

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE  
COUNCIL and  
ENVIRONMENTAL DEFENSE FUND,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

Case No. 18-cv-11227-PKC  
ECF Case

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT AND MOTION TO EXPEDITE**

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## INTRODUCTION AND REQUEST FOR EXPEDITED DISPOSITION

Last August, Plaintiffs submitted an expedited request to the Environmental Protection Agency (“EPA”) under the Freedom of Information Act (“FOIA”). Plaintiffs sought the public release of a discrete set of electronic records: recent updates to data files and basic-accounting programs known collectively as the Optimization Model for Reducing Emissions of Greenhouse Gases from Automobiles (“OMEGA”). OMEGA calculates how vehicle manufacturers can apply technologies to their fleets in order to reduce greenhouse gas (“GHG”) emissions.

EPA created OMEGA for public use and published the full model in 2010 when the agency first proposed vehicle greenhouse gas standards under the Clean Air Act. Because technology improves over time, EPA updates many of the files needed to run OMEGA to reflect those changes. Until 2017, EPA published these updates on its website and encouraged the public to access them. But those updates stopped appearing when EPA began to take steps to weaken its existing emission standards. Plaintiffs requested the unreleased updates under FOIA, but EPA refused to make them “promptly available.” 5 U.S.C. § 552(a)(3)(A). Plaintiffs filed this suit to compel disclosure.

EPA responded by declaring the latest version of the main OMEGA program—the “core” model—to be exempt from disclosure under the “deliberative process privilege,” while releasing purportedly all the input data and other files necessary to run that version of the model. But Exemption 5, the provision of FOIA that incorporates the deliberative-process privilege, shields from the public eye only “inter-agency or intra-agency memorandums or letters” that would be legally privileged “in litigation with the agency.” 5 U.S.C. § 552(b)(5). Plaintiffs now move this Court to expeditiously declare that Exemption 5 does not cover the withheld core model (v.1.4.59) and to order EPA to immediately release it.

EPA cannot carry its burden to show that the OMEGA v.1.4.59 core model is exempt from disclosure. *First*, the core model is not covered by the plain terms of Exemption 5—a computer accounting program is not an “inter-agency or intra-agency memorandum or letter,” or any analogous form of communication. *Second*, the core model could not be withheld as privileged in litigation. The core model itself is not “deliberative”; it neither contains nor reflects “advisory opinions, recommendations [or] deliberations.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). And EPA’s position that the core model is “predecisional” cannot be squared with the agency’s definitive statements that it *has not used* the model to inform its pending decision whether to weaken vehicle emission standards. *Finally*, disclosure will not frustrate any goal of the deliberative-process privilege: the core model is a basic-accounting program, and its release will not reveal any proposed policy before EPA adopts it, or otherwise hinder full and frank policy discussion among federal officials.

EPA has fully released OMEGA in the past, including the core model. It is only now that EPA is proposing to weaken standards that the agency has asserted that the core model should be hidden from the public. Public records indicate that application of the model yields data at odds with EPA’s official proposal, and the agency has spent the better part of a year rebuffing requests from Plaintiffs and others to disclose the latest version. But FOIA’s narrow exemptions are not a refuge for an agency seeking to bury facts at odds with its desired policy outcomes.

The only live dispute in this case is the applicability of a single FOIA exemption to the OMEGA v.1.4.59 core model. Because the OMEGA v.1.4.59 core model does not fall within the claimed exemption, EPA is improperly withholding it as a matter of law, *see Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), and the Court should order EPA to release it. Further, the stakes are high enough to warrant an expedited disposition. EPA is poised to finalize a



proposal that would significantly weaken pollution standards for all new cars and light trucks through the middle of the next decade. This is a massive public health rule, with billions of tons of climate pollution and hundreds of billions of dollars of societal costs in the balance. The public has a right to know if information in the agency’s sole possession does not support its proposal—and it has a right to know *before* the agency runs out the clock on its rulemaking. Because further delay may be tantamount to denial of Plaintiffs’ request for the core model, Plaintiffs respectfully submit that there is “good cause” for this Court to order the withheld core model to be produced on or before June 17, 2019. 28 U.S.C. § 1657(a).

## **BACKGROUND**

### **A. The Freedom of Information Act (“FOIA”).**

“The Freedom of Information Act adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies.” *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999). The Act mandates that a federal agency “promptly” release records upon request, 5 U.S.C. § 552(a)(3)(A), and confers jurisdiction on the district courts to “order the production of any agency records improperly withheld,” *id.* § 552(a)(4)(B).

Congress realized, however, “that legitimate governmental and private interests could be harmed by release of certain types of information.” *ACLU v. Dep’t of Defense*, 322 F. Supp. 3d 464, 473 (S.D.N.Y. 2018). To account for those interests, FOIA delimits nine specific exemptions to FOIA’s disclosure mandate. *See* 5 U.S.C. § 552(b). “These exemptions are explicitly made exclusive and must be narrowly construed.” *Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011) (citations omitted); *cf. Klamath*, 532 U.S. at 7–8 (“These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”).

At issue here is Exemption 5, which protects only “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). “The government bears the burden of demonstrating that an exemption applies to each item of information it seeks to withhold, and all doubts as to the applicability of the exemption must be resolved in favor of disclosure.” *Florez v. Cent. Intelligence Agency*, 829 F.3d 178, 182 (2d Cir. 2016). A reviewing court decides “de novo” whether the exemption applies, 5 U.S.C. § 552(a)(4)(B), and “[t]he agency’s decision that the information is exempt from disclosure receives no deference,” *Bloomberg, LP v. Bd. of Gov’rs of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

#### **B. Development of the OMEGA model.**

In 2009, EPA determined that emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution that endangers the public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA then undertook to develop greenhouse gas emission standards for new light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010); *see* 42 U.S.C. § 7521(a). A “critical technical underpinning” of “the feasibility and cost of potential [greenhouse gas] standards” “is the cost and effectiveness of the various control technologies.” *Id.* at 25,329.

