Exemption 5*

Exemption 5 of the Freedom of Information Act protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[1] Courts have construed this somewhat opaque language[2] "to exempt those documents, and only those documents, normally privileged in the civil discovery context."[3]

Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"[4] the Supreme Court subsequently made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges

* This section primarily includes case law, guidance and statutes up until January 31, 2024. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview).

[1] 5 U.S.C. § 552(b)(5) (2018).

[2] See, e.g., DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting & commenting on a point not reached by majority) (discussing "most natural meaning" of threshold and "problem[s]" inherent in reading it in that way).

[3] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Off. of Special Couns., 819 F.2d 1181, 1184 (D.C. Cir. 1987); Zander v. DOJ, 885 F. Supp. 2d 1, 15 (D.D.C. 2012) (holding that attorney-client privilege should be given "same meaning" in "both the discovery and FOIA contexts" to ensure that "FOIA may not be used as a supplement to civil discovery – as it could be if the attorney-client privilege were less protective under FOIA"); Bloomberg L.P. v. Bd. of Governors of the Fed. Rsrv. Sys., 649 F. Supp. 2d 262, 281 (S.D.N.Y. 2009) (recognizing incorporation of various civil discovery privileges).

[4] Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

explicitly mentioned in its legislative history.[5] Accordingly, the Court of Appeals for the District of Columbia Circuit has stated that the statutory language "unequivocally" incorporates "all civil discovery rules into FOIA [Exemption 5]."[6] The D.C. Circuit has also declared that in order to "justify nondisclosure under Exemption 5, an agency must show that the type of material it seeks to withhold is generally protected in civil discovery for reasons similar to those asserted by the agency in the FOIA context."[7]

It is important to bear in mind a difference between the application of privileges in civil discovery and in the FOIA context. In the former, the use of qualified privileges may be overcome by a showing of relevance or need by an opposing party.[8] In the FOIA context, however, the Supreme Court has held that the standard to be employed is whether the documents would "routinely be disclosed" in civil litigation.[9] By definition, documents for which a party would have to make a showing of need are not routinely disclosed and thus do not fall into this category.[10] As a result, in the FOIA context there is no difference between qualified and absolute privileges, and courts do not take into

---

[5] See United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); see also Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (noting that FOIA "incorporates . . . generally recognized civil discovery protections").

[6] Martin, 819 F.2d at 1185; see also Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("Exemption 5 requires the application of [] existing rules regarding discovery.").

[7] Burka, 87 F.3d at 517.

[8] See, e.g., Grolier, 462 U.S. at 27 (discussing circumstances under which attorney work-product privilege may be overcome in civil discovery).

[9] Weber Aircraft, 465 U.S. at 799; see Grolier, 462 U.S. at 26; see also Nkihtaqmikon v. Bureau of Indian Affs., 672 F. Supp. 2d 149, 153-54 (D. Me. 2009) (holding that "[n]o less than a private party engaged in litigation, individuals within the [agency] must be able to freely discuss their 'uninhibited opinions and recommendations'" (quoting Providence J. Co. v. U.S. Dept. of the Army, 981 F.2d 552, 557-59 (1st Cir. 1992))).

[10] See Grolier, 462 U.S. at 28 ("It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the *normally* privileged.").

account a party's need for the documents in ruling on a privilege's applicability.[11] This approach prevents the FOIA from being used to circumvent civil discovery rules.[12]

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"[13]), the attorney work-product privilege, and the attorney-client privilege.[14] Before invoking a privilege, however, Exemption 5's threshold requirement must be satisfied.

"Inter-Agency or Intra-Agency" Threshold Requirement

The initial consideration under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums."[15]

---

[11] See id.; NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also, e.g., Martin, 819 F.2d at 1184 ("[T]he needs of a *particular* plaintiff are not relevant to the exemption's applicability."); Swisher v. Dep't of the Air Force, 660 F.2d 369, 371 (8th Cir. 1981) (observing that applicability of Exemption 5 is in no way diminished by fact that privilege may be overcome by showing of need in civil discovery context); Jud. Watch, Inc. v. DHS, 841 F. Supp. 2d 142, 162-63 (D.D.C. 2012) (rejecting argument that need of plaintiff may overcome deliberative process privilege and noting that "an interpretation of Exemption 5 that would require courts to balance a private litigant's need against an agency's privilege claim in some 'hypothetical litigation' would be unworkable" (quoting Sears, 421 U.S. at 149 n. 16)). But see In re Diet Drugs Prods. Liab. Litig., No. 1203, 2000 WL 1545028, at *4 (E.D. Pa. Oct. 12, 2000) (stating that court must balance "relative interests of the parties" in determining applicability of deliberative process privilege under Exemption 5).

[12] See Weber Aircraft, 465 U.S. at 801 ("[R]espondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA."); see also Martin, 819 F.2d at 1186 ("[Plaintiff] was unable to obtain these documents using [normal] civil discovery methods, and FOIA should not be read to alter that result.").

[13] See, e.g., Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1305 (Fed. Cir. 2006) (noting that deliberative process privilege is one of many privileges that generally fall under rubric of "executive privilege") (non-FOIA case).

[14] See Sears, 421 U.S. at 149.

[15] 5 U.S.C. § 552(b)(5) (2018); see, e.g., Manivannan v. DOE, Nat'l Energy Tech. Lab'y, 843 F. App'x 481, 484 (4th Cir. 2021) (holding that "district court should first determine if the records were 'inter-agency or intra-agency' before deciding whether [agency] stated a good faith basis for applying the exemption"); Shapiro v. DOJ, 969 F. Supp. 2d 18, 35 (D.D.C. 2013) (holding that, "by definition, any document filed in a federal court is not an inter-agency or intra-agency memorandum because the destination of the document is not an 'agency'"); cf. Am. Immigr. Council v. DHS, 950 F. Supp. 2d 221, 238 (D.D.C. 2013)

The Supreme Court has stated that relevant statutory definitions of the term "agency" define it to mean "'each authority of the Government,' . . . and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency.'"[16]

Consultant Corollary

As the Supreme Court has recognized, "[a]lthough neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders, some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum under Exemption 5."[17] As those Courts of Appeals recognize, federal agencies frequently have "a special need for the opinions and recommendations of temporary consultants,"[18] and such expert advice can "play[] an integral function in the government's decision[making]."[19] Consistent with this analysis, some Courts of Appeals have allowed agencies to protect advice generated by a wide range of outside experts, regardless of whether these experts provided their assistance pursuant to a contract,[20] on

---

(denying defendant's motion for summary judgment after finding that defendant did not provide sufficient information for court to determine that Exemption 5 threshold is met).

[16] Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 2 (2001) (internal citations omitted).

[17] Id. at 9 (discussing cases); see also Rojas v. FAA, 989 F.3d 666, 673 (9th Cir. 2021) (holding that "[r]eading Exemption 5 to exclude communications with outside consultants altogether, as [the requester] urges [the court] to hold, would require us to assume that Congress saddled agencies with a strong disincentive to employ the services of outside experts, even when doing so would be in the agency's best interests" and joining "the six other circuits that have recognized some version of the consultant corollary").

[18] Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

[19] Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[F]ederal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities."); Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980) ("Congress apparently did not intend 'inter-agency' [or] 'intra-agency' to be rigidly exclusive terms.").

[20] See, e.g., Hanson v. AID, 372 F.3d 286, 292 (4th Cir. 2004) (applying privilege analysis to documents prepared by attorney hired by private company in contractual relationship with agency); Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5 to material supplied by outside contractors); Gov't Land Bank v. GSA, 671 F.2d 663, 665 (1st Cir. 1982) (protecting appraiser's report solicited by agency); Hoover, 611 F.2d at 1138 (same); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979) (protecting consultant's report concerning safe levels of workplace lead

a volunteer basis,[21] or in some other capacity,[22] creating what courts frequently refer to as the "consultant corollary" to the Exemption 5 threshold.[23] In these cases, courts have emphasized that the agencies sought this outside advice,[24] and that in providing their expertise, the consultants effectively functioned as agency employees,[25] providing the

---

exposure); Anand v. HHS, No. 21-1635, 2023 WL 2646815, at *18-19 (D.D.C. Mar. 27, 2023) (protecting documents prepared by and communications from private contractor that were used by agency in its own deliberative processes); Gov't Accountability Project v. U.S. Dep't of State, 699 F. Supp. 2d 97, 103-04 (D.D.C. 2010) (finding that documents created by contractor hired by agency meet Exemption 5 threshold even though contractor was hired to provide assistance to non-profit organization funded and supported by agency and not to agency directly); Miller v. DOJ, 562 F. Supp. 2d 82, 113 (D.D.C. 2008) (protecting formal opinion prepared by English barrister consulted for his expertise on English law); Citizens for Resp. & Ethics in Wash. v. DHS, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (protecting documents prepared by contractors for FEMA); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (upholding agency's invocation of Exemption 5 to protect documents prepared by private contractor hired to perform audit for agency).

[21] See, e.g., Nat'l Inst. of Mil. Just. v. DOD, 512 F.3d 677, 681 (D.C. Cir. 2008) (protecting advice provided by individuals whose counsel Army had solicited concerning regulations for terrorist trial commissions); Wu v. Nat'l Endowment for the Humans., 460 F.2d 1030, 1032 (5th Cir. 1972) (protecting recommendations of volunteer consultants); Heffernan v. Azar, 417 F. Supp. 3d 1, 15 (D.D.C. 2019) (protecting advice provided by individual whose counsel was affirmatively solicited by agency personnel via email prior to individual formally becoming a "Special Government Expert").

[22] See, e.g., Tigue v. DOJ, 312 F.3d 70, 77-79 (2d Cir. 2002) (protecting recommendations from a United States Attorney's Office to the Webster Commission, which was established to serve "as a consultant to the IRS"); Durns v. BOP, 804 F.2d 701, 704 & n.5 (D.C. Cir. 1986) (applying Exemption 5 to presentence report prepared by probation officer for sentencing judge, with copies provided to Parole Commission and BOP), vacated on other grounds & remanded, 486 U.S. 1029 (1988); Miller, 562 F. Supp. 2d at 113 (protecting discussions between U.S. government and government of St. Kitts and Nevis concerning possible prosecution of plaintiff); Lardner v. DOJ, No. 03-0180, 2005 WL 758267, at *14-15 (D.D.C. Mar. 31, 2005) (protecting documents written by judges and special prosecutors whose opinions were solicited by agency).

