide?*, GQ, Sept. 1, 1996, at 262, 264 [hereinafter Fischer, *Homicide*].

112. *Estate of Trentadue*, 397 F.3d at 848; *see* Fischer, *Homicide*, *supra* note 111, at 264.

113. Fischer, *Homicide*, *supra* note 111, at 263.

114. *Estate of Trentadue*, 397 F.3d at 848; *see* Mary Fischer, *Cover-Up in Cell 709*, GQ, Dec. 1, 1997, at 272, 273 [hereinafter Fischer, *Cover-Up*].

115. Fischer, *Cover-Up*, *supra* note 114, at 275.

116. *Id.* at 275.

117. *Id.* at 276.

118. Letter from Fred B. Jordan, M.D., Chief Medical Examiner, to the file of Kenneth Trentadue (Dec. 20, 1995), available at <http://www.motherjones.com/news/featurex/2007/07/>

marks on his brother's body with the precision of a professional medical examiner—complete with labels and photographs—and included them in a letter to Marie Carter, the acting warden of the Oklahoma City Federal Transfer Center.<sup>119</sup> Bruises covered Kenneth's body, both sets of knuckles were scraped and bruised, there were fingerprint marks under his armpits, there were restraint marks left by hands on his left wrist, and his throat was slashed.<sup>120</sup> The medical examiner wrote that he “felt Mr. Trentadue had been abused and tortured.”<sup>121</sup> Trentadue's family wondered how a man in protective custody, isolated from everyone but prison guards, could come to be in such a battered state.<sup>122</sup>

Theories abound as to the actual cause of Kenneth's injuries and death. Some speculators have suggested that FBI officials mistook Kenneth for John Doe No. 2, whom police sought in connection with the Oklahoma City bombing.<sup>123</sup> Regardless of why Kenneth had to struggle for his life, the Office of Inspector General (OIG) admits that prison officials made many errors in response to Kenneth's death.<sup>124</sup> Most of these errors revolve around what

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Jordan\_12.20.95.pdf [hereinafter Letter from Jordan].

119. Letter from Jesse C. Trentadue to Marie Carter, Acting Warden of the Oklahoma City Federal Transfer Center (Aug. 30, 1995), *available at* [http://www.motherjones.com/news/featurex/2007/07/Trentadue\\_08.30.95.pdf](http://www.motherjones.com/news/featurex/2007/07/Trentadue_08.30.95.pdf) [hereinafter Letter from Trentadue].

120. Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 849 (10th Cir. 2005); *see* Letter from Trentadue, *supra* note 119.

121. Letter from Jordan, *supra* note 118.

122. Letter from Trentadue, *supra* note 119.

123. James Ridgeway et al., *In Search of John Doe No. 2*, MOTHER JONES, Summer 2007, at 54. After the Oklahoma City bombing, law enforcement searched for a man that witnesses claimed they saw with Timothy McVeigh and who was seen by some walking away from the Ryder truck. *Id.* That man became known around the world as John Doe No. 2. According to the police, he was 5 foot 9 inches, muscular, and dark-haired. *Id.* John Doe No. 2 was likely a bank robber named Richard Lee Guthrie. *Id.* Guthrie and his gang, the Aryan Republican Army (ARA), carried out 22 bank robberies in the Midwest and used their money to support white supremacist activities. *Id.* It is theorized that federal law enforcement thought that the ARA was involved in the Oklahoma City bombing and thought that Trentadue was Guthrie. *Id.* Interestingly, the real Guthrie died by hanging in a jail cell shortly before he was due to testify in court. *Id.* A Chairman's Report from the Oversight and Investigations Subcommittee of the House International Relations Committee noted that the death of Richard Guthrie mirrored that of Kenneth Trentadue, who “may have been tangentially and incorrectly linked to the Oklahoma City bombing.” DANA ROHRABACHER, THE OKLAHOMA CITY BOMBING: WAS THERE A FOREIGN CONNECTION? 10 (2006), *available at* <http://rohrabacher.house.gov/UploadedFiles/Report%20from%20the%20Chairman.pdf>. Additionally, the House Report stated that “[t]he death of these two prisoners, who happened to be very similar in appearance, is more than disturbing.” *Id.* at 10.