Vehicle manufacturers “can choose from a myriad of [control] technologies and can apply one or more of these technologies to some or all of its vehicles,” such that, for a given emission standard, “there are an almost infinite number of technology combinations” that a manufacturer could theoretically apply to bring its vehicle fleet into compliance. *See* EPA, *Regulatory Impact Analysis*, at 4-1, Doc. EPA-420-R-10-002 (2010). Practically, manufacturers will likely prioritize the application of lower-cost, higher-efficiency technologies. *Id.* at 4–11. “Modeling is an efficient, rigorous way for EPA to investigate the lowest-cost technology

pathway under different regulatory scenarios.” Declaration of Margo Oge ¶ 19. However, “detailed analysis of the costs and benefits of various GHG emissions reduction requires a specialized application that optimizes and accounts for all the promising technologies, going beyond what can be accomplished with simple spreadsheet tools.” EPA, *OMEGA Model Documentation 1.0*, at 1, Doc. EPA-420-B-09-035 (2009) (*Model Doc. 1.0*).

To that end, EPA staff in the Office of Transportation and Air Quality (“OTAQ”) began developing what would become the OMEGA model. Oge Decl. ¶ 8. “[T]he development of the OMEGA model was a collaborative and open process,” and OTAQ staff submitted the model “to a rigorous peer-review process.” *Id.* ¶ 9. “EPA also received and responded to comments on the OMEGA model from automobile manufacturers and other interested public parties.” *Ibid.*

“OTAQ intentionally designed the OMEGA model to be transparent and publicly accessible.” Oge Decl. ¶ 12. “The model was designed not to incorporate or rely on confidential information from manufacturers,” and the model “intentionally used open-source software.” *Ibid.* “[T]he OMEGA model itself—including its source code—do[es] not reflect the work of any single EPA employee, but rather the collective work of many different agency experts based on the best available science.” *Id.* ¶ 11.

In 2010, EPA published a full version of OMEGA on a public webpage dedicated to the model. *See* Oge Decl. ¶ 13; EPA, “Optimization Model for reducing Emissions of Greenhouse gases from Automobiles (OMEGA)” (Ex. A), <https://www.epa.gov/regulations-emissions-vehicles-and-engines/optimization-model-reducing-emissions-greenhouse-gases>. Along with the release, EPA provided documentation describing in detail the structure and function of the model. *See Model Doc. 1.0*.

### C. Components and nature of the OMEGA model.

As EPA has explained, “OMEGA includes several components.” EPA, *Regulatory Impact Analysis*, at 3–5, Doc. EPA-420-R-12-016 (2012). Broadly speaking, OMEGA is comprised of inputs, the core model, and outputs. *See* Ex. B (EPA’s graphical depiction of model). Only the core model component remains in dispute in this action.<sup>1</sup> A brief description of the role of these components in the overall model helps clarify the nature of the core model itself.

To “run” OMEGA, a user first gathers the necessary input files. Declaration of Dr. Nicholas Lutsey ¶¶ 13, 20. These input files are Microsoft Excel spreadsheets containing quantitative data. *Id.* ¶¶ 11a, 13. One of these input data files is the “scenario file,” which contains hypothetical emission targets for vehicle manufacturers to meet. *Id.* ¶ 22. Other files contain, for example, data about the existing vehicle fleet, available control technologies, and fuel costs. *Id.* ¶¶ 11a, 13. Some of these inputs can be read directly by the core model; other inputs must be refined by “pre-processors.” *Id.* ¶¶ 11b, 15. The pre-processors are small computer programs and spreadsheets that convert raw inputs into a form readable by the core model. *Id.* ¶ 11b. In response to Plaintiffs’ lawsuit, EPA has released purportedly all the current input data and pre-processor files.

When all the data inputs are ready, the core model (the component of OMEGA that EPA is withholding) is ready to run. The core model is a computer program “written in the C# programming language.” *See* EPA, *OMEGA Core Model Version 1.4.56*, at 3, Doc. EPA-420-B-16-064 (July 2016). The core model program reads the input data and performs a series of

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<sup>1</sup> When EPA published OMEGA v.1.4.56, it released the core model under the heading “Installation Files.” Ex. A, at 2. EPA has declared exempt all comparable files that are compatible with OMEGA v.1.4.59. *See* 04/01/19 Letter from Benjamin Hengst to Irene Gutierrez (Ex. C); 03/04/19 Letter from Benjamin Hengst to Irene Gutierrez (Ex. D); Joint Status Rep. (Dkt. 37), at 1.

mathematical computations. Lutsey Decl. ¶¶ 11c, 20. Broadly speaking, reading from the input files, the core model: (i) loads data about a manufacturer’s existing vehicle fleet; (ii) combines that data with the scenario file to determine the applicable emission reduction target for that manufacturer; and (iii) applies available control technologies to the existing vehicle fleet until the manufacturer reaches emissions compliance. *Id.* ¶¶ 15–20. Technology is added in sequence, “using one of three distinct ranking approaches . . . set by the user.” EPA, *OMEGA Core Model Version 1.4.56*, at 5. The user can, for example, set the program to rank technology to be applied based on “the cost of the technology and the value of any reduced fuel consumption.” *Ibid.*