[23] See, e.g., Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001); Nat'l Inst. of Mil. Just., 512 F.3d at 682.

[24] See, e.g., Nat'l Inst. of Mil. Just., 512 F.3d at 680 (discussing importance of outside advice having been solicited by agency).

[25] See Klamath, 532 U.S. at 10 (discussing prior consultant cases, and noting that documents provided "by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done"); Am. Oversight v. HHS, 380 F. Supp. 3d 45, 55 (D.D.C. 2019) (finding that communications do not qualify as intra-agency where "the record does not support a finding that the communications with

agencies with advice similar to what it might have received from an employee. The District Court for the District of Columbia has found that there is no requirement that an agency not have its own employee with relevant expertise before seeking the assistance of an outside consultant.[26]

The Supreme Court had its first opportunity to interpret the Exemption 5 threshold in Department of the Interior v. Klamath Water Users Protective Ass'n.[27] Its ruling implicitly accepted (but did not directly rule on) the concept of the consultant corollary,[28] while placing important limitations on its use. In its unanimous decision, the Court ruled that the threshold of Exemption 5 did not encompass agency communications with several Indian tribes in which the tribes were "seeking a Government benefit at the expense of other[s]."[29]

Since Klamath was decided, courts have found in a variety of circumstances that records involving outside entities or experts qualify as intra-agency memoranda under Exemption 5.[30] The Court of Appeals for the Tenth Circuit has held that the consultant

---

Congress 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel'" (quoting Klamath, 532 U.S. at 2-3))).

[26] See Nat'l Inst. of Mil. Just. v. DOD, 404 F. Supp. 2d 325, 345 (D.D.C. 2005) (holding that there is "no requirement . . . that outside consultants possess expertise not possessed by those inside the agency"), aff'd, 512 F.3d 677 (D.C. Cir. 2008).

[27] 532 U.S. 1 (2001); see also OIP Guidance: Supreme Court Rules in Exemption 5 Case (posted 04/04/2001) (discussing meaning, contours, and implications of Klamath decision).

[28] See Klamath, 532 U.S. at 10-11, 12 n.4 (discussing prior cases upholding use of consultant corollary and noting that two such cases, Pub. Citizen Inc. v. DOJ, 111 F.3d 168, 170-72 (D.C. Cir. 1997) (protecting records involving former Presidents who were consulted by NARA and DOJ concerning treatment of their records) and Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980) (protecting records involving members of Senate who DOJ consulted with on judicial nominations), "arguably extend beyond" the "typical examples"); see also Ctr. for Diversity v. Off. of the U.S. Trade Representative, 450 F. App'x 605, 608-09 (9th Cir. 2011) (discussing Klamath and recognizing that consultant corollary is available to fulfill Exemption 5's threshold requirement).

[29] Klamath, 532 U.S. at 12 (noting that the tribes, in expressing their views to the Department on certain matters of administrative decisionmaking, were "self-advocates" having "their own, albeit entirely legitimate interests in mind").

[30] See, e.g., McKinley v. Bd. of Governors of the Fed. Rsrv. Sys., 647 F.3d 331, 337 (D.C. Cir. 2011) (finding that Exemption 5 threshold was met where Federal Reserve Bank of New York's interests were aligned with Board of Governors of Federal Reserve System when advising on whether to extend loan to Bear Stearns through JP Morgan Chase and that advice had been solicited by the Board); Greenspan v. Bd. of Governors of Fed. Rsrv. Sys., 643 F. Supp. 3d 176, 191 (D.D.C. 2022) (finding that communications met threshold where

corollary applies even where a consultant has "deep-seated views" on a subject as long as the consultant does not have a personal or economic stake in the outcome.[31] The Court of Appeals for the Fifth Circuit has reasoned that "Klamath does not stand for the broad principle that a consultant's 'self-interest' always excludes it from Exemption 5."[32] The Court of Appeals for the District of Columbia Circuit found that the consultant corollary applies where an outside party, the Federal Reserve Bank of New York, did not represent an interest of its own or the interest of any other client when advising the Board of Governors of the Federal Reserve System, and that the two parties "share[d] a common goal."[33]

Board of Governors of Federal Reserve System "relied on Federal Reserve Bank staff and a former board employee as consultants in its deliberations"); Elec. Priv. Info. Ctr. v. DOJ, 320 F. Supp. 3d 110, 121 (D.D.C. 2018) (applying consultant corollary to research by outside consultants in support of report concerning tools that sought to predict criminal recidivism, noting that "[plaintiff] has identified no evidence . . . that . . . [any] consultants . . . were advocating their own interests"); Jud. Watch, Inc. v. Dep't of State, 306 F. Supp. 3d 97, 111 (D.D.C. 2018) (finding that "fact that an individual [nominee] has been nominated to a high-level agency position suffices to trigger a consulting relationship under the consultant corollary"); 100Reporters LLC v. DOJ, 248 F. Supp. 3d 115, 148 (D.D.C. 2017) (holding that consultant corollary applies to communications between Monitor and government concerning monitorship of company because Monitor was not representing own interests and "plea and settlement agreement tasked the Monitor with the important job of exercising independent, fact-based judgment to evaluate [company's] compliance and submit reports to the government detailing [company's] compliance efforts"); Fox News Network, LLC v. U.S. Dep't of the Treasury, 739 F. Supp. 2d 515, 540 (S.D.N.Y. Sept. 2010) (holding that Federal Reserve Bank of New York and Treasury "were on the same team" and that any documents passed between them qualified as intra-agency communications).

[31] Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236, 1245 (10th Cir. 2009) (rejecting claim that paid consultant "must lack 'deep-seated views'" and further noting that "it would be unusual for an agency to seek out the advice of consultants who lack professional standing or who have not worked in the field, let alone those who have not published their views in their areas of expertise") (internal citation omitted).

[32] Jobe v. NTSB, 1 F.4th 396, 400 (5th Cir. 2021); see also Elec. Priv. Info. Ctr. v. DHS, 892 F. Supp. 2d 28, 45-46 (D.D.C. 2012) (holding that "to be excluded from the exemption," the outside party "must assume a position that is 'necessarily adverse' to the government" and that "[s]elf-advocacy is not a dispositive characteristic and does not control Exemption 5's scope" in case where outside party was contractor providing equipment to government and contractor also had ultimate goal of expanding its contractual relationship with government) (internal citation omitted).

[33] McKinley, 647 F.3d at 337-38 (holding that Federal Reserve Bank of New York's interests were aligned with Board of Governors of Federal Reserve System when advising on whether to extend loan to Bear Stearns through JP Morgan Chase).

Conversely, other decisions have found that in certain circumstances outside parties do not qualify under the consultant corollary.[34] Recently, the D.C. Circuit held that "[t]he key is that the consultant must not have a stake in the outcome of the agency's process that would render its advice on the subject anything other than disinterested."[35]

While agencies often are the recipients of expert advice, they also occasionally provide it. The D.C. Circuit held that documents conveying advice from an agency *to* Congress for purposes of congressional decisionmaking are not "inter-agency" records under Exemption 5 because Congress is not itself an "agency" under the FOIA.[36]

---

[34] See, e.g., COMPTEL v. FCC, 910 F. Supp. 2d 100, 118-19 (D.D.C. 2012) (denying application of Exemption 5 to documents submitted by company under investigation by FCC because company submitted documents in pursuit of its own interests); Ctr. for Int'l Env't Law v. Off. of U.S. Trade Representative, 237 F. Supp. 2d 17, 27 (D.D.C. 2002) (finding that documents exchanged with foreign government in course of bilateral trade negotiations didn't qualify for consultant corollary due to "degree of self-interest" of foreign government); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1191 (D. Colo. 2001) (holding that communications between Native American tribe and agency did not meet "inter or intra-agency" test because tribe was advocating its own interests); see also Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y, 161 F. Supp. 3d 120, 132-35 (D.D.C. 2016) (finding that "[w]hether a person is self-interested in a particular situation is not a binary question[;] [r]ather, self-interest exists on a spectrum, with altruism at one end and greed or avarice on the other" and holding that professor who analyzed agency draft document "had a professional and reputational stake in [agency's] decision . . . which endorsed [the professor's] climate theory" and, therefore, the professor "cannot be likened to a government employee whose 'only obligations are to truth and its sense of what good judgment calls for'") (internal citation omitted); Physicians Comm. for Responsible Med. v. NIH, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004) (finding that grant applicant failed to qualify for consultant corollary because application was submitted with applicant's own interests in mind and applicant was competing for governmental benefit at expense of others).

[35] Am. Oversight v. HHS, 101 F.4th 909, 920 (D.C. Cir. 2024) (holding that communications between agencies and Congress regarding pending legislation could not be protected because Congress was acting with its own institutional and constituent interests in mind while negotiating with agencies).

[36] Dow Jones & Co. v. DOJ, 917 F.2d 571, 574-75 (D.C. Cir. 1990); accord Elec. Frontier Found. v. Off. of the Dir. of Nat'l Intel., No. 08-1023, 2009 WL 3061975, at *5 (N.D. Cal. Sept. 24, 2009) (concluding that "[t]o the extent the withheld materials reflect communications between ODNI and DOJ and members of Congress in an effort to facilitate Congress' own deliberative process to craft legislation to reform FISA, these communications do not fall under the exemption as there is no evidence that they were used in an effort to aid any agency in its own deliberative process"), amended & superseded on other grounds, 639 F.3d 876 (9th Cir. 2010).