124. Memorandum from the Board of Inquiry Regarding Death of Inmate Vance Paul Brockaway 1 (Oct. 2, 1995), *available at* <http://www.motherjones.com/news/featurex/2007/07/>

appears to be a concerted effort to cover the truth. First, the prison workers who found Kenneth's body did not immediately cut him down or attempt to see if he was still alive.<sup>125</sup> Second, only a cursory investigation and attempt to preserve evidence occurred and the room was cleaned of all blood and trace evidence by that afternoon.<sup>126</sup> Third, CPR was not administered.<sup>127</sup> Fourth, the prison officials produced fraudulent memos stating that CPR had been performed when it had not<sup>128</sup> and that a second person's blood was found along with Kenneth's in his cell.<sup>129</sup> Finally, even more appalling, officials did not interview witnesses until nearly four months after the incident, and only then because of the pressure applied by the Trentadue family.<sup>130</sup>

## 2. A FOIA Battle to Uncover the Truth

Following Kenneth's death, several investigations ensued. Initially, the Bureau of Prisons looked into the matter, but ceased the inquiry after the Federal Bureau of Investigation (FBI) opened its own criminal inquiry.<sup>131</sup> When Trentadue's family questioned the FBI's conduct, the Civil Rights Division of the U.S. Department of Justice (DOJ) took over the investigation.<sup>132</sup> The DOJ Office of the Inspector General (OIG) determined that Kenneth Trentadue committed suicide, as did the Oklahoma City Police Department.<sup>133</sup>

The Trentadue family refused to believe that Kenneth killed himself. Consequently, Kenneth's brother, Jesse, filed an administrative complaint with the Integrity Committee (IC), a committee of the President's Council on Integrity and Efficiency (PCIE), which alleged misconduct by the DOJ Inspector General (IG) Glen Fine and his staff.<sup>134</sup> The IC has the power to "receive, review, and refer for investigation allegations of wrongdoing against IGs and certain staff members of the OIGs."<sup>135</sup> The IC determines if any

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BOP\_9.20.95.pdf [hereinafter Memorandum from Board of Inquiry].

125. *Estate of Trentadue*, 397 F.3d at 848; see Memorandum from Board of Inquiry, *supra* note 124, at 4-5.

126. *Estate of Trentadue*, 397 F.3d at 849; see Memorandum from Board of Inquiry, *supra* note 124, at 6.

127. *Estate of Trentadue*, 397 F.3d at 849; see Memorandum from Board of Inquiry, *supra* note 124, at 5.

128. Memorandum from Board of Inquiry, *supra* note 124, at 5.

129. Ridgeway et al., *supra* note 123.

130. Fischer, *Cover-Up*, *supra* note 114, at 276.

131. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1223 (10th Cir. 2007).

132. *Id.*

133. *Id.*

134. *Id.*

135. Exec. Order No. 12,993, § 1(a), 61 Fed. Reg. 13,043, 13,043 (Mar. 21, 1996).



wrongdoing occurred and can then either investigate the matter itself or refer it to another governmental agency for further action.<sup>136</sup>

The DOJ refused to pursue criminal charges; however, the IC did request that Fine respond to Jesse Trentadue's allegations.<sup>137</sup> Fine complied with the IC's request in September 2002.<sup>138</sup> Trentadue asked to view Fine's response, but the IC refused to release the document.<sup>139</sup> On November 26, 2002, the IC sent Trentadue a letter informing him that the IC would take no further action regarding his allegations.<sup>140</sup> Trentadue claimed he did not receive the letter and contacted the IC in February 2003 to determine the status of their investigation.<sup>141</sup> The IC resent the November 26 letter specifying that the investigation was closed.<sup>142</sup>

