

DC Circ.'s Exploratory Data Ruling Is A Win For Transparency

By **Lawrence Ebner and David Kanter** (October 5, 2021)

When scientists employed by universities, nonprofit institutes or corporations publish scientific studies, they routinely make their underlying research data available to peer reviewers and anyone else who is interested.

A recent U.S. Court of Appeals for the District of Columbia Circuit decision, *Pavement Coatings Technology Council v. United States Geological Survey*,^[1] confirms that federal government scientists should be no different.

They cannot shield their published work from professional, industry or public criticism by invoking Freedom of Information Act Exemption 5 — the deliberative process privilege — as a reason for refusing to disclose their exploratory research data.

Exploratory Data

Federal departments and agencies employ tens of thousands of scientists.

Every one of them uses the centuries-old scientific method when engaged in scientific research.

According to the Encyclopedia Britannica, the scientific method "is the technique used in the construction and testing of a scientific hypothesis ... a researcher develops a hypothesis, tests it through various means, and then modifies the hypothesis on the basis of the outcome of the tests and experiments."^[2]

Computer modeling has become a common way that scientists use the scientific method. They test hypotheses by constructing complex computer models of physical, biological or other systems, and then repeatedly run the model with various combinations of inputs to see how they affect the model's outputs.

The question of whether federal government scientists' computer model runs are exploratory data exempt from disclosure under the FOIA Exemption 5 deliberative process privilege was at the heart of the *Pavement Coatings* case.

This seemingly esoteric question actually has far-reaching implications for all federal government scientists, and for any company whose products or services may be affected by federal government research.

The USGS Urban Lakes Study

In the *Pavement Coatings* case, U.S. Geological Survey, or USGS, scientists obtained the agency's authorization to publish a modeling study that they designed and conducted to determine whether refined tar sealant, also known as sealcoat — a coal tar-based product used to prolong the service lives of asphalt surfaces such as residential driveways, parking lots and airport runways — is the principal source of environmentally ubiquitous, polycyclic aromatic hydrocarbons, or PAHs, in urban lakes.



Lawrence Ebner



David Kanter

The study, published in 2010 with the USGS imprimatur,[3] indicated that the study authors had performed more than 200 computer model runs. But based on what the authors claimed were their four best modeling scenarios, they concluded that refined tar sealant accounts for at least 90% of the PAHs in urban watersheds.

Relying primarily on the USGS urban lakes study, and on USGS' thinly veiled regulatory advocacy,[4] an increasing number of state and local governments have banned use of refined tar sealant.

FOIA Request and Response

In 2011, the Pavement Coatings Technology Council, which represents the producers and distributors of refined tar sealant, filed a FOIA request seeking, among other documents, printouts of the input and output data for the 200 computer model runs that were not analyzed or discussed in the published urban lakes study.

PCTC needed these data to determine whether USGS scientists had manipulated their computer model until they found input combinations — what the published study describes as the four best modeling scenarios — that supported their preconceived identification of refined tar sealant as the predominant source of urban PAHs.

More specifically, PCTC required the data not only to attempt to replicate the study conducted by USGS — an essential element in the scientific method — but also to determine whether USGS had cherry-picked the model runs used in its study in order to reach a desired conclusion.

In response, USGS dumped thousands of pages of useless raw data on PCTC, but refused to produce the 200 urban lakes computer model runs, claiming that they represent exploratory analysis of data and fall within FOIA Exemption 5's deliberative process privilege.

According to USGS, the withheld model runs were covered by this privilege because releasing them "would inhibit the ability [of USGS scientists] to freely explore and analyze data without concern for external criticism," and would "confuse the public on the approach and conclusions of the final published study."

FOIA Litigation

In 2014 PCTC sued USGS in the U.S. District Court for the District of Columbia. The parties filed cross motions for summary judgment. After sitting on the case for three years, U.S. District Judge Ketanji Brown Jackson, subsequently elevated to the D.C. Circuit, finally issued a ruling, granting summary judgment to USGS.[5]

PCTC appealed to the D.C. Circuit. Following briefing and oral argument, the court of appeals issued its decision in May 2021. In pertinent part, the court agreed with PCTC and held that USGS has not sustained its burden of demonstrating that the 200 withheld model runs qualify for Exemption 5's deliberative process privilege.