Similarly, records in which agencies provide advice or expertise to other non-agencies, including to state governments, are not "inter-agency records" under Exemption 5.[37]

Communications with Congress to assist agency decisionmaking have been deemed inter-agency records where these communications are "part and parcel of the agency's deliberative process."[38] However, in 2024, the D.C. Circuit clarified that "Congress has a particular institutional stake in the legislative process" and "when members of Congress and their staffs engage with executive agencies concerning legislation, they are almost inevitably acting on behalf of interests other than those of the agencies."[39] The D.C. Circuit further found that the consultant corollary could not apply where "members of Congress and their staff brought 'divergent interest[s] to bear' when they engaged with agencies concerning . . . legislation."[40]

The D.C. Circuit has found the threshold satisfied for communications exchanged with the Office of the President, even though the President and the President's immediate advisors are not themselves an "agency" under the FOIA.[41] Moreover, the Supreme Court

---

[37] See Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Army, No. 21-2482, 2023 WL 3995639, at *3 (D.D.C. June 14, 2023) (holding that consultant corollary does not apply where "the federal official's advice was sought to inform *state officials'* decision-making"); Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 596 F. Supp. 3d 130, 140-41 (D.D.C. 2022) (finding that consultant corollary does not apply where agency advice was sought by outside, non-agency party); cf. Hennessey v. AID, No. 97-1133, 1997 WL 537998, at *3 (4th Cir. Sept. 2, 1997) (rejecting use of deliberative process privilege because agency had not intended deliberations to be internal, but rather intended to involve outside parties) (unpublished disposition).

[38] Dow Jones, 917 F.2d at 574-75; see also Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980) (holding that communications from Congress to agency regarding judicial nominations are "intra-agency" where "record is submitted by outside consultants as part of the deliberative process" and is solicited by agency); Am. Oversight v. U.S. Dep't of the Treasury, 474 F. Supp. 3d 251, 264 (D.D.C. 2020) (holding that records are "intra-agency" where Treasury communicated with Congress regarding development of tax reform legislation and sufficiently demonstrated that communications with Congress were relied on akin to how agency would rely on analysis and recommendation of outside consultant).

[39] Am. Oversight, 101 F.4th at 920 (holding that "[t]he key is that the consultant must not have a stake in the outcome of the agency's process that would render its advice on the subject anything other than disinterested").

[40] Id. at 916 (internal citation omitted).

[41] Jud. Watch, Inc. v. DOJ, 365 F.3d 1108, 1110 n.1 (D.C. Cir. 2004) (noting that Office of the President is not an "agency," but "embrac[ing] the definitional analysis set forth" in In re Sealed Case, 121 F.3d 729, 749-50, 752 (D.C. Cir. 1997), to protect documents covered by the Presidential Communications Privilege without any further discussion of threshold); see also Berman v. CIA, 378 F. Supp. 2d 1209, 1219-20 (E.D. Cal. 2005) (rejecting plaintiff's

has found the threshold satisfied for documents generated for a presidentially created commission, even though such commissions are not agencies subject to the FOIA.[42] Indeed, the presidential communications privilege, which exists to protect advisory communications made to the President and the President's close advisers, has been repeatedly upheld in FOIA cases[43] although many cases do not directly address whether the records satisfy the Exemption 5 threshold.[44] (For further discussion of this privilege, see Exemption 5, Additional Privileges, below.)

---

claim that Exemption 5 could not protect documents addressed to President even though President is not an "agency").

[42] EPA v. Mink, 410 U.S. 73, 85 (1973) (finding that it was "beyond question that [agency documents prepared for a presidentially created committee organized to advise him on matters involving underground nuclear testing] . . . are 'inter-agency or intra-agency' memoranda or 'letters' that were used in the decisionmaking processes of the Executive Branch") (internal citations omitted); see also Jud. Watch, Inc. v. DOE, 412 F.3d 125, 130 (D.C. Cir. 2005) (holding that Exemption 5 applied to documents created by presidentially created commission because, while commission is not an "agency" as defined by the FOIA, it was created to advise President on specific policy issue and would be "inconceivable" for Congress to intend for Exemption 5 to apply to decisionmaking processes where decisionmaker is agency official subject to presidential oversight, but not to decisionmaking processes where decisionmaker is the President).

[43] See, e.g., Ryan v. DOJ, 617 F.2d 781, 786-87 (D.C. Cir. 1980) (rejecting argument that Attorney General is not "agency" when acting in advisory capacity to President); Buzzfeed, Inc. v. FBI, No. 18-2567, 2020 WL 2219246, at *7 (D.D.C. May 7, 2020) (finding that "binding D.C. Circuit precedent compels the conclusion that . . . a communication between the FBI and the President . . . constitutes 'intra-agency memorandums or letters' under FOIA Exemption 5" where the communication in question constitutes a supplemental background investigation file for a nominee to the Supreme Court); Berman, 378 F. Supp. 2d at 1219-20 (finding that threshold is met for Presidential Daily Briefs, explaining "Congress exempted the President from the definition of an 'agency' under FOIA because it wanted to protect the President from the burdens and intrusions of FOIA, not because it sought to deny the President the protections afforded by the exemptions for information communicated to the President but retained in an agency file").

[44] See Loving v. DOD, 550 F.3d 32, 37-38 (D.C. Cir. 2008) (holding, without specifically addressing threshold, that Exemption 5 "incorporates" the Presidential Communications Privilege, which "protects 'communications directly involving and documents actually viewed by the President,' as well as documents 'solicited and received' by the President or his 'immediate White House advisers'" (quoting Jud. Watch, Inc., 365 F.3d at 1114)); Elec. Priv. Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 81 (D.D.C. 2008) (holding, without specifically addressing threshold, that the privilege applies to records "received either by the President or an immediate advisor to the President" and that involve "matters related to the presidential decision-making process and/or matters on which the White House sought advice"); Citizens for Resp. & Ethics in Wash. v. DHS, No. 06-0173, 2008 WL 2872183, at *2-4 (D.D.C. July 22, 2008) (holding, without specifically addressing threshold, that Exemption 5 applies to DHS "communications with the President or his immediate advisers

Similarly, some courts have also found the threshold satisfied for documents exchanged between agencies and presidential transition teams[45] or nominees to high-level agency positions.[46]

There have been mixed outcomes on the issue of whether representatives of state and local governments qualify as consultants to federal agencies. The D.C. District Court found that a local government was not a consultant because it was acting as a co-regulator with a federal agency, thus sharing decisionmaking authority and not serving in an advisory capacity to the agency.[47] However, in a different decision the court found that

---

or their staff that were related to the President's decisionmaking regarding the response to Hurricane Katrina").

[45] See Leopold v. DOJ, 487 F. Supp. 3d 1, 17-19 (D.D.C. 2020) (upholding use of presidential communications privilege to protect communications involving transition officers concerning post-inauguration presidential decisionmaking without direct discussion of threshold issue); Protect Democracy Project, Inc. v. DOE, 330 F. Supp. 3d 515, 527 (D.D.C. 2018) (holding that "assuming that the transition team is not in fact an 'agency' under FOIA, [it] is not certain it necessarily follows that documents shared between DOE and the transition team fall outside Exemption 5" because "'[w]hat matters . . . is whether a document will expose the pre-decisional and deliberative processes of the Executive Branch'" (quoting Jud. Watch, Inc., 412 F.3d at 131)). But cf. Am. Oversight v. GSA, 311 F. Supp. 3d 327, 342 (D.D.C. 2018) (holding that communications between GSA and presidential transition team cannot be withheld under the attorney-client privilege of Exemption 5 because agency conceded that "'transition teams are considered non-agencies for purposes of the FOIA'" and thus threshold cannot be satisfied (quoting agency declaration)).

[46] See Jud. Watch, Inc. v. Dep't of State, 306 F. Supp. 3d 97, 111 (D.D.C. 2018) (finding that "fact that an individual [nominee] has been nominated to a high-level agency position suffices to trigger a consulting relationship under the consultant corollary"). But see Leopold v. Dep't of State, No. 18-1550, 2025 WL 622198 (D.D.C. Feb. 26, 2025) (rejecting agency attempt to withhold confirmation discussions with individuals outside executive branch because agency did not engage with "clarifying ruling" in Am. Oversight v. HHS, 101 F.4th 909 (D.C. Cir. 2024), and holding that "the question is no longer whether the outsider and the agency share interests, but whether the outsider has interests of his own that would render his opinions 'anything other than disinterested'" (quoting Am. Oversight, 101 F.4th at 916)).

[47] See People for the Am. Way Found. v. U.S. Dep't of Educ., 516 F. Supp. 2d 28, 39 (D.D.C. 2007) (holding that documents submitted by District of Columbia Mayor's Office could not be protected because District and agency "share[d] ultimate decision-making authority with respect to a co-regulatory project"); see also Grand Cent. P'ship Inc. v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999) (holding that letter sent from city councilman to agency did not meet threshold test, but specifically leaving open question of whether communication from state agency to federal agency pursuant to joint state-federal operation might be protected).

communications from state officials to FEMA could qualify for the Exemption 5 threshold because state officials worked with FEMA to inform agency decisionmaking.[48]

Common Interest

The common interest doctrine allows for the protection of certain privileged materials exchanged between the government and private parties with aligned interests that the government partners with in litigation.[49] In Georgia v. DOJ,[50] the D.C. Circuit endorsed the common interest doctrine in the FOIA context, holding that "when the government exchanges attorney work product with aligned parties under a common-interest agreement rooted in shared interests and a need for confidentiality, the shared work product qualifies as 'intra-agency' material under Exemption 5."[51] Likewise, in Hunton & Williams v. DOJ,[52] the Court of Appeals for the Fourth Circuit held that the common interest doctrine, while not mentioned in Klamath, was entirely consistent with the Supreme Court's opinion.[53] Specifically, the Fourth Circuit stated that "[i]t would eviscerate the meaning of Exemption 5 if we were to read it to exclude communications between federal agencies and their litigation partners where those communications advance an interest that is both common [to the government and its litigation partner] and, in the government's considered view, critical to the public's interest."[54] As the Fourth Circuit explained:

> The common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims. . . . Under [the plaintiff's] reading, however, the decision of a party, here the government, to partner with others in the conduct of litigation would somehow subject that party to

---

[48] See Citizens for Resp. & Ethics in Wash. v. DHS, 514 F. Supp. 2d 36, 44-45 (D.D.C. 2007) (protecting documents obtained from emergency management officials in Mississippi and Louisiana).

[49] See Georgia v. DOJ, 148 F.4th 724, 733 (D.C. Cir. 2025); Hunton & Williams v. DOJ, 590 F.3d 272, 288 (4th Cir. 2010).

[50] 148 F.4th 724 (D.C. Cir. 2025).

[51] Id. at 733 (explaining that "[a] common-interest agreement protects the privileged status of shared communications as to both the attorney-client privilege and (relevant here) the attorney work-product privilege").

[52] 590 F.3d 272 (4th Cir. 2010).

[53] Id. at 279.