After learning the IC had closed its investigation, "Trentadue filed a FOIA request, seeking: "(1) any IC reports or rulings issued in Case Number 349, (2) copies of all documents submitted by the DOJ or OIG to the IC, (3) copies of all documents sent from the IC or PCIE to the DOJ or OIG, and (4) any record indicating that the IC actually mailed the November 26 letter on November 26."<sup>143</sup> In April 2003, Trentadue filed a complaint against the IC and PCIE in federal court, although he later dismissed his claim against the PCIE.<sup>144</sup> By this point, the FOIA dispute narrowed to two records: "the set of documents submitted by Fine to the IC, and an IC scheduling notice."<sup>145</sup> The IC claimed that the documents could be withheld under FOIA Exemptions 5, 6, 7(A) and 7(C).<sup>146</sup>

The district court reviewed the record in camera and granted the IC's motion for summary judgment as to Fine's submissions to the IC, but the court found for Trentadue with respect to the scheduling notice.<sup>147</sup> Trentadue then appealed the district court's rulings under docket number 04-4200.<sup>148</sup> While his appeal was pending, the IC released two more documents to Trentadue: (1)

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136. *Trentadue*, 501 F.3d at 1223.

137. *Id.* at 1224.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

a cover letter accompanying a substitute page submitted by Fine to the IC, and (2) an attachment to Fine's comments that consisted of a district court order.<sup>149</sup>

While pursuing his appeal, Trentadue filed a second FOIA case in federal court.<sup>150</sup> After a series of hearings,<sup>151</sup> the district court found that Exemption Five would permit the IC to withhold all of the documents. Trentadue again appealed, and the court assigned another docket number: 06-4129.<sup>152</sup> The Tenth Circuit Court of Appeals consolidated his two appeals into *Trentadue v. Integrity Committee*.<sup>153</sup>

### *B. The Tenth Circuit's Decision: A Step Towards Revitalization of FOIA*

The IC argued that, under a functional view of the deliberative process privilege, factual material should be protected whenever it would "expose the deliberative process."<sup>154</sup> The Tenth Circuit correctly noted that allowing the exclusion of any information that disclosed some portion of an agency's decision making process would allow Exemption Five to completely swallow the FOIA.<sup>155</sup> Indeed, the court reasoned it could not "imagine a document that would not divulge some tidbit regarding an agency's deliberative process."<sup>156</sup> Even more importantly, the Tenth Circuit rejected the IC's argument in favor of a functional approach with a reminder that the IC's overly broad reading

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149. *Id.*

150. *Id.* at 1225 (citing *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946 (D. Utah May 23, 2005)).

151. *Id.* (citing *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946, slip op. at 2). In the federal case, Hillman (Public Integrity Section) submitted a declaration contending that the release of information would interfere with an ongoing investigation. *Id.* (citing *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946, slip op. at 2). The district court noted a "conflict in the record as to whether there is in fact an ongoing investigation being conducted by the Public Integrity Section." *Id.* (quoting *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946, slip op. at 2). The district court ordered Hillman to appear to testify as to the status of the investigation. *Id.* (citing *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946, slip op. at 2). Hillman submitted a declaration to the court stating that the investigation had been closed. *Id.* (citing *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946, slip op. at 2). The IC then followed a motion for vacatur and remand because 5 U.S.C. § 552(b)(7)(A) (2006) would no longer justify withholding the documents at issue. *Id.* (citing *Trentadue v. Fed. Transfer Ctr.*, No. 2:03-CV-00946, slip op. at 2). The motion was granted and the case was remanded to determine if any other FOIA exemptions would justify the withholding of the requested documents. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1228 (quoting *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988)).

155. *Id.*

156. *Id.*

contradicted the court's duty to construe the FOIA exemptions as narrowly as possible.<sup>157</sup>

By returning to a disclosure-centered policy for interpreting Exemption Five, the Tenth Circuit correctly moved away from the functional test adopted by the Ninth Circuit. Like the Eleventh Circuit, the Tenth Circuit held that “[t]he fact/opinion distinction continues to be an efficient and workable standard for separating out what is, and what is not, deliberative.”<sup>158</sup> Under the Tenth Circuit's holding, factual information may only be withheld under certain narrow circumstances.<sup>159</sup> Such information could be exempt from disclosure only when the information would “so expose the deliberative process within an agency that it must be deemed exempted.”<sup>160</sup>