When the core model is done calculating, it generates quantitative outputs. This voluminous data includes the cost to each manufacturer, per vehicle, to implement the technology necessary to meet the given emission target. Lutsey Decl. ¶ 20. The output files are Excel spreadsheets of raw data. *Id.* ¶¶ 11d, 20. “Post-processors”—other small computer programs and spreadsheets—convert some of the raw data into more user-friendly datasets. *Id.* ¶ 11e. In response to Plaintiffs’ lawsuit, EPA has released purportedly all the current output post-processor files. Plaintiffs are not seeking, and EPA has not disclosed in response to Plaintiffs’ lawsuit, any actual output data or other records reporting the results of specific OMEGA model runs. Computer programs exist in myriad varieties, from complex simulators to basic calculators. EPA’s most recent documentation explains that OMEGA is primarily an “accounting” model. *See* EPA, *OMEGA Core Model Version 1.4.56*, at 3–4. OMEGA “is not a vehicle simulation model” or “an economic simulation model.” *Ibid.*

An accounting model “is simply a computational tool—a type of specialized calculator.” Lutsey Decl. ¶ 22. It performs “a chain of many thousands of calculations,” but each individual calculation is straightforward. *Id.* ¶ 20. “Because OMEGA is an accounting model, the vehicles

[to be modeled] can be described using only a relatively few number of terms.” EPA, *OMEGA Core Model Version 1.4.56*, at 4.

The OMEGA model “is designed to be flexible in a number of ways,” *id.* at 7, but this flexibility is primarily achieved through the user’s modification of input data across different runs of the core model. Lutsey Decl. ¶¶ 13, 15, 22. “Very few numeric values are hard-coded in the model, and consequently, the model relies heavily on its input files.” EPA, *OMEGA Core Model Version 1.4.56*, at 7. For example, a user might run the model twice with different input values for the price of fuel, in order to generate data on the effect of changing fuel prices. The user also does not need to understand (or even view) the C# programming language to use the model. OMEGA has a graphic user interface. *See id.* at 47. This interface “is simple and relies on the fact that all of the information needed to run the model is contained in the input files.” *Ibid.*

#### **D. EPA stops disclosing OMEGA updates as it moves to weaken standards.**

Because vehicle technology improves over time, EPA needs to update OMEGA to reflect these changes. Oge Decl. ¶ 14. After the initial release in 2010, EPA affirmatively published at least four more updated versions of the full OMEGA model and associated files. *See Ex. A.*

Most recently, in November 2016, EPA released a full OMEGA update in conjunction with a proposed determination that the agency’s existing GHG-emission standards for passenger cars and light trucks of model years (“MY”) 2022–2025 remain “appropriate.” 81 Fed. Reg. 87,927 (Dec. 6, 2016). As with previous releases, EPA assured the public at that time that “[p]eriodic updates of ... the model ... will be available to be downloaded” from its website and urged “[t]hose interested in using the model ... to periodically check this website for these updates.” EPA, *OMEGA Core Model Version 1.4.56*, at 3. In January 2017, EPA finalized a determination that the agency’s extant GHG-emission standards for MY 2022–2025 passenger cars and light

trucks—which require automakers to make meaningful year-over-year reductions in fleetwide emissions—remain “appropriate,” in large part because automakers have “a range of feasible, cost-effective compliance pathways to meet [EPA’s] standards.” EPA, *Final Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation*, at 3–4, Doc. EPA-420-R-17-001 (2017).

Following a presidential transition, EPA opted to reconsider whether its existing emission standards for MY 2022–2025 passenger cars and light trucks remained appropriate. 82 Fed. Reg. 14,671 (Mar. 22, 2017). During that reconsideration, EPA continued to update OMEGA’s input data files and accounting programs, but the agency stopped disclosing the updates on its website or elsewhere.<sup>2</sup> Compl. 9–10, ¶¶ 33–38; Answer 8, ¶¶ 33–38. EPA sought comment on “advantages or deficiencies in [its] *past* approaches to forecasting and projecting automobile technologies,” 82 Fed. Reg. 39,551, 39,553/2 (Aug. 21, 2017) (emphasis added), but the agency remained silent regarding its *present* approach.

Hoping to end that silence, Plaintiffs and others wrote to EPA’s Assistant Administrator for the Office of Air and Radiation and asked him to release the latest version of OMEGA. 03/20/18 Letter from Environmental Defense Fund et al. to William Wehrum (Ex. E). But he neither responded to that request nor released any updated version of the OMEGA model or related files. *See* Compl. 11, ¶ 44; Answer 9, ¶ 44.

In April 2018, the EPA Administrator determined that the existing MY 2022–2025 standards for passenger cars and light trucks were “not appropriate” and “should be revised.” 83 Fed. Reg. 16,077, 16,077/3 (Apr. 13, 2018). Though EPA premised the about-face in part on

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<sup>2</sup> The sole exception was EPA’s release of a “revised OMEGA pre-processor, the TEB-CEB ‘Machine,’” in April 2017. Ex. A, at 2. *See also* Compl. 10, ¶ 37; Answer 8, ¶ 37.

criticism of OMEGA by automakers, *id.* at 16,079/3, 16,081/1, the agency still did not disclose the latest version of the model. That lack of transparency is especially conspicuous because, during the same month that the Administrator decided to revise the MY 2022–2025 standards to adjust for compliance costs supposedly “underestimated” by EPA when it issued the standards in 2012, *id.* at 16,084/1, EPA staff presented OMEGA results to the Office of Management and Budget showing that compliance costs would be *lower* than the agency had projected in 2012, *see* Compl. 9–10, ¶¶ 34–35; Answer 8, ¶¶ 34–35; Lutsey Decl. ¶ 27 & Attachment 2, at 24 (E.O. 12,866 Review Materials for *SAFE Proposed Rule*, EPA-HQ-OAR-2018-0283-0453: “EPA review of CAFE Model with ‘GHG’ settings (08-Mar ver.)”). In other words, the results from the latest OMEGA modeling were not in line with the Administrator’s course of action.