[54] Id.; see also Georgia, 148 F.4th at 739 (concluding that when common-interest agreement exists, circumstances satisfy "intra-agency" condition because outside parties to agreement are sufficiently aligned and involved in agency's enterprise).

> the loss of its most basic civil discovery privileges. . . . This is a sweeping view, and its impact on the government's ability to conduct complex and multi-faceted litigation would be staggering. We have made clear that the government was entitled . . . to a level playing field. . . . And there is nothing in FOIA that prevents the government from drawing confidential counsel from the private sector.[55]

Further, the Fourth Circuit opined that "[i]t does not matter that [the private party] was motivated by the commercial benefit that would accrue to it if it succeeded in [litigation] . . . while the government was motivated by concern for the public interest."[56] Instead, the doctrine merely requires a unity of interest between the government and the private party.[57] The Fourth Circuit concluded that the Exemption 5 threshold requirement should not deprive the government of the ability, available to any private litigant, to obtain undiscoverable advice from a common interest partner.[58]

The Fourth Circuit, in another decision, also made clear that the common interest doctrine does not attach until an agency has agreed to assist a private party.[59] While the court did not require a written agreement to be executed or that the agency and private parties be co-parties in litigation, for the common interest doctrine to attach it held that there must be an "agreement or a meeting of the minds."[60] Additionally, one court has held that "'[a] financial interest of a party, no matter how large, does not preclude a court from finding a legal interest shared with another party where the legal aspects materially affect the financial interests.'"[61] Finally, courts have noted that, while the common

---

[55] Hunton & Williams, 590 F.3d at 277-78.

[56] Id. at 282-83.

[57] Id.; see also Am. Small Bus. League v. DOD, 372 F. Supp. 3d 1018, 1031-32 (N.D. Cal. 2019) (finding that common interest doctrine applies to Exemption 5 but holding that, where parties communicated about matter over four-year period but only entered into formal joint defense agreement for one month before agreement was withdrawn, common interest doctrine does not apply to "communications that were not legitimately made pursuant to a joint defense agreement").

[58] Hunton & Williams, 590 F.3d at 287-88.

[59] See Am. Mgmt. Servs., LLC v. Dep't of Army, 703 F.3d 724, 732-33 (4th Cir. 2013) (holding that "an agency must show that it had agreed to help another party prevail on its legal claims at the time of the communications at issue because doing so was in the public interest").

[60] Id. at 733.

[61] Welby v. HHS, No. 15-195, 2016 WL 1718263, at *8 (S.D.N.Y. Apr. 27, 2016) (finding that threshold was met in communications among HHS, New York Department of State, and subject nongovernmental entity because of joint litigation strategy) (internal citation omitted).

interest doctrine may be used to fulfill the threshold requirement of Exemption 5, it is not a privilege in and of itself.[62]

In contrast, the Court of Appeals for the Sixth Circuit did not find any textual justification for the application of the common interest doctrine in Exemption 5 when considering a request for records concerning the requester's arrest, detention, and interrogation in Austria.[63] The Sixth Circuit found that "[t]he [Office of International Affairs ('OIA')], undoubtedly an authority of the Government of the United States, sent the [requests for assistance] to the Central Authority of Austria and an unnamed country, undoubtedly not authorities of the Government of the United States."[64] The Sixth Circuit explained, "however important it may be for the OIA to have frank communications with the Central Authority of Austria and an unnamed foreign government, however common the interest between the OIA and its international partners, the Central Authority of Austria and an unnamed foreign government are not, so far as Congress has defined the term, *agencies*."[65]

Deliberative Process Privilege

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, which protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[66] Specifically, three policy purposes consistently

---

[62] See Am. Mgmt., 842 F. Supp. 2d at 878 ("The common interest doctrine satisfies only the inter-agency or intra-agency requirement of Exemption 5; it does not satisfy the second requirement, namely that the withheld documents be privileged."); United States v. Duke Energy Corp., No. 00-1262, 2012 WL 1565228, at *13 (M.D.N.C. Apr. 30, 2012) (finding that common interest doctrine is "not a privilege in and of itself").

[63] Lucaj v. FBI, 852 F.3d 541, 547 (6th Cir. 2017) (holding that requests for assistance from Office of International Affairs to the Central Authority of Austria and an unnamed country are not inter-agency).

[64] Id.

[65] Id. at 549.

[66] U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 267 (2021) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)); see also Elec. Frontier Found. v. DOJ, 739 F.3d 1, 7 (D.C. Cir. 2014) (protecting documents that "'compris[e] part of a process by which governmental decisions and policies are formulated'" (quoting Pub. Citizen v. OMB, 598 F.3d 865, 875 (D.C. Cir. 2010))); Lahr v. NTSB, 569 F.3d 964, 982 (9th Cir. 2009) (stating that exposure of "internal deliberations . . . would discourage candid discussion and effective decisionmaking"); Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998) ("The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny."); ACLU v. DHS, 738 F. Supp. 2d 93, 110 (D.D.C. 2010)

have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.[67]

In concept, this privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.[68]

(holding that agency properly withheld documents so as not to discourage the candid exchange of ideas and analysis required to conduct thorough investigation); Am. Fed'n of Gov't Emps., Loc. 812 v. Broad. Bd. of Governors, 711 F. Supp. 2d 139, 156 (D.D.C. 2010) (protecting emails that reflect internal deliberations of agency employees because release would reveal employees' preliminary thoughts and approaches); Wilson v. U.S. Air Force, No. 08-324, 2009 WL 4782120, at *5 (E.D. Ky. Dec. 9, 2009) (determining that an internal Air Force memorandum was covered by the deliberative process privilege because it was "not a final action by the agency and disclosure of such opinions and recommendations could have a chilling effect on the agency's discussions of such matters").

[67] See, e.g., U.S. Fish & Wildlife Serv., 592 U.S. at 267 (noting that "[t]o encourage candor, which improves decisionmaking, the [deliberative process] privilege blunts the chilling effect that accompanies the prospect of disclosure"); Waterman v. IRS, 61 F.4th 152, 161 (D.C. Cir. 2023) (stating that "[t]he ultimate purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions," and "reflects the view that if agencies were to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer" (internal quotation marks & citations omitted); Solers, Inc. v. IRS, 827 F.3d 323, 330 (4th Cir. 2016) (noting that deliberative process privilege "encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding deliberations; and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, but for matters they considered before making up their minds" (quoting City of Va. Beach v. U.S. Dep't of Com., 995 F.2d 1247, 1252 (4th Cir. 1993))); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980) (discussing purposes of deliberative process privilege).

[68] See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Schell v. HHS, 843 F.2d 933, 940 (6th Cir. 1988) ("Because Exemption 5 is concerned with protecting the deliberative process itself, courts now focus less on the material sought and more on the effect of the material's release."); Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes—not to protect specific materials."); Am. Ctr. for L. & Just. v. DOJ, 334 F. Supp. 3d 13, 21 (D.D.C. 2018) (finding that "'courts have generally found that documents created in anticipation of press inquiries are protected'" (quoting Protect Democracy Project, Inc. v. DOD, 320 F. Supp. 3d 162, 177 (D.D.C. 2018))); Protect Democracy Project, 320 F. Supp. 3d at 177 (finding talking points to respond to press and Congress withholdable because "[r]evealing their contents would expose the process by which agency officials crafted a strategy for responding"); Davidson v. U.S. Dep't of State,

Thus, even the status of an agency decision within an agency decisionmaking process may be protectable if the release of that information would have the effect of prematurely disclosing "the recommended outcome of the consultative process . . . as well as the source of any decision."[69]

The FOIA Improvement Act of 2016 created a sunset provision on the deliberative process privilege, amending the text of Exemption 5 of the FOIA to provide that "the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested."[70]

Traditionally, courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.[71] First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency

---

264 F. Supp. 3d 97, 113 (D.D.C. 2017) (finding that communications generated before adoption of agency policy on litigation at time when the Department was actively formulating litigation strategy reflected "'the give-and-take of the consultative process'") (internal citation omitted); Skinner v. DOJ, 744 F. Supp. 2d 185, 205-06 (D.D.C. 2010) (protecting emails between ATF agents and ATF attorneys discussing ongoing criminal investigation as release "'would inhibit the candid, internal discussion necessary for efficient and proper . . . preparation'") (internal citation omitted).

[69] Wolfe v. HHS, 839 F.2d 768, 775-76 (D.C. Cir. 1988) (en banc) (protecting records indicating what actions had been completed by FDA, but awaited final decision or approval by Secretary of HHS or OMB because Exemption 5 "allows agencies a space within which they may deliberate" and finding that disclosure of where proposal was in decisionmaking chain "would force officials to punch a public time clock" which could lead to "hasty and precipitous decisionmaking"); see also Elec. Frontier Found., 739 F.3d at 7 ("The deliberative process privilege protects agencies from being 'forced to operate in a fishbowl.'" (quoting EPA v. Mink, 410 U.S. 73, 87 (1973))); cf. W. Values Project v. DOJ, 317 F. Supp. 3d 427, 435 (D.D.C. 2018) (rejecting agency's attempt at using Exemption 5 Glomar response because "[t]he existence of a responsive record here would show only that OLC engaged in some deliberation, full stop . . . [and i]t would not necessarily reveal the content [of] any deliberations – any details about the agency's 'give-and-take' – surrounding a decision of whether to rescind a prior opinion") (internal citation omitted).

[70] 5 U.S.C. § 552(b)(5) (2018); see also OIP Summary of the FOIA Improvement Act of 2016 (posted 8/17/2016).

[71] See Mapother v. DOJ, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing Petroleum Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))); Adamowicz v. IRS, 672 F. Supp. 2d 454, 469 (S.D.N.Y. 2009) (protecting documents that "temporally precede and relate to specific agency decisions," and that "reflect the consultative process underlying the IRS's decisions"), aff'd, 402 F. App'x 648 (2d Cir. 2010).

policy."[72] Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[73] The burden is upon the agency to show that the information in question satisfies both requirements.[74] The quality of an agency's declaration and Vaughn Index have been found to be crucial to the agency's ability to meet this obligation.[75] The Court

---

[72] Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011) (stating that agency "recommendations are pre-decisional because they were created '[a]ntecedent to the adoption of an agency policy'" (quoting Jordan v. DOJ, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc))).

