



**William Herrmann**  
Executive Vice President, Chief Legal and Human Resources Officer

August 14, 2025

**Via email: [liam.blank@gmail.com](mailto:liam.blank@gmail.com)**

Liam Blank  
Chair, Transportation & Infrastructure Committee  
The City Club of New York

**Re: Freedom of Information Act Appeal of Freedom of Information Act Request #20-FOI-00443**

Dear Liam Blank:

This letter is in response to your appeal of your Freedom of Information Act ("FOIA" or the "Act") request. Your appeal was received via email on July 15, 2025. I have reviewed your appeal and for the reasons set forth herein, I uphold the decision of the FOIA Officer to deny your request and appeal.

### **Background**

On July 1, 2025, you submitted a request to the Amtrak FOIA Office seeking records pertaining to the Penn Station Transformation Project. The specific request sought records from four categories including: (1) leadership directives; (2) the P3 financial consultant RFQ; (3) the 2024 Doubling Trans-Hudson Capacity Feasibility Study; and (4) Stakeholder Meetings. As it pertains to Item 3, you requested: "All preliminary drafts, internal markups, and, most critically, all underlying operational modeling data, simulation inputs/outputs, and analyses used to evaluate the through-running alternatives. This includes all data related to train dwell times and reverse-peaks service constraints."<sup>1</sup>

On July 10, 2025, in response to your FOIA request, Amtrak FOIA Manager Rebecca Conner provided links to several publicly available reports. As it pertains to Item No. 3, Ms. Conner provided a link to the final version of the Feasibility Study but advised that all internal drafts and underlying data are being withheld under FOIA Exemption 5's deliberative process privilege.

### **The Basis for Your Appeal**

On July 15, 2025, you submitted an appeal focused on Item No. 3 which sought the draft reports and all underlying operational modeling data, simulation inputs/outputs and analyses used to evaluate through-running alternatives in October 2024 "Doubling Trans-Hudson Capacity"

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<sup>1</sup> Your appeal only concerned Item No 3. Accordingly, this decision will not address the remaining requests.



Feasibility Study. Your appeal asserts that: (1) Amtrak improperly withheld purely factual and scientific data; (2) Amtrak failed to comply with its statutory obligation to release reasonably segregable factual information and (3) There is a compelling public interest in government transparency.

As for the underlying scientific data, you assert that those items are calculated data points, not policy judgments and, as such, factual materials embedded within deliberative documents cannot be held under Exemption 5. You further state that Amtrak cannot assert a blanket withholding of Exemption 5, and that it is required to identify which portions of the requested materials contain purely factual data.

As a form of relief, you are requesting Amtrak to: (1) Reverse the initial determination for Item 3 for all nonexempt factual records; (2) Conduct a proper “segregability analysis” to identify and release all factual data files that may contain both factual and deliberative material; (3) provide records in native electronic format; and (4) provide a detailed Vaughn Index describing each withheld document with sufficient specificity to permit meaningful review.

### **Discussion**

In response to Item 3 of your FOIA request, the FOIA office produced the final report concerning the New York Penn Station Capacity Expansion Feasibility Study. The Study was co-sponsored by Amtrak, MTA and NJ Transit and prepared by WSP/FXC, a consultant team. The purpose of the study was to consider alternatives to double the trans-Hudson train capacity of New York Penn Station. Alternatives included adding capacity within the existing station or expanding the station boundaries. In reviewing the FOIA file, the Office withheld 16 draft versions of the study and comment logs containing various revisions and comments for each draft. Several drafts contained visual markups and comments.

Although the drafts have undergone substantial revisions, the most notable changes to the drafts were located in the Appendix section which contained supporting documentation for the study. Specifically, the engineer drawings that depicted the proposed track alignments and expansions went through several modifications before the final product and those drafts were marked as “progress print deliberative draft and confidential.” The appendix in the earlier draft versions contained a cost estimate for an alternative that was no longer being considered by the project team. Finally, the search did not reveal any simulations or modeling data in Amtrak’s possession, and the dwell times were based on publicly available data.

