

Exemption 5

The Civil Discovery Privileges



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Office of Information Policy

Exemption 5

Protects “**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**, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested”

5 U.S.C §552(b)(5).



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Exemption 5

Incorporates civil discovery privileges into the FOIA.

Prevents requesters from using the FOIA to get documents that would be privileged in discovery.



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Exemption 5

Two requirements:

1. Threshold

and

2. Applicable discovery privilege



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Part I: Threshold

Basic Definition

- “Inter-agency or intra-agency memorandums or letters”
- This includes all forms of written communications—emails, reports, etc.



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Threshold

The “Consultant Corollary”

- The Exemption 5 threshold has been expanded to cover **certain** situations in which an agency communicates or consults with an outside party.



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Consultant Corollary: Who is a Consultant?

Covers situations where outsiders are functioning as if they were agency employees.

- Includes both paid and unpaid outsiders consulted formally or informally
- Advice from a consultant must be coming into the agency, not from the agency



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Consultant Corollary: Who is a Consultant?

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001)

- Court found that consultant corollary (if it exists) did not apply to certain communications between Department of Interior and Klamath/Yurok Tribes



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Consultant Corollary: Who is a Consultant?

Am. Oversight v. United States Dep't of Health & Hum. Servs., 101 F.4th 909 (D.C. Cir. 2024)

- “The question, instead, is whether the outsider is *disinterested*—whether it comes to the table with no obligation or stake in the outcome of an agency’s process other than a duty to provide good advice to the agency, just as the agency’s own personnel is expected to.”



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Threshold

The “Common Interest” Doctrine:

- The outside party must have a common interest with the agency,
- After the point at which the agency decides to enter into a common interest agreement.



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Common Interest Doctrine:

- Documents created while the outside party is seeking the agreement itself will not meet the threshold.



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Exemption 5

1. Threshold

and

2. Applicable discovery privilege



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Part II: Discovery Privileges

Exemption 5 incorporates certain civil discovery privileges into the FOIA.



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Part II: Discovery Privileges

In practice, only three come up with any degree of regularity:

- Deliberative process privilege
- Attorney work-product privilege
- Attorney-client privilege.



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The Deliberative Process Privilege

Purposes of the privilege:

- Encourage open, frank discussion
- Protect against premature disclosure of proposed policies
- Guard against public confusion from release of rationales that were not ultimately the basis for agency decisions



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The Deliberative Process Privilege

Protects Process

- Integrity of agencies' decision-making processes.
- Documents protected where release would harm the decision-making process.



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The Deliberative Process Privilege

Elements

Documents must be:

1. Predecisional

and

2. Deliberative



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The Deliberative Process Privilege

“Predecisional” Defined

- Before the adoption of an agency policy.



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The Deliberative Process Privilege

Identifying Decisionmaking Processes

- Decisionmaking process that promoted the creation of the documents.
- Final agency decision is not required.



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The Deliberative Process Privilege

Eligible Information

- Documents created by the decisionmaker.
- Documents that do not end up being considered by the final decisionmaker.



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The Deliberative Process Privilege

Postdecisional Documents

- Generally, postdecisional documents are not protected by the privilege.
- FOIA's purpose is served by disclosure of documents reflecting agency final decisions.



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The Deliberative Process Privilege

Losing Predecisional Status

Incorporation & **Adoption** have been defined as the same concept.



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The Deliberative Process Privilege

Incorporation

- The decisionmaker expressly cites a previously predecisional document as the rationale for an agency's decision.



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The Deliberative Process Privilege

Adoption

- A previously predecisional document comes to be used by the agency as the embodiment of agency policy.



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The Deliberative Process Privilege

*Retaining Predecisional Status:
No Express Approval*

- Adoption of a bottom-line recommendation in a document without expressly indicating approval of the rationale(s) for the recommendation is not enough to satisfy this standard.



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The Deliberative Process Privilege

Elements

Documents must be:

1. Predecisional

and

2. **Deliberative**



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The Deliberative Process Privilege

“Deliberative” Defined

- Communications that are offered in support of the agency’s decisionmaking process.



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The Deliberative Process Privilege

Deliberative Information

- Recommendations
- Proffered opinions (e.g. “I believe that,” “In my opinion,” etc.).



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The Deliberative Process Privilege

Duty to Segregate Factual Information

- The deliberative process privilege only applies to deliberative portions of documents.
- Agencies must segregate out and release factual portions of the responsive document(s).



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The Deliberative Process Privilege

Duty to Segregate Factual Information

- “Inextricably intertwined”
- Identity of the author is normally not deliberative.
- “Elastic facts”



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The Deliberative Process Privilege

Duty to Segregate Factual Information

- Process of selection and inclusion of factual material can constitute deliberation



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The Deliberative Process Privilege

Examples of Deliberative Documents

- Briefing materials
- Drafts



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Applying the Foreseeable Harm Standard

Cannot withhold information under Exemption 5 unless you reasonably foresee that disclosure would harm an interest protected by an exemption.