[73] Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); see Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ, 697 F.3d 184, 194 (2d Cir. 2012) (holding that documents are deliberative when they are "'related to the process by which policies are formulated'" (quoting Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 356 (2d Cir. 2005))).

[74] See Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); see also ACLU v. DOJ, 655 F.3d 1, 5 (D.C. Cir. 2011) (noting that burden is upon agency to demonstrate that withheld documents are exempt from disclosure).

[75] Compare Henson v. HHS, 892 F.3d 868, 877-78 (7th Cir. 2018) (finding that agency "detail[ed] on an individual basis the topics discussed by the agency's employees and the purposes for the communications"), Andela v. Admin. Off. of U.S. Cts., 569 F. App'x 80, 85 (3d Cir. 2014) (concluding that unredacted Substantial Weight Review is exempt from disclosure in part because the agency's declaration sufficiently described substantial weight review decisionmaking process), Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211 (8th Cir. 2008) (upholding agency's use of deliberative process privilege where it could be "fairly concluded" from Vaughn Index and declaration that release of documents could reveal deliberative process), Khatchadourian v. Def. Intel. Agency, 597 F. Supp. 3d 96, 116 (D.D.C. 2022) (noting that unlike the "'broad and opaque' nature of defendants' previous Vaughn Index and supporting affidavits . . . their renewed explanations detail how these records are predecisional and deliberative") (internal citation omitted), Crisman v. DOJ, No. 12-1871, 2019 WL 1330587, at *3 (D.D.C. Mar. 25, 2019) (finding that "[t]he agency's declaration provides context, and the disclosures are detailed as opposed to categorical assertions regarding the content of the redacted material"), and Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *4-5 (N.D. Cal. May 5, 2009) (same), with Citizens for Resp. & Ethics in Wash. v. DOJ, 45 F.4th 963, 967 (D.C. Cir. 2022) (holding that memorandum was not protected by deliberative process privilege since "the Department's submissions in the district court gave no indication that the memorandum related to Attorney General Barr's decision about making a public statement on the Mueller Report"), Pavement Coatings Tech. Council v. U.S. Geological Surv., 995 F.3d 1014, 1021 (D.C. Cir. 2021) (noting that "[t]he agency bears the burden of explaining its decision-making process, but we have no declaration that does so"), Rein v. U.S. Pat. & Trademark Off., 553 F.3d 353, 368 (4th Cir. 2009) (determining that "the Agencies' descriptions of many of the challenged documents lack the specificity and particularity required for a proper determination of whether they are exempt from disclosure"), Morley v. CIA, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (criticizing "minimal information" provided in agency submissions as being inadequate for court to determine if privilege was claimed properly), Elec. Frontier Found. v. DOJ, 826 F. Supp. 2d 157, 174-75 (D.D.C. 2011) (ordering

of Appeals for the District of Columbia Circuit has required agencies to explain the role a document played in decisionmaking — the "who, what, where, and how" of internal government deliberations — by identifying the roles of the document drafters and recipients, the nature of the withheld content, the stage within the broader deliberative process in which the withheld material operates, and the way in which the withheld material facilitates agency deliberation.[76]

Predecisional

The D.C. Circuit has held that a document is "predecisional" if it is "generated before the adoption of an agency policy."[77] In determining whether a document is predecisional, courts have found that an agency does not necessarily have to point specifically to an agency final decision,[78] but must instead establish "what deliberative

---

agency to supplement its Vaughn Index because previous submission did not provide adequate basis for evaluating applicability of Exemption 5), Info. Network For Responsible Mining (INFORM) v. Bureau of Land Mgmt., 611 F. Supp. 2d 1178, 1188-89 (D. Colo. 2009) (same), and Columbia Snake River Irrigators Ass'n v. Lohn, No. 07-1388, 2008 WL 750574, at *5 (W.D. Wash. Mar. 19, 2008) (ordering in camera review of documents where agency's submissions had not made clear whether withheld documents were party of agency's deliberative process).

[76] Jud. Watch, Inc. v. DOJ, 20 F.4th 49, 56-57 (D.C. Cir. 2021); see also Watkins L. & Advoc., PLLC v DOJ, 78 F.4th 436, 452 (D.C. Cir. 2023) (remanding for further consideration of deliberative process and attorney-client privileges given that agency's declarations lacked specificity including the "who," "what," "where," and "how"); Campaign Legal Ctr. v. DOJ, 34 F.4th 14, 23 (D.C. Cir. 2022) (holding that "to demonstrate that a document is deliberative, the government must explain the role it played in administrative decisionmaking—the 'who, what, where, and how' of internal governmental deliberations" (quoting Jud. Watch, Inc., 20 F.4th at 57)); Mountgordon v. U.S. Coast Guard, No. 21-1319, 2023 WL 5607454, at *4 (D.D.C. Aug. 30, 2023) (noting that agencies must establish "who," "what," "where," and "how").

[77] Jud. Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006); accord Stevens v. U.S. Dep't of State, 20 F.4th 337, 345 (7th Cir. 2021) (rejecting argument that "document is only predecisional if it pertains 'to the formulation or adoption of an official agency policy'" and finding that a "document is predecisional if it is generated before an agency's final decision on a matter, whether that matter is official or not") (internal citation omitted).

[78] See Nat. Res. Def. Council v. EPA, 19 F.4th 177, 192 (2d Cir. 2021) (rejecting claim that record must "relate to a specific decision facing the agency" and finding that "a record is predecisional if it relates to a specific decision *or a specific decisionmaking process* and was generated before the conclusion of that decision or process"); Rein, 553 F.3d at 373 ("Contrary to [plaintiff's] argument, the Agencies were not required to identify the specific policy judgment at issue in each document."); Techserve All. v. Napolitano, 803 F. Supp. 2d 16, 26-27 (D.D.C. 2011) (rejecting plaintiff's argument that defendants failed to show predecisional nature of certain documents where they did not "match the document with the corresponding final document"); Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of

process is involved, and the role played by the documents [at] issue in the course of that process."[79] On this point, the Supreme Court has been clear:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda

---

the Fed. Rsrv. Sys., 762 F. Supp. 2d 123, 136 (D.D.C. 2011) (rejecting plaintiff's contention that "the Board must identify a specific decision corresponding to each [withheld] communication"); The Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 359 (E.D.N.Y. 2009) (noting that agencies "are not required to point to a specific agency decision in order to establish that the deliberative process is involved"); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 522 (D. Minn. 2008) (rejecting claim that agency was required to link withheld documents to specific agency decision); Perdue Farms Inc. v. NLRB, No. 96-27, 1997 U.S. Dist. LEXIS 14579, at *17 (E.D.N.C. Aug. 5, 1997) ("Although some [deliberative] processes do not ripen into agency decisions, this does not preclude application of the deliberative process privilege."). But see ACLU of Mass., Inc. v. ICE, 448 F. Supp. 3d 27, 40 (D. Mass. 2020) (finding that "ICE has not, as is its burden, 'pinpoint[ed] the specific agency decision to which the [last-in-time version of the draft talking points] correlates' or 'verif[ied] that the [last-in-time version of the draft talking points] precedes, in temporal sequence, the decision to which it relates'" (quoting Providence J. Co. v. U.S. Dept. of the Army, 981 F.2d 552, 557 (1st Cir. 1992))).

[79] Coastal States, 617 F.2d at 868; see also Providence J. Co. v. U.S. Dep't of the Army, 981 F.2d 552, 559-60 (1st Cir. 1992) (protecting IG's recommendations even though decisionmakers were not obligated to follow them as recommendations were "'essential' to the consultative process within the agency"); Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123 (D.C. Cir. 1989) (protecting recommendations on suitability of article for publication, though decision on "whether and where" to publish article had not yet been made); Schell v. HHS, 843 F.2d 933, 941 (6th Cir. 1988) ("When specific advice is provided, . . . it is no less predecisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use."); Competitive Enter. Inst. v. Dep't of State, 225 F. Supp. 3d 582, 586 (E.D. Va. 2016) (finding that while agency has not pointed to particular decision that documents related to, "there is an additional burden on State to justify nondisclosure[]" and "State has met that burden . . . by demonstrating how the withheld information related to the formulation of actual agency policy"); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Lab., 478 F. Supp. 2d 77, 82 (D.D.C. 2007) (upholding protection because agency was "generally considering" whether to support particular proposal); Maydak v. DOJ, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) (protecting information concerning federal inmate that was used by BOP officials as part of continuing process of making decisions regarding inmate's status); cf. Carter v. U.S. Dep't of Com., 186 F. Supp. 2d 1147, 1153-54 (D. Or. 2001) (holding that adjusted census data not examined by decisionmaker "cannot be said to have contributed" to decisionmaking process; and rejecting argument that data were nevertheless predecisional because agency was actively considering using them in future), aff'd, 307 F.3d 1084 (9th Cir. 2002).

> containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.[80]

The Supreme Court reiterated that recommendations reflecting a preliminary view rather than a final decision are protected even if they prove to be the last word, when such recommendations are last not because they are final but because they died on the vine.[81] Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, courts have found Exemption 5 can be applicable.[82] The D.C. Circuit has emphasized the importance of identifying the larger process to which a document contributes.[83]

---

[80] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975).

[81] U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 262 (2021) (holding that "deliberative process privilege protects the draft biological opinions at issue here because they reflect a preliminary view – not a final decision" and "were subject to change and had no direct legal consequences"); see also Cause of Action Inst. v. VA, No. 20-997, 2021 WL 1549668, at *11 (D.D.C. Apr. 20, 2021) (finding that "like the draft biological opinions disputed in [U.S. Fish & Wildlife Serv.], the pilot market assessments and briefing documents are regarded by VA as subject to revision" and the "VA has not held these documents out as final in any way").

[82] See, e.g., Campaign Legal Ctr. v. DOJ, 34 F.4th 14, 25 (D.C. Cir. 2022) (finding that in drafting letter, agency "was not simply describing an already-made decision" but "[i]nstead, it was engaged in formulating and refining both the actual content of and the public rationale for a new and consequential governmental policy"); N.H. Right to Life v. HHS, 778 F.3d 43, 54 (1st Cir. 2015) (finding that documents created after final decision are predecisional because they "deal with the Department's decision of how and what to communicate to the public [about that final decision], which is a decision in and of itself"); ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at *5 (W.D. Wash. Mar. 10, 2011) (holding that the FBI properly withheld documents that "do not reflect final agency decisions" and "are integral parts of an on-going decision-making process within the agency"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1038 (N.D. Cal. 2005) (protecting documents concerning government's "no-fly" list even after implementation of the lists, because withheld documents discussed potential revisions to relevant regulations); Tarullo v. DOD, 170 F. Supp. 2d 271, 277 (D. Conn. 2001) (concluding that, because withheld material consisted "primarily of specific subjective recommendations about future agency conduct and policy" and was part of ongoing policy considerations, withholding was proper).