After reviewing the FOIA regulations, the applicable caselaw and the basis for your appeal, I have concluded that Exemption 5 was appropriately applied in withholding the draft versions of the studies and have concluded that the drafts did not contain any segregable portions.

### **1. Records Withheld Under Exemption 5**

Exemption 5 of the FOIA protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . .” 5 U.S.C. § 552(b)(5) (2000). This exemption protects, among other things, documents that are shielded pursuant the deliberative process or



executive privilege. See Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 858 (D.C. Cir. 1980). The deliberative process privilege of Exemption 5 serves a number of purposes including the protection of: (1) “creative debate and candid consideration of alternatives within an agency”, (2) “the public from confusion that would result from premature exposure of discussions occurring before the policies affecting it had actually been settled upon” and (3) “the integrity of the decision-making process itself by confirming that officials would be judged by what they decided not for matters they considered before making up their minds.” Petroleum Information Corp. v. U.S. Dept. of the Interior, 976 F.2d 1429, 1434 n. 5 (D.C. Cir. 1992) (internal quotation omitted).

For the privilege to be invoked, the communication must be both pre-decisional and deliberative. Documents are “predecisional” if they were generated before the agency’s final decision on the matter, and they are “deliberative” if they were prepared to help the agency formulate its position. United States Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 268 (2021). Proposed drafts of a non-final agency decision that are still undergoing review, debate, and editing are the type of deliberative work in progress that falls at the core of the deliberative process privilege. *Id.* As stated in Dudman Communications Corp. v. Dep’t, of the Air Force, 815 F.2d 1565,1569 (1987):

Disclosure of editorial judgments - for example, decisions to insert or delete material or to change a draft's focus or emphasis - would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work . . . An author would hesitate to advance unorthodox approaches if he knew that the agency's rejection of an approach could become public knowledge . . . . Editors would place pressure on authors to write drafts that carefully to the party line.

It is true that factual information is generally not protected by the deliberative process privilege and any non-privileged material that is "reasonably segregable" from the deliberative portions of records must be produced. Petroleum Info. Corp. v. Dep’t of the Interior, 491 F.2d 63,71 (D.C. Cir 1974); see also Reliant Energy Power Generation, Inc. v. FERC, 520 F. Supp. 2d 194, 208 (D.C. Dist. Ct. 2007). However, “the distinction between the facts and opinions is not necessarily dispositive; purely factual material is protected by Exemption 5 if its disclosure “may so expose the deliberative process within an agency.” *Id.* (quoting Mead Data Cent. v. Dep’t of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)). In all, one must distinguish between "raw facts with informational value in their own rights" and facts that "serve primarily to reveal the 'evaluative' process by which different members of the decision-making chain arrive at their conclusions and what those pre-decisional conclusions are. See Mead Data Cent., Inc. v. Dep't of the Air Force, 575 F.2d 932, 935 (D.C. Cir. 1978) (holding that cost comparisons were deliberative because they were directed at a particular decision.) Further, even if data plugged into a model is itself purely factual, the selection and calibration of data is part of the deliberative process. See Goodrich Corp. v. United States EPA, 593 F. Supp. 2d 184, 189 (D.C. District Ct. 2009) (citing Montrose Chemical Corp. v. Train, 491 F.2d 63, 71, (D.C. Cir. 1974)).

Here, all versions of the drafts and comment logs are both pre-decisional and deliberative. A review of the file clearly reveals that the drafts were pre-decisional as they were undergoing significant editorial changes with preliminary data and other considerations that differ from the



final report. The draft versions are also deliberate as it contains thoughts, analysis, and key inputs as to how Amtrak would formulate its final recommendation for the study.

Your appeal emphasizes Amtrak's ability to release any underlying data and inputs and such information is factual in nature and therefore should be segregable from any exempt portions. After reviewing the various versions of the report, there are no portions of the draft that could be segregated without revealing the team's deliberative thoughts process. In reviewing the appendix, the supporting documentation such as the engineer drawings were also in draft form and the evolving iterations of the diagrams and input models reflect the opinions of the project team, which may not represent the ultimate conclusions relating to the feasibility of the project.

