Briefly
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April 2021 ■ Catherine A. Mullhaupt, Chair ■ Helen Lizzie Mills & Jacob P. Fox, Editors

2021 Summer Conference Update

As many of you may already be aware, our Joint GLS/MAMA 2021 Summer Conference will not take place this summer. We are hoping to offer a limited virtual educational conference later this summer and will have more details coming soon.

In the meantime, we do have an opportunity to utilize rooms previously reserved at our group rate with the **Grand Hotel** on **Mackinac Island** during the previously scheduled conference weekend from **June 17 to June 20, 2021**. While only limited rooms are available on Thursday, June 17th, a block of 70 rooms are available for each evening of Friday, June 18th and Saturday, June 19th. The Grand Hotel will also provide our group rate to any friends and family of GLS or MAMA members using the form at this link! To reserve a room, please complete the Reservation Form provided by the Grand Hotel and return to the hotel no later than May 18, 2021. The available rooms will be released after May 18, 2021 and no reservations at our group rate will thereafter be available. Please note also, a two-night minimum stay is still required, but the room cost includes breakfast and dinner each day.

For those able to take a break from our pandemic isolation, please consider joining friends from GLS and MAMA on the island for some socially distanced time together. While formal programing cannot take place this year, GLS and MAMA leadership will set aside some time for limited conference planning with members able to attend. Most importantly, we expect our outdoor *Bocce Ball* tournament to be available!

DATE:	Arrive: Friday, June 18, 2021; Depart: Sunday, June 20, 2021
EVENT:	GLS/MAMA Summer Informal Meeting – Grand Hotel, Mackinac Island, MI
TIME:	Meeting and Bocce Ball times - To Be Determined

RESERVATIONS DUE BY: MAY 18, 2021

Room reservations are being handled directly by the Grand Hotel with the form at this link. However, if you can attend, please let Helen "Lizzie" Mills or Vincent L. Duckworth know with a quick email to enable them to better plan for informal events. Please also let us know if you have any questions.

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U.S. Supreme Court Holds Draft Opinions Reflecting Final Policy are Protected from FOIA Disclosure Under Deliberative Process Privilege

By Caroline B. Giordano and Sonal Hope Mithani, Miller, Canfield, Paddock and Stone, PLC

In a 7-2 decision released on March 4, 2021, the United States Supreme Court held in *United States Fish and Wildlife Services, et al. v. Sierra Club, Inc.* (Dkt. No. 19-547) that draft opinions prepared by a federal agency were exempt from public disclosure under the federal Freedom of Information Act's ("FOIA") exception for documents subject to the deliberative process privilege. While it is unclear how much of this opinion Michigan courts might adopt, local governments faced with FOIA requests for "deliberative" internal records should be aware of the decision because our state judiciary has previously relied on federal law to construe the deliberative process privilege.

Under federal law, the deliberative process privilege falls under the FOIA exception for "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 order to receive protection under the deliberative process privilege, documents must be "deliberative" in nature – meaning they were prepared to help the agency formulate its position – and they must be "predecisional" – meaning they were generated before the agency's final decision on a matter. Similarly, the deliberative process exception in Michigan's FOIA statute protects "communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." MCL §15.243(m).

The Supreme Court's recent decision in *U.S. Fish and Wildlife* concerned the Sierra Club's FOIA request for records related to the agency's' "draft biological opinions" about whether a 2013 proposed EPA rule regarding water structures used to cool industrial equipment would jeopardize endangered species. Issuance of a so-called "jeopardy biological opinion" could require the EPA to either go back to the drawing board with its proposed rule or seek an exemption.

Staff members at the agency prepared draft biological opinions concluding that the EPA's 2013 proposed rule was indeed likely to jeopardize certain species. However, the drafts were neither approved by high-up decisionmakers at the agency nor sent to the EPA for review. Instead, the agency shelved the drafts and continued to consult with the EPA. As a result of these discussions, the EPA ultimately sent the agency a new proposed rule in 2014 that significantly differed from the 2013 version. The agency concluded that the new proposed rule was unlikely to harm endangered species and issued a joint final "no jeopardy" biological opinion. The EPA issued its final rule the same day.