[83] See Access Reps. v. DOJ, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991) (finding agency "met its burden of identifying the decisionmaking process to which [the withheld documents] contributed–the Department's study of how to shepherd the FOIA bill through Congress[-]" and upholding use of privilege even where withheld documents bore "a superficial relation to . . . [a] postdecisional explanation or justification," because documents were more "like a staffer's preparation of 'talking points'" for use by a superior) (internal citation omitted); see also Assassination Archives Rsch. Ctr. v. CIA, No. 18-5280, 2020 WL 13120318, at *2 (D.C. Cir. Dec. 21, 2020) (upholding use of privilege where "withheld communications

The predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision[84] or has decided not to make a final decision.[85] The mere passage of time does not alter the predecisional character of a document.[86]

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,[87] that implement an

---

indisputably precede the CIA's decision" and finding that "it is evident that the redacted matter amounted to predecisional communications from staff made for the purpose of informing the agency's ultimate decision as to what the law required of the Agency in response to the Center's FOIA request"); Nielsen, 252 F.R.D. at 522 (protecting documents where agency sufficiently tied opinions and recommendations to specific agency deliberative processes); Citizens for Resp. & Ethics in Wash., 478 F. Supp. 2d at 83 (applying privilege to agency deliberations on how to respond to media report); Sierra Club v. U.S. Dep't of Interior, 384 F. Supp. 2d 1, 16 (D.D.C. 2004) (upholding use of privilege to documents discussing agency strategies to promote legislative proposals to Congress).

[84] See, e.g., Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979) (holding that, because Exemption 5 is intended to protect free flow of advice, issuance of decision does not remove need for protection); Smith v. Dep't of Lab., 798 F. Supp. 2d 274, 281-82 (D.D.C. 2011) (finding that fact that OIG report was published "after the citations were issued" does not alter deliberative nature of communications "because the question is whether the deliberation, not the publication of the report, preceded the citation"); Elec. Priv. Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) ("Contrary to plaintiff's assertion that materials lose their Exemption 5 protection once a final decision is taken, it is the document's role in the agency's decision-making process that controls."); Jud. Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (rejecting as "unpersuasive" assertion that deliberative process privilege is inapplicable after deliberations have ended and relevant decision has been made).

[85] See Sears, 421 U.S. at 151 n.18 (extending protection to records that are part of decisionmaking process even where process does not produce actual decision by agency); Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *21 (D.D.C. Mar. 20, 2006) (rejecting plaintiff's claim that documents relating to action ultimately not taken did not qualify as predecisional); Jud. Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995) (holding that to release deliberative documents because no final decision was issued would be "exalting semantics over substance"), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); cf. Elec. Priv. Info. Ctr., 384 F. Supp. 2d at 112 (holding that documents concerning now-abandoned agency program were nonetheless predecisional).

[86] See, e.g., Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 359-60 (E.D.N.Y. Sept. 9, 2009) (finding that "the passage of time . . . does not render the deliberative process privilege . . . inapplicable" as it is a "matter of logic[ ] that "'[t]he predecisional character of a document is not lost simply . . . because of the passage of time'" (quoting Bruscino v. BOP, No. 94-1955, 1995 WL 444406, at *5 (D.D.C. May 15, 1995))).

[87] See U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 271 (2021) (explaining that while decision's "real operative effect" is an indication of its finality, "that reference is to

established policy of an agency,[88] or that explain actions that an agency has already taken.[89] The Supreme Court has declared that Exemption 5 ordinarily does not apply to

---

the legal, not practical, consequences that flow from an agency's action") (citation omitted); Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983) (holding that chief counsel opinions, indexed and afforded precedential weight, are "'statements of policy and interpretations which have been adopted'" rather than "'advisory opinions'") (internal citation omitted); Sterling Drug Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971) (stating that certain documents "are not the ideas and theories which go into the making of the law," but instead "are the law itself, and as such should be made available to the public"); Evans v. OPM, 276 F. Supp. 2d 34, 40 (D.D.C. 2003) (holding that deliberative process privilege does not protect memorandum issued by OPM's Office of General Counsel that is "clear statement" of OPM's position on adoption of governmentwide hiring policy); cf. Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997) ("'A strong theme of our [deliberative process] opinions has been that an agency will not be permitted to develop a body of "secret law". . . .'" (quoting Coastal States Gas Corp. v. DOE, 617 F.2d 854, 867 (D.C. Cir. 1980))).

[88] See, e.g., Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980); Knight First Amendment Inst. at Columbia Univ. v. CDC, 560 F. Supp. 3d 810, 831 (S.D.N.Y. 2021) (holding that "discussions of how to apply a binding policy, rather than conferring about developing that policy" as well as temporary policy, which operated as "a final decision while in effect" were postdecisional); ACLU v. DOD, No. 15-9317, 2017 WL 4326524, at *9 (S.D.N.Y. Sept. 27, 2017) (holding that guidance "clearly intended to have 'operative effect'" was not deliberative even though agency characterized it as "'preliminary input in advance of final decision from Headquarters'") (internal citations omitted); Safeway Inc. v. IRS, No. 05-3182, 2006 WL 3041079, at *9 (N.D. Cal. Oct. 24, 2006) (ordering release of documents characterized as "intraagency discussion of how to apply established policy and law to the particular facts of Plaintiff's audit"); Nissei Sangyo Am., Ltd. v. IRS, No. 95-1019, 1997 U.S. Dist. LEXIS 22473, at *23-24 (D.D.C. May 8, 1997) (magistrate's recommendation) (declining to apply deliberative process privilege to results of tax audit in which agency was merely "applying published tax laws to factual information regarding a taxpayer"), adopted, (D.D.C. Jan. 28, 1998).

[89] See, e.g., Sears, 421 U.S. at 153-54; Coastal States, 617 F.2d at 869 (denying protection for memoranda that "were not suggestions or recommendations as to what agency policy should be," but instead were "straightforward explanations of agency regulations in specific factual situations"); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of the Treasury, No. 20-2256, 2022 WL 3042180, at *4-5 (D.D.C. Aug. 2, 2022) (finding that "[r]egardless of whether the 'final' agency decision appears" elsewhere, document in question is final document because it "'simply describe[s] already-made and in-place policy choices'" (quoting Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 367 (D.C. Cir. 2021))); Elec. Priv. Info. Ctr. v. DOJ, 490 F. Supp. 3d 246, 272 (D.D.C. 2020) (finding that certain information withheld is not predecisional because it explains decisions already made by the Special Counsel, and such information is not protected by the deliberative process privilege); Warren v. SSA, No. 98-0116E, 2000 WL 1209383, at *3 (W.D.N.Y. Aug. 22, 2000) (determining that privilege does not protect ordered ranking of job applicants, and reasoning that such ranking "is not pre-decisional . . . as [it is] the result of the panel's decisions" rather than intermediate step in a multi-layered decisionmaking process but noting this information may still be withheld pursuant to Exemption 6), aff'd in pertinent

postdecisional documents as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted."[90] At the same time, it is possible for communications to be postdecisional in form and timing, but predecisional in content.[91] Careful analysis of the decisionmaking process is required to determine whether the records relate only to a previously made, final decision, and thus are postdecisional, or also relate to another future decision, whereby they may retain their predecisional nature.[92]

---

part & remanded on other grounds, 10 F. App'x 20 (2d Cir. 2001); Jud. Watch Inc. v. HHS, 27 F. Supp. 2d 240, 245 (D.D.C. 1998) (noting that "deliberative process privilege does not protect documents that merely state or explain agency decisions"); see also Badhwar v. DOJ, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing *pre* decisional about a recitation of corrective action already taken."), aff'd in part, vacated in part, & remanded on other grounds, 829 F.2d 182 (D.C. Cir. 1987).

[90] Sears, 421 U.S. at 152.

[91] See Sears, 421 U.S. at 151 (noting that postdecisional documents may still reflect protected "prior communications and the ingredients of the decisionmaking process"); see also Mead Data Cent. Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are.") (internal citation omitted); Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 233-34 (D.D.C. 2009) (holding that records created after agency decision had been made could be protected because they contained discussions of predecisional deliberations); Elec. Priv. Info. Ctr. v. DHS, No. 04-1625, 2006 U.S. Dist. LEXIS 94615, at *22-24 (D.D.C. Dec. 22, 2006) (protecting email message generated after agency decision made that "recanted" deliberations preceding decision); cf. N. Dartmouth Props. Inc. v. HUD, 984 F. Supp. 65, 69 (D. Mass. 1997) (noting that author may not have known that final decision had been reached at time he composed message because "[n]o one would waste time preparing an e-mail message in an attempt to persuade someone to reach a conclusion if he knew that the conclusion he was advocating had already been reached").