While EPA prepared to weaken its existing standards, Plaintiffs sent the agency an expedited FOIA request for “all versions of the [OMEGA] model not previously made public” and related agency records. 07/25/18 Letter from Irene Gutierrez to EPA FOIA Officer, at 1 (Ex. F). EPA received the request on or before August 10, 2018. Compl. 10, ¶ 48; Answer 10, ¶ 48. The agency refused to expedite processing of the request, 08/21/18 Letter from Larry Gottesman to Irene Gutierrez, at 1 (Ex. G), but EPA did waive Plaintiffs’ processing fees, *ibid.*, thereby acknowledging that disclosure of the latest OMEGA updates “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” 40 C.F.R. § 2.107(l)(1).

Shortly after receiving Plaintiffs’ FOIA request, EPA formally proposed to stop requiring *any* improvement in fleetwide GHG emissions for passenger cars and light trucks for six years starting in MY 2021. 83 Fed. Reg. 42,986 (Aug. 26, 2018). In justifying that proposal, EPA “g[ave] particular consideration to the high projected costs of the [extant] standards.” *Id.* at



43,431/3. But those cost projections were not the result of using OMEGA. EPA's notice of proposed rulemaking, issued jointly with the National Highway Traffic Safety Administration ("NHTSA"), revealed that EPA was relying on "only [NHTSA's] models and inputs/outputs," *id.* at 43,002 n.61, to project when, how, and at what cost automakers can implement technologies to meet EPA's emission standards. In short, rather than use the custom-built, peer-reviewed OMEGA model that EPA staff continued to use to generate data on the cost of compliance with EPA's emission standards, EPA instead would use a NHTSA model developed to aid NHTSA to carry out its duty to set fuel-economy standards under the Energy Policy and Conservation Act, *see* 49 U.S.C. § 32902(a). The joint notice of proposed rulemaking did not acknowledge the fact that EPA staff continued to run the OMEGA model or attempt to explain why EPA had stopped publishing updates to the model.

Soon thereafter, EPA missed its nondiscretionary statutory deadline to notify Plaintiffs whether the agency would disclose OMEGA records responsive to their FOIA request. *See* Compl. 13, ¶¶ 62–63; Answer 11, ¶¶ 62–63; 5 U.S.C. § 552(a)(6). Plaintiffs then sent the Assistant Administrator a second letter urging expeditious release of OMEGA updates, to afford the public access to EPA's own model for use in preparing comments on the cost of compliance with the agency's standards. 09/20/18 Letter from Environmental Defense Fund et al. to William Wehrum (Ex. H). Once again, the Assistant Administrator made no response, *see* Compl. 14, ¶ 57; Answer 12, ¶ 57.

Plaintiffs were not the only ones seeking to obtain the updates to OMEGA. The State of California, a co-regulator of GHG emissions from automobiles, *see* 42 U.S.C. § 7543(b), sent EPA its own FOIA request seeking the latest full version of the model and related files. 09/11/18 Letter from Ellen Peter to Andrew Wheeler 5–6 (Ex. I). Although the State's request post-dated

that of Plaintiffs, EPA issued California an interim response just before the comment period for EPA's proposed rule closed. 10/23/18 Letter from John Shoaff to Ellen Peter (Ex. J). EPA's response letter acknowledged the existence of undisclosed OMEGA updates but declined to release them on the ground that they "were not used to develop the proposed rule." *Id.* at 2. On April 5, 2019, the State of California sued EPA in the Northern District of California seeking these records and others related to the agency's pending rulemaking. *Cal. Air Res. Bd. v. EPA*, D.D.C. No. 1:19-cv-965 (filed Apr. 5, 2019).

**E. Plaintiffs sue to compel EPA to release the latest full version of OMEGA.**

On December 3, 2018, still having received no response to their FOIA request, Plaintiffs filed this lawsuit to compel "the production of ... [EPA] records improperly withheld." 5 U.S.C. § 552(a)(4)(B). Later that month, Plaintiffs moved this Court to expedite the case under the Civil Priorities Act, *see* 28 U.S.C. § 1657(a), and order EPA to release "a priority subset of records" encompassing "the most up-to-date version" "of EPA's [OMEGA] model and data." Pls.' Mot. to Expedite & Mot. for Partial Summ. J. (Dkt. 13), at 10. *See also* Pls.' Reply to Mot. to Expedite & Mot. for Partial Summ. J. (Dkt. 27), at 9 (requesting "the full current package" of records comparable to the suite of records historically published on EPA's OMEGA website).

Before this Court ruled on that motion, EPA produced purportedly "all the latest available input files for the latest full version of the OMEGA model (version 1.4.59)." Ex. D. Still, the agency withheld "the latest full version of the OMEGA model itself," citing only "5 U.S.C. § 552(b)(5), the Deliberative Process Privilege." *Ibid.* EPA stated that "the latest full version" was "predecisional and deliberative and would harm agency decision making if released." Ex. D.

To avoid further delay, Plaintiffs narrowed their FOIA request to cover only "the most recent complete set of records compatible with v.1.4.59 of EPA's OMEGA model (with the

exception of model ‘output’ data files),” in exchange for the agency’s commitment to make a final determination on the remainder of those records by April 1, 2019. Joint Status Rep. 1 (Dkt. 37) (hereinafter, “JSR”). On that date, EPA “conclude[d] its response to [Plaintiffs’] narrowed request” by releasing what the agency stated were “all ... the most recent fully updated OMEGA pre-processors” and “post-processors.”<sup>3</sup> 04/01/19 Letter from Benjamin Hengst to Irene Gutierrez (Ex. C), at 2. The agency continued to withhold the OMEGA v.1.4.59 core model without further explanation. *Ibid.*

## ARGUMENT

EPA is improperly withholding the OMEGA v.1.4.59 core model under FOIA’s Exemption 5. The Court should expeditiously declare that Exemption 5 does not apply and order EPA to immediately release the withheld core model.