When the Sierra Club requested the draft biological opinions regarding the EPA's 2013 proposed rule under FOIA, the agency invoked the deliberative process privilege to withhold the opinions. Sierra Club sued the agency to obtain these documents. Eventually, the Ninth Circuit ordered the agency to disclose the opinions, holding that the deliberative process privilege did not apply to these documents because even though they were labeled "drafts," the documents represented the agency's final opinion regarding the 2013 proposed Rule.

Reversing the Ninth Circuit's decision in a majority opinion written by Justice Amy Coney Barrett, the Supreme Court held that the draft biological opinions were protected by the deliberative process privilege even if the drafts reflected the agency's last views about a proposal. (Slip op. at 5-11.) The Court emphasized that the pur-

pose of the deliberative process privilege is to improve agency decision-making by encouraging candor during deliberations and blunting the chilling effect that could accompany the possibility of the agency's pre-decisional deliberations becoming public. (*Id*. at 5.) In the Court's view, the draft opinions were protected from disclosure because: (a) they reflected a preliminary view rather than a final decision about the EPA's proposed 2013 rule; (b) they were subject to change; and (c) they had no direct legal consequences. (*Id*. at 7-11.) The Court also made clear that "a document is not final solely because nothing else follows it," noting that many proposals, like the EPA proposed 2013 rule, may simply "die on the vine." (*Id*. at 6.) The crucial question to consider when assessing whether a document is "final" (and therefore outside the scope of the deliberative process privilege) is "whether it communicates a policy on which the agency has settled," or whether, by contrast, it "leaves agency decisionmakers free to change their minds." (*Id*. at 6-7.) The Court's decision effectively expands the scope of agency records that may qualify for deliberative process protection under FOIA.

Justice Breyer wrote a dissenting opinion joined by Justice Sotomayor. The dissent noted that a draft biological opinion would not normally be protected by the deliberative process privilege; indeed, the word "draft" in this context was somewhat misleading. (Dissent at 1.) According to the dissent, the evidence showed that draft biological opinions functioned similarly to "final" biological opinions because they typically informed the EPA of the lower agency's conclusions on a proposed rule and triggered the EPA's process of deciding how to handle those conclusions. (*Id*. at 4.) Further, once disclosed to the EPA, draft biological opinions had legal consequences because they placed some constraints on the EPA's available options for proceeding with its proposed rule. (*Id*. at 5-6.) The dissent also noted that disclosure of draft biological opinions under FOIA was unlikely to promote a "chilling effect" because the evaluating agencies had a long history of disclosing draft biological opinions in some contexts. (*Id*. at 4.) Justice Breyer would thus have focused less on the "draft" designation and remanded to determine "just how much work was left to be done" to finalize the particular draft opinions at issue in this case. (*Id*. at 6.)

Like many cases analyzing FOIA exemptions, *U.S. Fish and Wildlife* considered the tension between two competing interests: on the one hand, the public interest in promoting transparency in governmental decision-making; and, on the other hand, the government's interest in maintaining its ability to freely evaluate all options on a given issue without fear that candid communications will be subject to public scrutiny. While it is difficult to generalize about the Court's approach to FOIA exemptions, the Court's decision affirming the government's ability to withhold records protected by the deliberative process privilege in *U.S. Fish and Wildlife* is consistent with its opinion upholding the government's non-disclosure of information in another recent FOIA exemption case, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 204 L. Ed. 2d 742 (2019). In *Food Marketing Institute*, the Court held that the U.S. Department of Agriculture could properly withhold national food-stamp program ("SNAP") redemption data received from individual grocery retailers under FOIA's exemption for "commercial or financial information obtained from a person [that is] privileged or confidential." *Food Mktg. Inst*., 139 S. Ct. at 2360-61, *citing* 5 U.S.C. § 552(b)(4). The Court reached this decision by consulting dictionary definitions of "confidential" contemporaneous with FOIA's enactment, concluding that where commercial information is customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is exempt from FOIA under § 552(b)(4). *Id*. at 2262-63. In so holding, the Court abrogated an existing test predicating the § 552(b)(4) exemption in part on whether disclosure of the information would cause "substantial competitive harm" to the information's source. Taken together, *U.S. Fish and Wildlife* and *Food Marketing Institute* suggest that the current Court is willing to construe FOIA's exemptions more expansively to protect certain types of private or confidential records from disclosure despite the statute's overriding goal of ensuring governmental accountability through transparency.