Deliberative process privilege records can be good candidates for release under the foreseeable harm standard or as a matter of discretion.



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The Deliberative Process Privilege

Sunset Provision

- The privilege “shall not apply to records created 25 years or more before the date on which the records were requested.”



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Knowledge Check

Dotty at the Department of the Interior is reviewing records regarding whether permits should be issued for the importation of Canadian wood bison trophies. Which of these records could potentially be withheld under b5?

- (a) email communications from a lower level DOI employee to her supervisor discussing her opinions on whether the permit should be granted
- (b) emails from a tourist company's CEO to a DOI employee providing more information about the Canadian wood bison trophies
- (c) an internal draft memo containing recommendations about the permits
- (d) an internal report about Canadian wood bison trophies that has been sent to a reporter
- (e) a final decision about the permits



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The Attorney Work-Product Privilege

Protects documents that were:

1. Prepared by or at the direction of an attorney

AND

2. Created in reasonable anticipation of litigation



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The Attorney Work-Product Privilege

Prepared by or at the Direction of an Attorney

- Attorneys in various capacities
- Non-attorneys who are supervised by attorneys



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The Attorney Work-Product Privilege

In Reasonable Anticipation of Litigation

- Though a specific claim need not have been actually filed, the privilege will not apply until an articulable claim likely to lead to litigation has arisen.



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The Attorney Work-Product Privilege

Applies to documents created in:

- Civil and criminal litigation
- Administrative proceedings
- An effort to settle claims***
- Recommendations to close a case or to decline prosecution



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The Attorney Work-Product Privilege

- The privilege does not apply to documents created subsequent to the closing of a claim.
- A document must meet the criteria for the privilege at the time of its creation to be covered by the privilege.



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The Attorney Work-Product Privilege

The privilege does not apply to documents created in an agency's normal course of business.



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The Attorney Work-Product Privilege

Agencies are generally not required to segregate factual material from documents covered by the privilege.



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Knowledge Check

Dotty is now processing records created by her attorney colleague pursuant to a pending litigation relating to the permit decisions denying the importation of Canadian wood bison trophies. Does Exemption 5 apply to the attorney's notes about the case?



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Knowledge Check

True or False: Once the litigation concludes, the documents lose the attorney work-product privilege.



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The Attorney-Client Privilege

Confidential communications between an attorney and their client relating to a legal matter for which the client has sought professional advice.



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The Attorney-Client Privilege

Protects confidential information supplied from client to attorney, as well as the attorney's advice based upon client supplied information.



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The Attorney-Client Privilege

The attorney-client privilege is not limited to situations involving litigation.



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The Attorney-Client Privilege

For privilege to apply, communications must be:

1. Between an attorney and client

AND

2. Confidential



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The Attorney-Client Privilege

Who is “the Client?”

- Can be a federal agency

AND

- Must identify client



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The Attorney-Client Privilege

“Confidential” Defined

- Communications can be considered “confidential” when the specific information conveyed is confidential, even though the underlying subject matter is known to third parties.



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The Attorney-Client Privilege

As with work-product, the attorney-client privilege applies to both factual and deliberative materials.



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Knowledge Check

Dotty is reviewing some confidential communications involving an employee and an attorney in the GC's office that seek and provide legal advice. Can these communications be withheld in full?



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Knowledge Check

Can an agency withhold confidential information supplied from a client to an attorney in records not involving litigation?



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Applying the Foreseeable Harm Standard

“An agency shall withhold information...only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption...”

5 U.S.C §552(a)(8)(A)



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Applying the Foreseeable Harm Standard

Machado Amadis v. Dep't of State, 971 F. 3d 364, 371 (D.C. Cir. 2020)

- An agency “specifically focused on ‘the information at issue’ in the [records]” and had “concluded that disclosure of that information ‘would’ chill future internal discussions.”

Reps. Comm. for Freedom of the Press v. FBI, 3 F. 4th 350, 369 (D.C. Cir. 2021)

- 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.”



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Applying the Foreseeable Harm Standard

In accordance with the Attorney General's 2022 FOIA Guidelines, agencies should confirm in their administrative response letters that they have applied the foreseeable harm standard when considering disclosure determinations.



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Exemption 5 Review

Step 1: Are the records inter-agency or intra-agency? If yes, continue.

Step 2: Consider discovery privilege(s), including:

- Deliberative Process Privilege
- Attorney Work-Product Privilege
- Attorney-Client Privilege

Step 3: Foreseeable harm analysis.



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Questions?



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