### **I. EXEMPTION 5 DOES NOT APPLY TO THE OMEGA V.1.4.59 CORE MODEL.**

EPA’s justification for withholding the OMEGA v.1.4.59 core model is that it is exempt from disclosure under “the Deliberative Process Privilege.” Ex. D. Exemption 5 of FOIA incorporates that privilege to a certain extent. *See Klamath*, 532 U.S. at 8. But Exemption 5 does not encompass the core model, which is a computer accounting program that performs a sequence of mathematical calculations on data not exempt from disclosure.

Exemption 5 applies to (1) “inter-agency or intra-agency memorandums or letters” that (2) “would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). The OMEGA v.1.4.59 core model meets neither of these conditions. *First*, the core

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<sup>3</sup> Lacking a full and complete version of OMEGA, Plaintiffs are unable to verify EPA’s assertion that it has otherwise produced “the most recent complete set of records compatible with v.1.4.59 (with the exception of model ‘output’ data files).” JSR at 1. For present purposes, Plaintiffs take EPA at its word that the agency produced all records sought except for the core model, which prior releases denominated “Installation Files.”

model is not an “intra-agency memorandum or letter” or any analogous form of communication. *Second*, the core model would not be privileged in civil litigation because it is neither “deliberative” nor “predecisional.” Further, and relatedly, public release of the OMEGA v.1.4.59 core model will not disserve the purposes of the deliberative-process privilege.

**A. The OMEGA v.1.4.59 core model is not an intra-agency communication.**

Consideration of the scope of a FOIA exemption “starts with its text.” *Milner*, 562 U.S. at 569 (urging attention to the “simple words” of FOIA). While this is true of statutory construction more generally, the Supreme Court has “insisted” that FOIA’s exemptions “be read strictly in order to serve FOIA’s mandate of broad disclosure.” *Klamath*, 532 U.S. at 16. Although many Exemption 5 cases turn on the second statutory condition—that the agency record must be privileged in litigation—“the first condition of Exemption 5 is no less important than the second.” *Id.* at 9.

Under the first condition, Exemption 5 applies only to “inter-agency or intra-agency memorandums or letters.” 5 U.S.C. § 552(b)(5). This language stands in contrast to other FOIA exemptions applicable more broadly to “records or information,” *id.* § 552(b)(7), or “information and data,” *id.* § 552(b)(9).<sup>4</sup> FOIA does not define “memorandum” or “letter,” but when the exemption was enacted in 1966, Pub. L. No. 89-487, just as now, *memorandum* and *letter* denoted prose documents used for interpersonal communication. *See Webster’s New World Dictionary of the American Language* 918 (Coll. Ed. 1966) (defining *memorandum* as “an informal written communication, as from one department to another in a business office”); *id.* at 840 (defining *letter* as “a written or printed personal or business message, usually sent by mail in

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<sup>4</sup> EPA has not disputed that the records withheld here are subject to FOIA insofar as they are “record[s] ... maintained by [the] agency in ... an electronic format.” 5 U.S.C. § 552(f)(2)(A).

an envelope”); *cf. Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (courts should interpret words “consistent with their ordinary meaning” at enactment).

Courts have reasonably construed Exemption 5 to extend to memorandum- and letter-like communications, most notably the ubiquitous modern equivalent: e-mail. *See, e.g., Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enf’t Agency*, 811 F. Supp. 2d 713, 749 (S.D.N.Y. 2011) (*NDLON*), *amended on reconsideration* (Aug. 8, 2011). But e-mails, like memorandums and letters, are sent *from* people *to* other people. *See Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (quoting *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994), for the proposition that “relevant factors to be considered in determining whether [Exemption 5] applies ... are ‘the identity and position of the author and any recipients of the document, along with the place of those persons within the decisional hierarchy’”). *Cf. Brennan Ctr. for Justice v. Dep’t of Homeland Sec.*, 331 F. Supp. 3d 74, 93 (S.D.N.Y. 2018) (Exemption 5 “generally requires the agency to explain ... the nature of the decisionmaking authority vested in the document’s author and recipient” (citation omitted)). In short, “Exemption 5 protects only ‘intra-agency’ or ‘inter-agency’ communications.” *Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 77 (2d Cir. 2002).

The OMEGA v.1.4.59 core model is a computer program written in C# programming code. For illustrative purposes, attached to this motion is a transcription of a portion of the last public release (v.1.4.56) of the OMEGA core model. Ex. K. The core model is simply a set of instructions to a computer. *See Oge Decl.* 3, ¶ 11. EPA decisionmakers do not conduct interpersonal communications through core model code. Officials may write memorandums or send emails to each other *about* the core model, or discussing results of its use, but they do not communicate with each other via the core model itself. In short, because the OMEGA v.1.4.59

core model is not a “memorandum” or “letter,” or any analogous intra-agency communication, 5 U.S.C. § 552(b)(5), Exemption 5 by its plain terms does not apply in this case.

**B. The OMEGA v.1.4.59 core model would not be privileged in litigation.**

Even construing the OMEGA v.1.4.9 core model to be an intra-agency communication, it would still fail of the second condition of Exemption 5. The second condition—the requirement that a record “would not be available by law” in litigation with the agency, 5 U.S.C. § 552(b)(5)—incorporates “what is sometimes called the ‘deliberative process’ privilege.” *Klamath*, 532 U.S. at 8. EPA asserts that the core model itself would be covered by this privilege. But the privilege only applies to interagency documents that are both “deliberative” and “predecisional.” *See Tigie*, 312 F.3d at 76. The OMEGA v.1.4.59 core model is neither.