[92] See, e.g., Campaign Legal Ctr. v. DOJ, 34 F.4th 14, 24 (D.C. Cir. 2022) (holding that "even after an agency head has set the direction of agency policy at the macro level, the subsequent work needed to define, refine, debate, and flesh out the boundaries of and justifications for that position can, upon a proper showing, also qualify as predecisional"); N.H. Right to Life v. HHS, 778 F.3d 43, 54 (1st Cir. 2015) (finding that documents created after final decision are predecisional because they "deal with the Department's decision of how and what to communicate to the public [about that final decision], which is a decision in and of itself"); Stalcup v. CIA, 768 F.3d 65, 71-72 (1st Cir. 2014) (finding that documents were predecisional because CIA's task did not end when it reached its initial conclusion but rather continued when it was presented with new data and undertook to determine whether it needed to change its position); City of Va. Beach v. U.S. Dep't of Com., 995 F.2d 1247, 1254 (4th Cir. 1993) (protecting documents discussing past decision insofar as it influences future decision); Access Reps. v. DOJ, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (finding that staff attorney memorandum on how proposed FOIA amendments would affect future cases not postdecisional working law, but rather opinion on how to handle pending legislative

Several criteria have been fashioned by the courts to clarify what has been called the "often blurred" distinction between predecisional and postdecisional documents.[93] First, an agency should determine whether the document is a "final opinion" within the meaning of one of the two proactive disclosure provisions of the FOIA.[94] In Rockwell International Corp. v. DOJ,[95] the D.C. Circuit determined that "as a general principle[, an] action taken by the responsible decisionmaker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA."[96] In addition, the D.C. Circuit further held that if a final decision is accompanied by an explanation from the decisionmaker discussing the basis of the

---

process); Gellman v. DHS, 525 F. Supp. 3d 1, 11 (D.D.C. Feb. 22, 2021) (finding that records containing reactions to news articles without articulated future decision do not qualify for privilege but upholding use of privilege for records that include both reactions to news articles and articulated future decisions); Competitive Enter. Inst. v. EPA, 12 F. Supp. 3d 100, 121 (D.D.C. 2014) (finding that "[d]eliberations over how to commemorate a past event are obviously 'predecisional' to the actual commemoration—they bear little, if at all, on the event itself"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1038 (N.D. Cal. 2005) (upholding decision to withhold documents that concerned possible revisions to "no-fly" list regulations); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (rejecting plaintiff's argument that mere fact that documents in question were created after relevant settlement agreement was concluded mandated holding that they were postdecisional; agency may properly withhold documents evaluating prior agency decision); cf. Steinberg v. DOJ, No. 91-2740, 1993 WL 385820, at *3 (D.D.C. Sept. 13, 1993) (holding that protection of exemption is not lost where decision to conduct particular type of investigation was merely intermediate step in larger process).

[93] Schlefer v. United States, 702 F.2d 233, 237 (D.C. Cir. 1983).

[94] 5 U.S.C. § 552(a)(2)(A); see Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360-61 n.23 (1979) (holding that "with respect to final opinions, Exemption 5 can never apply" but that the "mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges"); Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982) (finding that Congress intended proactive disclosure provisions of FOIA "to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency'") (internal citation omitted).

[95] 235 F.3d 598 (D.C. Cir. 2001).

[96] Id. at 602-03 (concluding that report was not final opinion because it contained "conclusions of a voluntarily undertaken internal agency investigation, not a conclusion about agency action (or inaction) in an adversarial dispute with another party"); see Common Cause v. IRS, 646 F.2d 656, 659-60 (D.C. Cir. 1981) (rejecting claim that document was final opinion, because agency's action involved "the voluntary suggestion, evaluation, and rejection of a proposed policy by an agency, not the agency's final, unappealable decision not to pursue a judicial remedy in an adversarial dispute").

decision, that explanation would be considered part of the final decision and must be disclosed.[97] In another case discussing final opinions, the D.C. Circuit held that even though the opinions at issue were found to be "nonbinding" on the ultimate decisionmakers, they were not predecisional because they constitute "statements of an agency's legal position."[98]

Second, courts have considered the nature of the decisionmaking authority vested in the office or person issuing the document.[99] If the author lacks "legal decision authority," the document is far more likely to be predecisional.[100] The D.C. Circuit has,

---

[97] Rockwell, 235 F.3d at 603; see also Citizens for Resp. & Ethics in Wash. v. GSA, 358 F. Supp. 3d 50, 53-54 (D.D.C. 2019) (finding that a document is not predecisional where it "was intended to be 'an expression of the agency's official position' rather than an 'expression of the individual author's views'" and holding that "[t]he document is announcing what the agency *is* doing (and why), not arguing for what it *should* be doing" (quoting Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.C. Cir. 1989))).

[98] Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997); see also Tax Analysts v. IRS, 483 F. Supp. 2d 8, 17-18 (D.D.C. 2007) (ordering release of documents reflecting agency's official position on tax code); Evans v. OPM, 276 F. Supp. 2d 34, 39 (D.D.C. 2003) (ordering release of memorandum setting forth agency's legal position on issue after finding document at issue "indistinguishable" from records at issue in Tax Analysts); Ginsberg v. IRS, No. 96-2265, 1997 WL 882913, at *4 & nn.4, 5 (M.D. Fla. Dec. 23, 1997) (magistrate's recommendation) ("Although the opinions of District Counsel may not represent final opinions or policy statements of the IRS . . . [they were] relied upon and specifically referenced" by IRS agent in conduct of examination.), adopted, (M.D. Fla. Jan. 27, 1998).

[99] See, e.g., Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.D.C. 1989) ("What matters is that the person who issues the document has authority to speak finally and officially for the agency.").

[100] Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184-85 (1975) (finding that reports prepared prior to final decision of full Board were predecisional); see also Rutigliano v. DOJ, 847 F. App'x 86, 87 (2d Cir. 2021) (finding that AUSA's declination memorandum to supervisor is predecisional); Elec. Frontier Found. v. DOJ, 739 F.3d 1, 8-9 (D.C. Cir. 2014) ("OLC is not authorized to make decisions about the FBI's investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy" and is thus predecisional as it "amounts to advice offered by OLC for consideration by officials of the FBI[.]"); A. Michael's Piano Inc. v. FTC, 18 F.3d 138, 147 (2d Cir. 1994) (finding staff attorney's recommendation predecisional as she had no authority to close investigation); Worldnetdaily.com, Inc. v. DOJ, 215 F. Supp. 3d 81, 84 (D.D.C. 2016) (finding that memorandum to supervisors recommending declination of prosecution of two Assistant United States Attorneys "does not reflect a *determination* to decline to prosecute, but a *recommendation* that the United States Attorney decline to do so, along with the evidence and analysis supporting that recommendation" and, therefore, is deliberative); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 24-25 (D.D.C. 2001) (protecting memoranda "written by a component office without decisionmaking authority to a different component office" that had such authority), aff'd in part, rev'd in part on other grounds & remanded, 294 F.3d 71 (D.C. Cir. 2002); Tax Analysts v. IRS, 97 F. Supp. 2d 13, 17 (D.D.C. 2000) ("Because the

however, looked "beneath formal lines of authority to the reality of the decisionmaking process."[101] Hence, the D.C. Circuit has held that even though an official lacks ultimate decisionmaking authority, if agency "practices" commonly accord decisionmaking authority to that official they will be considered to be final authority in the context of determining whether a document is predecisional.[102] Conversely, an agency official who appears to have final authority may in fact not have such authority or may not be wielding that authority in a particular situation.[103]

Third, it is useful to examine the direction in which the document flows along the decisionmaking chain. A document "from a subordinate to a superior official is more likely to be predecisional"[104] than is one that travels in the opposite direction: "'[F]inal

---

drafters lack ultimate [decisionmaking] authority, their views are necessarily [predecisional]."), aff'd, 294 F.3d 71 (D.C. Cir. 2002).

[101] Schlefer v. United States, 702 F.2d 233, 238 (D.C. Cir. 1983); see also Nat'l Wildlife Fed. v. U.S. Forest Serv., 861 F.2d 1114, 1123 (9th Cir. 1988) (rejecting plaintiff's argument that Schlefer compelled release of recommendations to Regional Forester, finding that documents contained "merely opinions, recommendations, and queries aimed at improving" forest plans and were not "final, binding agency policy"); cf. Goldstein v. Off. of Indep. Couns., No. 87-2028, 1999 WL 570862, at *7 (D.D.C. July 29, 1999) (protecting recommendations on possible criminal investigations from head of DOJ's Criminal Division to Director of FBI).

[102] Schlefer, 702 F.2d at 238, 241; see, e.g., Badran v. DOJ, 652 F. Supp. 1437, 1439 (N.D. Ill. 1987) (concluding that INS decision on plaintiff's bond was final, even though it was reviewable by immigration judge, "because immigration judges are independent from the INS, and no review of plaintiff's bond occurred within the INS").

[103] See, e.g., Nat'l Wildlife, 861 F.2d at 1122-23 (finding that headquarters' comments on regional plans were opinions and recommendations "constitut[ing] the 'give-and-take' of the Forest Service") (internal citation omitted); Heggestad v. DOJ, 182 F. Supp. 2d 1, 10 (D.D.C. 2000) (finding that top official in DOJ's Tax Division actually had made decision to prosecute despite fact that authority to make such decisions was normally exercised by chief of Tax Division's Criminal Section and so all documents prepared prior to that decision were predecisional).

[104] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 868 (D.C. Cir. 1980); see Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 370 (D.C. Cir. 2020) (holding that "recommendations from subordinates to superiors lie at the core of the deliberative process privilege"); Casad v. HHS, 301 F.3d 1247, 1252 (10th Cir. 2002) (highlighting usefulness of identifying "relative positions in the agency's 'chain of command' occupied by the document's author and recipient" in determining whether document is predecisional) (internal citation omitted); Muttitt v. Dep't of State, 926 F. Supp. 2d 284, 308 (D.D.C. 2013) (citing Coastal States and noting that documents from subordinate to supervisor are more likely to be predecisional than documents flowing in other direction); Trea Senior Citizens League v. Dep't of State, 923 F. Supp. 2d 55, 68 (D.D.C. 2013) (same); see also Nadler v. DOJ, 955 F.2d 1479, 1491 (11th Cir. 1992) ("[A] recommendation to a supervisor on how to

opinions' . . . typically flow from a superior with [policymaking] authority to a subordinate who carries out the policy."[105] However, a superior's involvement does not mean a document is always postdecisional,[106] as recommendations can also flow from the superior to the subordinate.[107]

Of final note, courts have found documents to be "predecisional" not only when they are circulated within the agency, but also when they originate from an agency lacking decisional authority that advises another agency possessing such authority.[108] The privilege has been found to protect "documents which the agency decisionmaker herself

---

proceed is predecisional by nature."); Hayes v. Dep't of Lab., No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at *18 (S.D. Ala. June 18, 1998) (magistrate's recommendation) ("[A] recommendation from a lower-level employee to a higher-level manager qualifies as a predecisional, deliberative document for purposes of exemption 5."), adopted, 1998 U.S. Dist. LEXIS 14154 (S.D. Ala. Aug. 10, 1998); Am. Fed'n of Gov't Emps., Loc. 2782 v. U.S. Dep't of Com., 632 F. Supp. 1272, 1276 (D.D.C. 1986) (noting that "[a] reviewing court must consider such factors as whether the documents were composed by a subordinate for use by a superior who actually makes the decision"), aff'd, 907 F.2d 203 (D.C. Cir. 1990); Ashley v. U.S. Dep't of Lab., 589 F. Supp. 901, 908 (D.D.C 1983) (withholding documents "written by agency personnel who had no decisionmaking authority, and were addressed to agency superiors to help them formulate general or specific policies").