The only underlying data that could potentially be considered segregable were cost projections<sup>2</sup> for alternatives that *were not considered in the final study*. The DC Circuit Courts have explained that the deliberate process also protects these types of estimates. See Quarles v. Department of Navy, 893 F.2d 390, 392 (D.C. Cir. 1990) (holding "cost estimates . . . are far from fixed" and they "derive from a complex set of judgments—projecting needs, studying prior endeavors, and assessing possible suppliers."). Further, while the cost estimates may appear factual on its face, they were actually analytical tools used to weigh competing options and ultimately the team decided to not consider those estimates in the final report. That decision was an exercise of judgment that is deliberative in of itself. Nevertheless, releasing those cost estimates may mislead the public by suggesting that the agency has adopted certain assumptions or conclusions that remain under active review.

## **2. Foreseeable Harm Analysis**

Even when record falls within an exemption, The FOIA Improvement Act of 2016 mandated agencies to apply a foreseeable harm standard in which agencies should only withhold information under FOIA only when (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law. See 5 U.S.C. § 552(a)(8)(A)(i). Agencies must "articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld." Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 369 (D.C. Cir. 2021).

As described above, the withheld documents contain draft projections, drawings and other figures that were inaccurate and were revised prior to submitting the final report. Disclosure of such drafts and estimates would chill internal deliberations by discouraging staff from freely expressing views or modeling innovative options. Agencies rely on the ability to test scenarios and explore outcomes without concern that these exploratory documents will later be taken out of context or characterized as final positions. Further, release of drafts that are inaccurate could cause public confusion. This is exactly the type of harm to agency policy-oriented decision-making that Exemption 5 of the FOIA was intended to prevent. Therefore, the requested information clearly meets the elements established for Exemption 5 protection and the foreseeable harm analysis.

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<sup>2</sup> Although not raised in the initial FOIA response, these projections would also be considered exempt under section 4 of the Act since the information was obtained from a company outside of Amtrak and contained figures that are typically confidential.



### 3. Vaughn Index

The appeal's request for reliefs seeks a Vaughn Index. The index is typically used in connection with the adjudication of a defendant's motion for summary judgment in litigation and does not apply to the administrative process. The statutory language of the FOIA requires only that an agency inform the requester of the reasons for the denial of an initial request, of the name and title of each person responsible for the denial, and the right to administrative appeal. *See* 5 U.S.C. § 552(a)(6)(i), (6)(C). Even so, this appeal describes the various documents produced as a result of the search. Such documents included 16 versions of the study, and comment logs for each draft.

### Conclusion

As noted above, I have concluded that the FOIA officer's decision to withhold the draft feasibility studies and related documents is upheld. These drafts reflect the evolving thought process of the drafters and Amtrak, capturing internal discussions, proposed changes, and strategic considerations that informed the development of the final document. In this particular case, there are 16 distinct drafts, each representing a different stage in Amtrak's deliberations. The extensive revisions across these drafts serve as a blueprint of Amtrak's internal reasoning and decision-making. Disclosure of these drafts would risk a chilling effect on future deliberations by discouraging candid discussion and the free exchange of ideas among staff. Moreover, releasing multiple versions of the same document could confuse the public by presenting incomplete or preliminary views that do not reflect the Amtrak's final position. I have also determined that there are no segregable portions that are subject to disclosure. Accordingly, these drafts are protected under Exemption 5 and are being withheld to preserve the integrity of the Amtrak's deliberative processes. As such, your appeal is denied in its totality. You are advised that you may seek judicial review of this determination in accordance with the provisions of 5 U.S.C. § 552(a)(4) (2000).

Sincerely,

A handwritten signature in black ink, appearing to read "William Herrmann", with a stylized flourish at the end.

William Herrmann

*Executive Vice President, Chief Legal and Human Resources Officer*

cc: Rebecca Conner - Amtrak  
Carol F. Westmoreland, Esq. - Amtrak