**1. The OMEGA core model is not “deliberative.”**

Deliberative documents contain “advisory opinions, recommendations and deliberations [that] compris[e] part of a process by which governmental decisions and policies are formulated.” *Klamath*, 532 U.S. at 8 (citation omitted). In contrast, deliberative-process protection does not, as a general matter, extend to factual, investigative material. *See EPA v. Mink*, 410 U.S. 73, 87–89 (1973) (Exemption 5 “requires different treatment for materials reflecting deliberative or policy-making processes,” which Congress exempted from disclosure, “and purely factual, investigative matters” which are not exempt.); *New York v. U.S. Dep’t of Commerce*, 2018 WL 4853891, at \*3 (S.D.N.Y. Oct. 5, 2018). The OMEGA v.1.4.59 core model falls decidedly at the factual, investigative end of the spectrum.

As described in more detail above, *supra* pages 6–8, OMEGA is comprised of several components, principally: inputs, the core model, and outputs. OMEGA “is designed to be flexible” to model a wide range of scenarios, but this investigative flexibility is achieved through

the user's modification of data inputs across different model runs. *E.g.*, EPA, *OMEGA Core Model Version 1.4.56*, at 7; *ibid.* (“Very few numeric values are hard-coded in the model, and consequently, the model relies heavily on its input files.”); *id.* at 47 (core model has a “simple” user interface as “all of the information needed to run the model is contained in the input files”); Lutsey Decl. ¶ 22. The core model itself is simply an “accounting” program, that reads the input data and performs a pre-set series of mathematical computations. *See id.* ¶¶ 9, 22. The core model outputs quantitative data that can then be used to inform agency decision-making.

In particular, if EPA wants to model a hypothetical potential emission standard, the information about that potential standard is contained in one of OMEGA's input data files, *not* in the core model. *See id.* ¶¶ 13, 22; Oge Decl. ¶ 16. In other words, the core model itself is scenario neutral—running the same inputs through the core model twice will yield the exact same results. *See Oge Decl.* ¶¶ 16, 20. To investigate different scenarios, a user changes OMEGA's inputs, not the core model. Thus, release of the core model will not disclose any additional information about potential standards the agency may have been considering. Any such information would be gleaned, if at all, from the files that EPA has already disclosed.

In short, OMEGA is an “investigative” tool—within which the core model is simply an “accounting” program—that does not “reflect[] deliberative or policy-making processes.” *Mink*, 410 U.S. at 89. Indeed, EPA itself has recently cautioned the public not to “conflate the analytical tool used to inform the decisionmaking with the action of making the decision,” 83 Fed. Reg. at 43,002/1. The OMEGA model “neither sets standards nor dictates where and how to set standards; it simply informs as to the effects of setting different levels of standards.” *Ibid.*; *accord id.* at 43,000/1.

In limited circumstances, factual records may be considered for deliberative protection where release would reveal “the process by which ‘factual material was assembled through an exercise of judgment.’” *Color of Change v. U.S. Dep’t of Homeland Sec.*, 325 F. Supp. 3d 447, 455 (S.D.N.Y. 2018) (quoting *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). But courts have recognized that programmed computer code does not reveal the process by which any judgment was exercised; the code at most reveals *what* was programmed, not *why* it was programmed that way or even *who* decided to program it that way.

Even where courts have considered modeling records more reflective of judgment than the core model here, those records have been held not deliberative. For example, in *Reilly v. EPA*, EPA sought to withhold a series of outputs from a computer model that projected mercury emissions from power plants. 429 F. Supp. 2d 335, 348–49 (D. Mass. 2006). Disclosure of model outputs would reveal EPA’s choice of model inputs, the latter of which the Court acknowledged were developed through “research and discussion within the EPA” and would “reveal . . . to some extent the agency’s thought process.” *Id.* at 352. But the court observed that “this is true of any investigation by which an agency seeks facts,” and, if EPA’s argument was accepted, an ostensibly narrow deliberative-process exemption would overwhelm FOIA’s disclosure mandate. *Ibid.* EPA could not invoke the exemption for the model outputs because the model as a whole was “an investigative technique utilized to generate raw data,” and it was “those facts that then serve[d] as the grist for the agency’s decision-making, that data which is debated and discussed.” *Id.* at 352–53. Although the court necessarily limited its holding to model outputs, it nonetheless



observed that “the internal workings of [the model],” *i.e.*, the core model, were “not in any way deliberative.” *Id.* at 353.<sup>5</sup>

Likewise, in *Lahr v. NTSB*, the agency sought to withhold a computer program that modeled aircraft flight paths for use in investigating the explosion of TWA Flight 800 off the coast of Long Island. 2006 WL 2854314, at \*1, \*23 (C.D. Cal. Oct. 4, 2006). Although an agency expert “may have used . . . judgment” in coding the program, the court found there was “no evidence that, by reviewing the disclosed source file, a reader would be able to understand or reconstruct the NTSB’s deliberative process.” *Id.* at \*24. The program “was merely a tool used in connection with other data to derive a result based upon that data.” *Ibid.*; *accord, e.g., Carter v. U.S. Dep’t of Commerce*, 186 F. Supp. 2d 1147, 1155–56 (D. Or. 2001), *aff’d*, 307 F.3d 1084 (9th Cir. 2002) (release of census data derived from one possible calculation would not reveal agency’s deliberative process over whether to use that data). Like the computer models in *Reilly and Lahr*, OMEGA is an investigative tool that generates data—its output data may be “debated and discussed,” but that does not make the upstream core model itself deliberative.