What does this decision mean for local governments moving forward? The Court's opinion in *U.S. Fish and Wildlife* reaffirms the viability of the deliberative process privilege as a valid FOIA exemption for "pre-decisional," draft documents prepared by a federal agency. As long as the draft documents do not reflect final policies on

which the agency has actually settled, those documents are likely protected.

Less clear is whether state courts are likely to apply the *U.S. Fish and Wildlife* decision outside matters in which local governments withhold documents based on deliberative process privilege. In Michigan, some case law suggests that state courts will be receptive to federal courts' construction of the deliberative process privilege when reviewing FOIA matters. In general, the Michigan Court of Appeals has "adopted the deliberative-process privilege recognized under federal law," and cited federal deliberative process law as persuasive authority. *Truel v. City of Dearborn,* 291 Mich. App. 125, 135; 804 N.W.2d 744, 751 (2010); *see also Ostoin v. Waterford Twp. Police Dep't,* 189 Mich. App. 334, 337-38; 471 N.W .2d 666, 668 (1991). Because Michigan does not have a particularly comprehensive body of precedent addressing deliberative process, the U.S. Supreme Court's opinion squarely addressing the application of the privilege may carry considerable weight in discovery disputes or FOIA litigation against governmental entities.

On the other hand, the Michigan Court of Appeals has noted that the deliberative process exception identified in Michigan's FOIA (MCL §15.243(m)) is narrower than its federal counterpart. Where the "federal exemption contains an implicit presumption that the value of promoting frank communications is such that it outweighs the public's right to know," the analogous exception in Michigan's FOIA states that it "does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." *See Herald Co. v. E. Michigan Univ. Bd. of Regents*, 265 Mich. App. 185, 197–98; 693 N.W.2d 850, 857–58 (2005), *citing* MCL §15.243(m)). The Michigan Supreme Court also continues to generally read the Michigan FOIA broadly in favor of disclosure. *See, e.g., Bisio v. City of Vill. of Clarkston*, 506 Mich. 37, 41; 954 N.W.2d 95 (2020). Whether Michigan courts will look to the *U.S. Fish and Wildlife* decision for guidance in rulings on deliberative process claims will likely depend on fact-specific inquiries regarding the nature of the records at issue. In addition, Michigan courts may treat the deliberative process analysis differently depending on whether a claim of deliberative process occurs in the context of a FOIA lawsuit (in which the court would be required to apply the statutory balancing test) or in the context of general civil discovery (in which the court could rely on a broader construction of deliberative process privilege developed in common law).

About the Authors

Caroline B. Giordano *is a principal at Miller, Canfield, Paddock and Stone, PLC, where she represents a wide variety of commercial and governmental clients in state and federal courts. Caroline has extensive experience working on multimillion-dollar cases representing governmental entities at both the trial and appellate level. Caroline is active in Miller Canfield's class action defense practice, and she has also worked on numerous matters involving business torts, physician reimbursement claims, breach of contract litigation, non-compete litigation, and trade secret disputes.*

Soni Mithani *is a Senior Principal at Miller, Canfield, Paddock and Stone, P.L.C., where she also serves as the firm's General Counsel and the Resident Director of the Ann Arbor office. Soni has represented scores of commercial and governmental clients as lead trial and appellate counsel over the past 25 years, and has more than a decade of experience defending municipalities against constitutional claims ranging from $10-150 million in alleged value. Soni was honored by Michigan Lawyers Weekly as one of its Women in the Law for 2017 and named as one of Crain's Notable Women in the Law in 2019. She is the current Secretary-Treasurer of the State Bar's Government Law Section Council and serves as a member of the State Bar's Standing Committee on Character and Fitness. She is also a Fellow of the American Bar Foundation.*

Ordinance Enforcement Against the *DEAD*

By Brien Heckman, Bauckham, Sparks, Thall, Seeber & Kaufman, PC

There are few times a municipal attorney will find themselves in Probate Court. The most common appearance may be on the docket as a decedent. As such, municipal attorneys often overlook the Probate Court when trying to enforce ordinances against deceased property owners.