The Tenth Circuit also rejected the functional test—specifically the decision in *National Wildlife Federation*—which allowed an agency to withhold facts if revealing them would reflect the writer's choice as to which facts to include.<sup>161</sup> The court correctly noted that extending Exemption Five to encompass nearly all factual information completely contradicted *EPA v. Mink*.<sup>162</sup>

After determining that factual materials are not privileged unless they fit within the narrow exemption, the Tenth Circuit examined the actual documents in dispute.<sup>163</sup> In doing so, the court overturned the district court's decision by finding most of the documents disclosable.<sup>164</sup> For most of the documents requested, the court held that Exemption Five did not protect the information from disclosure.<sup>165</sup> The court went further, dissecting the documents sentence-by-sentence in order to disclose every possible disclosable piece of information.<sup>166</sup>

In a victory for the Trentadue family, the Tenth Circuit ordered large portions of the letter from Fine to the IC that had previously been withheld to

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157. *Id.*

158. *Id.* (quoting *Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 949 (11th Cir. 1992)).

159. *Id.*

160. *Id.* (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)).

161. *Id.*

162. *Id.* at 1229; *see also EPA v. Mink*, 410 U.S. 73, 89 (1973) (“Exemption 5 . . . requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.”).

163. *Trentadue*, 501 F.3d at 1229.

164. *Id.* at 1230-31.

165. *Id.*

166. *Id.* at 1230.

now be disclosed.<sup>167</sup> More importantly, the court found that a large portion of the second document, Fine's substantive response to the IC, must also be disclosed to the Trentadue family.<sup>168</sup> The court held that the first seven pages of the response were disclosable because it covered background information on Kenneth's death and the investigations that followed.<sup>169</sup> Additionally, the court concluded that most of Fine's response was similarly disclosable despite the district court's finding that the response consisted of exempt opinions.<sup>170</sup>

The Tenth Circuit's step-by-step analysis of the disputed documents, down to the individual sentences, should serve as a guide for courts confronted with Exemption Five claims. While such a process may be tedious and time-consuming, the importance of the FOIA in fighting conspiracies and corruption supersedes the inconvenience to the government. For the Trentadue family, the Tenth Circuit's diligent examination of the information at issue could provide the answer to years of searching for the truth behind Kenneth's death.

#### *IV. Analysis of the Modified Fact or Opinion Test Adopted by the Trentadue Court*

##### *A. Courts Must Remain True to the Purpose of the Freedom of Information Act*

Congress clearly recognized the importance of open government when it passed the Freedom of Information Act.<sup>171</sup> The U.S. Supreme Court has noted that the basic purpose of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and

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167. *Id.* The court found that, while some of the letter contained Fine's opinion and clearly fell within the exemption, almost all of page two did not reflect Fine's opinion. *Id.* That portion of the letter simply states historical facts about the OIG's investigation of Kenneth's death and should be disclosed. *Id.* Additionally, the letter lists the individuals that helped prepare the OIG's response to the IC and, again, the court found that this should be disclosed with only minor portions redacted because they contain Fine's personal opinions. *Id.*

168. *Id.*

169. *Id.* The court analyzes the document sentence-by-sentence in order to determine which sections contain factual material that must be disclosed, which contain factual material that would reveal the deliberative process and which would constitute the writer's opinions and must be exempt. *Id.*

170. *Id.* The court found Fine's substantive responses "largely factual, though a small amount of deliberative material is sprinkled throughout." *Id.*

171. H.R. REP. NO. 89-1497, at 6 (1966) ("It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.").

to hold the governors accountable to the governed.”<sup>172</sup> Even forty years later, legislators praise FOIA as “a watershed moment for our democracy” and “an indispensable tool in protecting the people’s right to know.”<sup>173</sup>