*Cleary, Gottlieb, Steen & Hamilton v. Dep’t of Health & Human Servs.*, 844 F. Supp. 770 (D.D.C. 1993), is perhaps in tension with *Reilly* and *Lahr*, as the court held a computer model exempt under the deliberative-process privilege on the ground that it was “inextricably intertwined” with the “deliberations,” “opinions,” and “mental processes” of its creator. *Id.* at

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<sup>5</sup> A model, by its nature, generates factual projections rather than indisputable facts. But the inherent uncertainty in any projection does not mean that the means of making the projection is so subjective as to be termed “deliberative.” *Cf. Kansas ex rel. Schmidt v. U.S. Dep’t of Defense*, 320 F. Supp. 3d 1227, 1243–44 (D. Kan. 2018) (observing that “the deliberative process privilege does not protect estimates made where the estimator followed a strict set of guidelines and made few subjective guesses.”). Models may, by their nature, also need updating over time. But the mere fact that a model is in a “draft” state during updating does not render it “deliberative” either. *Cf. NDLO*, 811 F. Supp. 2d at 741 & n.103.

783. *Cleary* was wrongly decided, but it also is readily distinguishable. Unlike the OMEGA core model, which has no specific author, Oge Decl. ¶ 20, in *Cleary* an identifiable single author, Dr. Philen, wrote a custom program “uniquely” tailored to a specific epidemiological database; further, Dr. Philen’s modeling required “continuous changes” in the selection of data from the database, and it was only the “frequent” iterative revisions to her program code, that, coupled with the output files, made it possible to trace “[her] mental processes.” *Cleary*, 844 F. Supp. at 782–83. No such frequent iterative tracing is possible here. Further, the OMEGA core model does not play a role in “the culling and selection of relevant facts.” *Id.* at 783. The culling and selection of facts in OMEGA occurs, if at all, in preparing the data files that EPA already has released for processing outside the core model.

Where it is employed, the OMEGA v.1.4.59 core model can be an element of a decision-making process by providing data for “debate[] and discuss[ion].” *Reilly*, 429 F. Supp. 2d at 353. But the core model does not *itself* “reflect the give-and-take of the consultative process.” *Brennan Ctr.*, 331 F. Supp. 3d at 93. The OMEGA core model is a specialized calculator, not an artificial intelligence advising EPA’s Administrator. It is non-deliberative and must be disclosed.

## **2. *The OMEGA v.1.4.59 core model is not “predecisional.”***

The second requirement of the deliberative-process privilege is that, in addition to being deliberative, the documents must also be “predecisional,” *i.e.*, “prepared in order to assist an agency decisionmaker in arriving at [a] decision,” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975), on a “specific” issue “facing the agency,” *Tigue*, 312 F.3d at 80. The government “has the burden of establishing what deliberative process is involved, and the role played by the documents at issue in the course of that process.” *Coastal States Gas*

*Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). EPA cannot carry that burden with respect to the OMEGA v.1.4.59 core model.

It is indisputable that EPA developed the OMEGA model to assist agency decisionmakers in establishing standards for GHG emissions from new automobiles under the Clean Air Act. *See supra*, pages 4–5. EPA historically has deployed the model to perform calculations that provide a factual foundation for those regulatory decisions. *See ibid.* But the relevant question here is whether *OMEGA v.1.4.59* – assuming it were a memorandum or letter that was also “deliberative” – played a role “in the course of [EPA’s] process” of setting GHG standards for cars and light trucks in its *current* rulemaking. *Coastal States*, 617 F.2d at 868.

EPA has answered that question definitively. The agency has stated that unpublished versions of the OMEGA model “were not used to develop the proposed rule.” Ex. J, at 2. In other words, according to EPA, OMEGA v.1.4.59 did not play *any* “role ... in the course of [EPA’s decisionmaking] process.” *Coastal States*, 617 F.2d at 868. Having announced not only that the agency is *not relying* on OMEGA v.1.4.59 to make its decision, *see* 83 Fed. Reg. at 43,000/1, but that the model was *not used* in the decisionmaking process, EPA cannot now invoke the protection of the deliberative-process privilege to keep OMEGA v.1.4.59 hidden from the public on the theory that it is “predecisional.”

**C. Disclosure of the OMEGA v.1.4.59 core model would not disserve any purpose of the deliberative-process privilege.**

The text of Exemption 5 does not cover the OMEGA v.1.4.59 core model, for reasons just explained. To the extent this Court remains unsure whether the model is exempt from disclosure, it should look to the animating purposes of the deliberative-process privilege:

- (1) “to assure that subordinates ... will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism”;

- (2) “to protect against premature disclosure of proposed policies before they have been finally formulated or adopted”; and
- (3) “to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.”

*Coastal States*, 617 F.2d at 866 (quoted with approval in *Tigue*, 312 F.3d at 76). None of those purposes will be frustrated by disclosure of the OMEGA v.1.4.59 core model to the public.

*First*, disclosing the core model will not “subject [EPA subordinates] to public ridicule or criticism.” *Coastal States*, 617 F.2d at 866. The core model is not the work of any one employee who could be singled out for criticism. *See* Oge Decl. 3, ¶ 11. Nor does the core-model program code contain or reflect “opinions and recommendations,” *Coastal States*, 617 F.2d at 866; it is a sequence of instructions to a computer to process input data, data for which EPA claimed no exemption from disclosure. The law demands that EPA “assess manufacturers’ response to policy alternatives,” 83 Fed. Reg. at 43,022/3, and project automakers’ “cost of compliance” with GHG-emission standards, 42 U.S.C. § 7521(a)(2). EPA will not cease making those projections, or abandon the enterprise of modeling industry’s response to regulation, merely because the agency’s best efforts will be disclosed to the public. After all, routine disclosure of OMEGA updates through 2016 did not hinder development of EPA’s model or its standards; to the contrary, disclosure *improved* the model and the decisionmaking process by inviting robust public feedback. *See* Oge Decl. 7, ¶ 26.