The opinion explains[6] that Exemption 5 "covers deliberative, pre-decisional communications within the Executive Branch ... and was intended to protect not simply deliberative material, but also the deliberative process of agencies." [7] "To qualify for withholding, information must be both pre-decisional and deliberative." [8]

The D.C. Circuit's panel opinion, authored by U.S. Circuit Judge Robert L. Wilkins, holds that the withheld model runs are neither predecisional nor deliberative.

Not Predecisional

The court found that USGS "failed to introduce any evidence establishing what role the requested model runs played in its decision to publish the urban lakes study." [9]

Although USGS argued that the relevant decision for Exemption 5 deliberative process privilege purposes was USGS's decision on whether to authorize publication of the study, the court of appeals was "faced with a record devoid of evidence that any decision-maker at USGS considered the discarded model runs in determining whether and in what form to publish the urban lakes study." [10]

Not Deliberative

The deliberative prong of the deliberative process privilege "focuse[s] on whether disclosure of the requested material would tend to discourage candid discussion within an agency." [11]

Based on the affidavits provided by USGS, the court found that "USGS failed to establish how or why disclosure of the model runs would chill scientists' use of exploratory model runs in the future or impact the accuracy or efficiency of the Survey's operations. The agency's affidavits contain no explicit statement that disclosure will harm the agency's decision-making." [12]

As to "claims that releasing the model runs will enable criticism of USGS," the court emphasized that "criticism is not a recognized harm against which the deliberative process privilege is intended to protect." [13] Further, USGS "does not explain how, if these model runs are disclosed, scientists will cease to conduct model runs in the future or do them differently." [14]

Conclusion

USGS, represented by the U.S. Department of Justice, contended that the working thoughts of a scientist, reflected by computer modeling exploratory analyses, fall within the deliberative process privilege.

As the D.C. Circuit confirmed in its Pavement Coatings decision, however, such intellectual exercises, i.e., the scientific method's trial-and-error process, are not legal or policy deliberations, which is what Congress intended to protect when it enacted Exemption 5.

Equally important, the Pavement Coatings decision makes it clear that federal government scientists are no different than nongovernmental scientists when it comes to making a published study's underlying data available to interested parties, including for the purpose of replicating a study to assess its validity and credibility.

Like every other published study, a federal agency's published studies should not be immune from criticism. Indeed, because government-sponsored studies often influence federal, state and local policies, as they have in the case of refined tar sealant, they should be subjected to heightened scrutiny.

The Pavement Coatings decision advances this objective by precluding federal government

scientists from hiding behind Exemption 5. Their ethical obligations should be no different from those of private or nonprofit sector scientists.

As a practical matter, the Pavement Coatings decision will deter government agencies from attempting to manipulate computer modeling in a way that supports individuals' preconceived results regulatory agendas.

Although the rigging of federal government studies is presumably rare, it can have undue influence on federal, state and local decisionmakers. This is exactly why FOIA was enacted — to shed light on Executive Branch activity and make government personnel, including government scientists, accountable.

For this reason, when a lawyer is confronted with a federal government-conducted scientific study that is being used to disparage their client's products or services, they should not hesitate to file a FOIA request to obtain all relevant underlying data, including all computer model runs or other exploratory data.

Lawrence S. Ebner is the founder of Capital Appellate Advocacy PLLC.

David A. Kanter is a partner at Swanson Martin & Bell LLP.

Disclosure: Ebner and Kanter represented the Pavement Coatings Technology Council in the FOIA litigation discussed in this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Pavement Coatings Technology Council v. United States Geological Survey, 995 F.3d 1014 (D.C. Cir. 2021)

[2] Encyclopedia Britannica, Scientific Method (Jan. 16, 2020), available at <https://www.britannica.com/science/scientific-method>.

[3] Van Metre, P.C., and Mahler, B.J. 2010, Contribution of PAHs from coal tar pavement sealcoat and other sources to 40 U.S. Lakes, *Sci. Total Environ.*, 49: 334-344.

[4] See, e.g., USGS, Coal-Tar-Based Pavement Sealcoat, PAHs, and Environmental Health, available at <https://tinyurl.com/rrz6pt8z>; USGS Fact Sheet 2011–3011 (Feb. 2011), Coal-Tar-Based Pavement Sealcoat, Polycyclic Aromatic Hydrocarbons (PAHs), and Environmental Health, available at <https://tinyurl.com/ntk4kw2w>.

[5] 436 F. Supp. 3rd 115 (D.D.C. 2019).

[6] 5 U.S.C. § 552(b)(5).

[7] 995 F.3d at 1021.

[8] *Id.*

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id. at 1023.