Despite the professed importance of FOIA and a Presidential Directive aimed at increasing agency compliance,<sup>174</sup> individuals making FOIA requests are waiting longer to receive information. As of 2005, FOIA performance was at its lowest since reporting began in 1998.<sup>175</sup> Reports show that, in 2005, 31% of requests had not been filled by the end of the year—138% higher than in 1998.<sup>176</sup> Additionally, agencies are denying more requests than ever, and the number of individuals receiving the information they requested fell by 31%.<sup>177</sup>

As a result of the lackluster response to FOIA requests, Senators Patrick Leahy and John Cornyn introduced the Open Government Act of 2007 in an attempt to plug some of the procedural holes in FOIA.<sup>178</sup> The bill was quickly approved by Congress and signed into law as Public Law No. 110-175.<sup>179</sup> The bill’s passage reflects a growing discontent with the difficulty of the public in receiving responses to their FOIA requests and the frequent rejection of valid requests. President Bush signed the bill toughening FOIA, making it the first attempt aimed at strengthening public access in over a decade.<sup>180</sup> Thus, the *Trentadue* decision, with its pro-disclosure slant, also reflects a trend back towards the original purpose of the FOIA.

#### *B. The Trentadue Court Returns to the Heart of the Freedom of Information Act*

The Tenth Circuit took an important step towards a policy of disclosure and transparent government. Through a series of poorly reasoned decisions, courts had chipped away at Exemption Five until even summaries of facts proved to

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172. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975).

173. *Open Government: Reinvigorating the Freedom of Information Act: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary).

174. Exec. Order No. 13,392, 29 C.F.R. § 2702.3 (2005).

175. THE WAITING GAME: FOIA PERFORMANCE HITS NEW LOWS 1 (2007), available at [http://www.cjog.net/documents/CX\\_\\_FOIA\\_report\\_Part\\_1.pdf](http://www.cjog.net/documents/CX__FOIA_report_Part_1.pdf).

176. *Id.*

177. *Id.* at 2.

178. OPEN Government Act of 2007, Pub. L. No. 110-17, 121 Stat. 2524 (to be codified at 5 U.S.C. § 552 (2006)).

179. *Id.*

180. *FOIA Makeover Signed into Law by Bush, Giving Greater Access*, LONG BEACH PRESS TELEGRAM, Jan. 1, 2008, at 6A.

be exempt.<sup>181</sup> Such an interpretation of Exemption Five would exclude nearly all information that an individual might seek so long as it is peripherally related to a deliberative process. The *Trentadue* court outright rejected such a broad interpretation and appropriately used the *Mink* fact or opinion test, allowing for a very narrow exception that would allow some factual information to be withheld only if it dangerously exposed the deliberative process.<sup>182</sup> Even Judge Pregerson, who drafted a concurring opinion in *National Wildlife Federation* notes that, “[u]nder the majority’s so-called ‘functional’ test, FOIA is swallowed up by exemption 5, a result contrary to the plain purpose of the Act.”<sup>183</sup> By rejecting the functional test, the Tenth Circuit remains true to the purpose of FOIA.

The Justice Department cites three main reasons for the deliberative process privilege: to encourage frank discussion on matters of policies between subordinates and superiors, to protect agencies from premature disclosure of policy, and “to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action.”<sup>184</sup> The Ninth Circuit’s functional test widely overestimates the chilling effect that certain information would have upon governmental agencies. The Tenth Circuit has found the appropriate measuring stick for determining whether information reveals the deliberative process privilege—when the information would “so expose the deliberative process within an agency that it must be deemed exempted.”<sup>185</sup> Because the Tenth Circuit’s rule appropriately values disclosure over non-disclosure, its decision more accurately reflects Congress’ interest in the FOIA. It is not merely that information might expose some aspects of the deliberative process, but that it would expose the deliberative process to a degree greater than the need for government transparency.

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181. *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (stating it is permissible for courts to “shelter factual summaries that were written to assist the making of a discretionary decision,” at least where “the selection of the facts thought to be relevant clearly involves ‘the formulation or exercise of . . . policy-oriented *judgment*’ or ‘the process by which *policy* is formulated.” (quoting *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992))).

182. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1228 (10th Cir. 2007).