*Second*, there is no danger that disclosing *this version of the* core model will “premature[ly] disclos[e] ... proposed policies before they have been finally formulated or adopted.” *Coastal States*, 617 F.2d at 866. Because OMEGA v.1.4.59 “was not used to develop [EPA’s] proposed rule,” Ex. I, at 2, there is no reason to believe that this version embodies or reflects the agency’s proposed policy. Indeed, as noted earlier, the core model is, by nature,

scenario neutral; it takes its cues from input files that the agency already has disclosed to Plaintiffs without objection. *See supra*, pages 16–17.

*Third*, EPA has made clear that “the ultimate reasons for [its] action” are not dependent on facts derived from OMEGA v.1.4.59. *Coastal States*, 617 F.2d at 866. Disclosing the model thus will not “confus[e] the issues” or “mislead[ ]” the public to think that EPA *has* relied on the model to inform its decision. *Ibid*. But FOIA exists to ensure that the public has access to important government records, and the OMEGA core model is of significant public interest precisely because EPA has thus far *not* taken the results of its own model into account in its upcoming decision. If this Court orders the model released, Plaintiffs—and the public at large—will be able to run the model, publicize the results, and place those results in the rulemaking docket. The Court should not permit EPA to use the deliberative-process privilege to abet its “deliberate[ ] or negligent[ ] exclu[sion]” from the public record of facts “adverse to its decision.” *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (citation omitted); *cf. Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 41 & n.9 (D.D.C. 2006) (“meaningful debate” about government activity “cannot be based solely upon information that the Administration voluntarily chooses to disseminate”). In these circumstances, it is disclosure, not secrecy, that will “prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

In summary, EPA’s withholding of the OMEGA v.1.4.59 core model under Exemption 5 contravenes both the language and purpose of that exemption. Secreting the model does not “further the goal of promoting sound decisions and policies,” *Fox News Network, LLC v. U.S. Dep’t of the Treasury*, 911 F. Supp. 2d 261, 266 (S.D.N.Y. 2012); it does the opposite. The proper remedy for EPA’s improper invocation of Exemption 5 is to compel EPA to produce the

withheld records. *See* 5 U.S.C. § 552(a)(4)(B); *Tax Analysts*, 492 U.S. at 151 (“agency records which do not fall within one of the exemptions are ‘improperly’ withheld”). Plaintiffs ask that such an order issue promptly.

**II. THE COURT SHOULD EXPEDITE DISPOSITION OF THIS CASE UNDER THE CIVIL PRIORITIES ACT.**

The Civil Priorities Act provides that a federal court “shall expedite the consideration of any action ... if good cause therefor is shown.” 28 U.S.C. § 1657(a). That Act singles out FOIA alone as a statute under which expedited review may be warranted. *Ibid.* Because “[s]peed is an essential element in” FOIA suits, Plaintiffs’ claim of good cause should “‘be liberally construed.’” *Ferguson v. F.B.I.*, 722 F. Supp. 1137, 1144 (S.D.N.Y. 1989) (citation omitted). *Accord Brennan Ctr.*, 300 F. Supp. 3d at 547.

Good cause exists to expedite consideration of this case. The agency records withheld by EPA are, in Plaintiffs’ view (though not EPA’s), “of central relevance to” a pending rulemaking, 42 U.S.C. § 7607(d)(4)(B)(i), that the agency plans to finalize in the near future, *see* Valerie Volcovici, *California sues U.S. agencies over data on vehicle emissions freeze*, REUTERS (Apr. 5, 2019) (Ex. L). As soon as the core model is released, Plaintiffs will use it to run OMEGA based on the already released inputs and, with sufficient time, will be able to lodge the resulting outputs in the rulemaking docket. EPA has pledged to “consider comments” submitted until the rule is finalized “[t]o the extent practicable.” 83 Fed. Reg. at 43,471/1. Plaintiffs will be harmed if they do not receive the core model with sufficient time remaining before EPA issues a final rule to make public differences between the analysis EPA has relied on and the results of its own

OMEGA model. Moreover, the odds that the agency will assert that it is “impracticable” to address any OMEGA model results increase rapidly as the date of finalization approaches.<sup>6</sup>

The importance of accurate information on compliance costs to EPA’s standard-setting for GHG emissions from new vehicles, and the importance of those standards in protecting the public from the devastating impacts of climate change, mean that Plaintiffs’ “request for expedited consideration has merit.” 28 U.S.C. § 1657(a). The government itself has estimated that 7.4 billion additional tons of carbon pollution are at stake in EPA’s rulemaking—more than a year’s worth of carbon emissions by the United States as a whole. *Compare* NHTSA, *Draft Environmental Impact Statement for the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule*, at S-18, NHTSA Dkt. No. 2017-0069 (July 2018), *with* EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017*, at ES-4, Doc. EPA 430-P-19-001 (April 2019).

Plaintiffs are filing this motion a mere seven days after EPA issued its final determination on their FOIA request. The parties have stipulated to a briefing schedule whereby cross-motions for summary judgment should be fully briefed by May 23, 2019. JSR at 2. There is only one legal issue in this case: whether Exemption 5 covers a bounded, agreed-upon set of EPA records. Given EPA’s plans to finalize a rulemaking by “late spring or early summer,” Ex. L, Plaintiffs respectfully request an order compelling the records to be produced on or before June 17, 2019.

### CONCLUSION

This Court should grant Plaintiffs summary judgment, declare Exemption 5 inapplicable to the latest full version of the OMEGA model, including the OMEGA v.1.4.59 core model, and order EPA to produce it on or before June 17, 2019.

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<sup>6</sup> Plaintiffs could petition EPA for reconsideration after a rule is finalized, but a proceeding for reconsideration does “not postpone the effectiveness of the rule.” 42 U.S.C. § 7607(d)(7)(B).

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