A municipality faced with a blighted property should consider appointment of the County Public Administrator (hereinafter "Public Administrator") pursuant to Public Act 194 of 1947. Upon appointment, the Public Administrator serves as the Personal Representative of the decedent's estate. The procedure discussed below is a win for the municipality, as the municipality can submit a claim and recoup their costs, including attorney fees, to open the estate. It is a win for the heirs of the deceased property owner as the heirs may receive money from the estate. And, it is a win for the Public Administrator as the Public Administrator is paid for their services to administer the Estate.

Further, the process is relatively simple. The municipal attorney merely prepares a few Supreme Court Administrative Office (SCAO) forms and appears at one court hearing. The Public Administrator will handle the rest, including searching for the family of the decedent.

The main question becomes whether the real property can be salvaged and sold. If the answer is yes, then a municipality should consider appointing of a Public Administrator to handle the procedure.

Here is an example. A residential property with a deceased owner has trash in the yard, and a hole in the roof. The Fair Market Value of the property is $50,000 (SEV $25,000). The property is two years in arrears on taxes ($5,500). The trash removal with dumpster will cost around $1,000. The roof repair will cost around $9,000. The cost to repair water damage and insulation is around $8,500. The Public Administrator fee to handle this Estate would be approximately $5,000. The total amount needed at sale for the Public Administrator to break even would be $29,000. If the property sells at or near $50,000 the result is a $21,000 surplus.

Where – as in the above example – one expects a surplus of funds, it makes sense to contact the Public Administrator and ask if they would be willing to accept the appointment. The alternative is to allow the property to sit vacant and in disrepair for another two years. The water damage will continue to worsen, and by the time the property ends up in the tax auction, it will have to be gutted resulting in fewer buyers that want to take on that massive project. If an unsuspecting buyer at the tax auction is unable to pay for all of the necessary repairs, the property may thereafter continue to sit vacant, and may once again end up in the next tax auction three years later. And so on, and so forth ad nauseam.

The municipality might demolish the structure during that period and assess the costs against the property. However, demolition is not always a good idea. If the property does not sell at tax auction, under the General Property Tax Act, Public Act 206 of 1893, the County Treasurer may charge the municipality for the money paid out of the delinquent tax revolving fund.

In deciding whether to proceed with the appointment of the Public Administrator, an attorney should speak with two people: the municipality's building official and the Public Administrator. The building official may be able to provide some guidance on which homes can be repaired and which cannot. And, the Public Administrator should confirm they are willing to take on the appointment.

While there has been recent legislation, 2017 HB 4821 and 2017 HB 4822, which purported to burden Public Administrators, there has been little change in the Public Administrators calculation as to whether to accept an appointment. The most burdensome of these amendments, came from 2017 HB 4821, and amended MCL

700.3414. That statute now requires a Public Administrator seeking appointment who has knowledge that real property of the Estate is delinquent on taxes or is subject to mortgage foreclosure, to provide additional notice under penalty of misdemeanor.

In sum, if a property can be repaired and sold, then municipalities should consider the appointment of a Public Administrator to handle blighted properties held by decedents. The costs to open the Estate will be payable out of the Estate, the family of the deceased may receive some money from any surplus funds after sale, and the Public Administrator will handle all the details that must otherwise be handled by the municipality.

About the Author

Brien Heckman *is a senior associate with Bauckham Sparks. He represents and counsels public entities on various aspects of municipal law including the Zoning Enabling Act, Freedom of Information Act, Opening Meetings Act, and Ordinance formulation. He acts as general counsel and prosecuting attorney for municipalities in southwest Michigan. He additionally serves as a Special Assistant Attorney General for the Corporate Oversite Division of the Attorney General's Office.*