183. *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1124 (9th Cir. 1988) (Pregerson, J., concurring).

184. MARK BRIDGES & TIFFANY VILLAGER, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 71 (William S. Hein & Co. 1992); U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 14 (2007), available at [http://www.usdoj.gov/oip/foia\\_guide07.htm](http://www.usdoj.gov/oip/foia_guide07.htm).

185. *Trentadue*, 501 F.3d at 1228 (quoting *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)).

Even more important to a fair administration of the FOIA than the Tenth Circuit's rule is its application of the rule to the documents at hand. The court examined each document specifically and dissected each sentence in order to disclose every piece of non-exempt information.<sup>186</sup> Although the district court examined the documents and found that every factual statement was "inextricably intertwined" with the deliberative material, its response can only be evidence of judicial inefficiency or a misunderstanding of "segregable."<sup>187</sup> In contrast, the Tenth Circuit found that non-exempt factual information could easily be excised from the surrounding deliberative material.<sup>188</sup>

For the Trentadue family, this newly-ordered disclosable information could shed some light on the mysterious circumstances surrounding Kenneth's death and the alleged government cover-up that followed. While courts could easily examine documents in a vacuum, leading to much easier denials and less desire to parcel out disclosable information, the importance of each piece of information that can now be disclosed should not be underestimated. Even minor factual data could expose a conspiracy that stretches through several governmental agencies.

### *C. The Supreme Court Needs to Provide Further Guidance to Lower Courts*

The last time that the Supreme Court addressed Exemption Five of the FOIA, it established the fact or opinion test in *Mink*. Since that test emerged, the circuit courts have split on whether or not to strictly apply the test or to stretch the fact or opinion test to include facts that might have some bearing on the deliberative process. Without clearer guidance on how to interpret Exemption Five's deliberative process privilege, lower courts will continue to adopt divergent views on how to decide whether a factual document reveals the deliberative process and should be exempt. The difference between the Ninth Circuit's functional test and the Tenth Circuit's interpretation of the *Mink* opinion will produce widely variable decisions regarding whether information can be withheld as exempt. Under the functional test, most of Fine's letter—which the Tenth Circuit ordered to be turned over—could be withheld for exposing the deliberative process of the IC. Even more confusion lies within jurisdictions that do not yet have circuit court decisions to guide them. Individuals making FOIA requests will pay a high price for the uncertainty among the circuits, including increased rejections, longer wait times, increased litigation, and a wide disparity of decisions on similar cases.

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186. *Id.* at 1229-32.

187. *Id.* at 1230.

188. *Id.*

Additionally, increased litigation and appellate reviews will cause undue delays in the procurement of documents. Pending appeal, FOIA defendants can seek injunctions allowing them to withhold documents they have been ordered to overturn. Appeals can be lengthy, leaving FOIA plaintiffs in limbo, waiting for their information after winning in district court. For instance, in *Trentadue*, the IC similarly requested that it not be forced to overturn Fine's letter until certiorari had been granted or rejected by the Supreme Court.<sup>189</sup> Jesse Trentadue did not end up receiving the documents that the Tenth Circuit ordered to be handed over until seven months after the opinion had been filed.

#### *VI. Conclusion*

Democracy requires transparency in government. True transparency, as should be afforded by the FOIA, provides a check against possible corruption and waste in the government. While government officials can always be counted on to tout their exploits and successes, mistakes and dishonesty can often only be revealed through FOIA requests. The *Trentadue* case demonstrates the need to reveal government secrets to expose the possible cover-up of a murder.

The *Trentadue* case returned to the ultimate goal of the FOIA: disclosure and transparency with appropriate restraints. Instead of embracing the functional test put forth by the Ninth Circuit, the Tenth Circuit correctly interpreted Exemption Five narrowly and required the IC to turn over documents containing factual information.

*Amanda Marie Swain*

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189. Geoffrey Fattah, *Cover-Up Case Stalls with Appeal to the U.S. Supreme Court*, DESERET MORNING NEWS, Nov. 27, 2007, available at <http://deseretnews.com/dn/view/0,5143,695231222,00.html>.