[105] Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

[106] See Austin Sanctuary Network v. ICE, No. 20-01686, 2022 WL 4356732, at *18 (S.D.N.Y. Sept. 19, 2022) (finding that "[w]hile discussions involving senior leaders may be more likely to be the denouement of decision-making authority than those involving junior or midlevel employees, it is not the case that discussions in which senior leaders are involved necessarily or even are likely to involve such authority").

[107] See Nat'l Wildlife, 861 F.2d at 1123 (finding comments from headquarters to regional office, under circumstances presented, to be advisory rather than directory); N. Dartmouth Props. Inc. v. HUD, 984 F. Supp. 65, 70 (D. Mass. 1997) (dictum) ("Conversation is, after all, a two-way street. A superior would be willing to engage a subordinate in candid debate only if he knows that his opinions will also be protected by the 'deliberative process' privilege.") (internal citation omitted).

[108] See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 188 (1975); Bureau of Nat'l Affs. v. DOJ, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (finding that agency recommendations to OMB concerning development of proposed legislation were predecisional because OMB had final decisionmaking authority, even though agency had made final decision as to substance of its recommendation); Schaefer v. EPA, No. 20-2702, 2023 WL 2663015, at *6 (D.D.C. Mar. 28, 2023) (finding that emails exchanged between EPA and FBI concerning related criminal matter in which EPA did not possess decisionmaking authority were predecisional); Defs. of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 18-19 (D.D.C. 2004) (protecting documents relating to ethics investigation that were prepared by Department of the Interior and given to Office of Government Ethics, which had final authority over investigation).

prepared as part of her deliberation and decisionmaking process,"[109] or documents that do not end up being considered by the agency decisionmaker at all.[110] Lastly, the Court of Appeals for the Seventh Circuit held that the privilege is not limited to deliberations connected solely to agency activities that are specifically authorized by Congress.[111]

Deliberative

In addition to being predecisional, in order to fall within the deliberative process privilege, the material must be "deliberative."[112] As the D.C. Circuit has stated, to be protected by the deliberative process privilege, the document must "reflect[ ] the give-and-take of the consultative process," either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate a decision.[113]

---

[109] Jud. Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 14 (D.D.C. 2000) (protecting notes taken by Attorney General that she did not share with others); see Nat'l Rt. to Work Legal Def. & Educ. Found. Inc. v. U.S. Dep't of Lab., 828 F. Supp. 2d 183, 190 (D.D.C. 2011) (protecting unattributed handwritten notes detailing discussion of policy issues regarding agency rulemaking); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 515-16 (S.D.N.Y. 2010) (withholding handwritten notes constituting senior officials' comments on another document).

[110] See, e.g., Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., 376 F.3d 1270, 1279 (11th Cir. 2004) (holding that documents which had contributed to decisionmaking process are privileged even though they had not been considered by final decisionmaker); Hamilton Sec. Grp. Inc. v. HUD, 106 F. Supp. 2d 23, 30 (D.D.C. 2000) (protecting draft audit report that was never reviewed by agency decisionmaker; holding that "only those materials that are reviewed and approved by the District Inspector General represent the agency's final position"), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); Greenberg v. Dep't of the Treasury, 10 F. Supp. 2d 3, 16 (D.D.C. 1998) (rejecting argument that documents were not deliberative because they were not actually relied upon, observing that "[i]f the author had known that the notes discussing the proposed questions and issues would be subject to FOIA disclosure if not actually used, the author likely would have been more cautious in what he or she recommended"); Brooks v. IRS, No. 96-6284, 1997 U.S. Dist. LEXIS 21075, at *23-24 (E.D. Cal. Nov. 17, 1997) (stating that "[g]overnmental privilege does not hinge on whether or not the District Counsel relied on or accorded any weight to the information at issue in rendering its final decision").

[111] Enviro Tech Int'l Inc. v. EPA, 371 F.3d 370, 376 (7th Cir. 2004) (protecting documents that contained EPA recommendations on workplace exposure limits to n-Propyl Bromide, despite fact that EPA lacks statutory authority to regulate such exposure limits).

[112] McKinley v. Bd. of Governors of Fed. Rsrv. Sys., 647 F.3d 331, 339 (D.C. Cir. 2011) ("To qualify for Exemption 5 protection under the deliberative process privilege, 'an agency's materials must be both "predecisional" and a part of the "deliberative process."'" (quoting Nat'l Inst. of Mil. Just. v. DOD, 512 F.3d 677, 680 n.4 (D.C. Cir. 2008))).

[113] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980) (explaining that deliberative process privilege "covers recommendations, draft documents, proposals,

Courts have protected under the deliberative process privilege material that would expose the opinions, advice, or recommendations offered in the course of agency decisionmaking.[114]

Generally, factual information is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel.[115] District courts have concluded that there is no discretion or

---

suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"); see also Assassination Archives & Rsch. Ctr. v. CIA, No. 18-5280, 2020 WL 13120318, at *2 (D.C. Cir. Dec. 21, 2020) (finding that redacted material "'reflects the give-and-take' of a 'consultative process' through which the agency sought to identify records within its possession potentially responsive to the . . . requests") (internal citations omitted); Energy Pol'y Advocs. v. SEC, No. 22-01497, 2023 WL 6976071, at *4 (D.D.C. Oct. 23, 2023) (finding that "informal internal agency dialogue about the nuts and bolts of proposed rulemaking" is deliberative and explaining "it would be hard to imagine content more clearly exemplifying the 'give-and-take of the consultative process'" (quoting Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 364 (D.C. Cir. 2021))); Louise Trauma Ctr., LLC v. DOJ, No. 20-3517, 2022 WL 278771, at *8 (D.D.C. Jan. 30, 2022) (declining to extend privilege to training materials, explaining that "although give-and-take conversations may have occurred at the training, the deliberative process privilege would only protect the withheld materials if the documents themselves reflected that deliberative process"); Docufreedom Inc. v. DOJ, No. 17-2706, 2019 WL 3858166 (D. Kan. Aug. 16, 2019) (concluding that discussions about how to respond to a FOIA request fall squarely under the deliberative process privilege because such "discussions would demonstrate the 'give-and-take of the consultative process'") (internal citation omitted).

[114] See, e.g., Shapiro v. DOJ, 293 F. Supp. 3d 99, 117 (D.D.C. Feb. 1, 2018) (finding that OIP correctly withheld impressions, analysis, and recommendation of staff in evaluation and adjudication of adequacy of FBI's FOIA searches); Elec. Frontier Found. v. DOJ, 892 F. Supp. 2d 95, 102 (D.D.C. 2012) (protecting material that "constitutes advice used by decision-makers at the FBI . . . in the context of their efforts to ensure that any [FBI] information-gathering procedures fully comply with the law") (internal quotations omitted), aff'd, 739 F.3d 1 (D.C. Cir. 2014); Elec. Frontier Found. v. DOJ, 890 F. Supp. 2d 35, 43-48 (D.D.C. 2012) (protecting materials that would reveal development of agency's negotiating position in discussions with foreign nations).

[115] See, e.g., EPA v. Mink, 410 U.S. 73, 91 (1973) (refusing to extend deliberative process privilege protection to "factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy, or opinion"); Kowack v. U.S. Forest Serv., 766 F.3d 1130, 1135 (9th Cir. 2014) (finding that even though facts are not automatically subject to disclosure, facts must reveal the deliberative process in order to be protected); Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002) (holding that site-specific information provided by state agency to Department of the Interior was not deliberative because it consisted of purely factual information); Coastal States, 617 F.2d at 867 (holding that deliberative process privilege only applies to "opinion" or "recommendatory" portions of documents not factual information (citing Mink, 410 U.S. at 93)); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of State, 585 F. Supp. 3d 34, 47-48 (D.D.C. 2022) (finding that tally of documents responsive to specific congressional inquiries

deliberation involved in fact-finding and, therefore, "unverified observations of first impression" are also considered to be factual information not covered by the deliberative process privilege.[116] Courts have found that, not only would factual material "generally be available for discovery,"[117] but its release usually would not risk chilling agency deliberations.[118] Thus, courts generally require agencies to segregate out purely factual information for release.[119] This seemingly straightforward distinction between

---

is factual, not deliberative, where agency "never explains the role the numbers here play in any consultative process"); McGrady v. Mabus, 635 F. Supp. 2d 6, 18-19 (D.D.C. 2009) (distinguishing between letters and memoranda which are deliberative and documents that contain only factual material); Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (concluding that release of "raw research data" would not expose agency's deliberative process, on grounds that such data were not recommendations, not subject to alteration upon further agency review, and not "selective" in character), aff'd on other grounds, 314 F.3d 1060 (9th Cir. 2002).

[116] Nat'l Pub. Radio, Inc. v. DHS, No. 20-2468, 2022 WL 4534730, at *6-7 (D.D.C. Sept. 28, 2022) (finding that records containing "unverified observations of first impression," or notations, such as measurements, made during routine investigations of DHS detention centers are "just the sort of purely factual information that ordinarily is not deliberative"); see also Project on Gov't Oversight, Inc. v. DHS, 657 F. Supp. 3d 50, 62 (D.D.C. 2023) (same); Harvard Immigr. & Refugee Clinical Program v. DHS, No. 21-12030, 2023 WL 4685961, at *11 (D. Mass. July 21, 2023) (same). But see Zaid v. DOJ, Nos. 21-1130, 21-2625, 22-1602, 2023 WL 4351401, at *13-14 (D. Md. July 5, 2023) (upholding use of deliberative process privilege for handwritten interview notes containing facts, as well as Special Agent's observations and impressions collected during interview), aff'd on other grounds, 96 F.4th 697 (4th Cir. 2024).

[117] Mink, 410 U.S. at 87-88.

[118] See Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974) (holding that release of factual material would not be "injurious" to decisionmaking process); Citizens for Resp. & Ethics in Wash. v. DHS, 648 F. Supp. 2d 152, 158-59 (D.D.C. 2009) (holding that request for assistance in determining what sector of agency should have responsibility for particular task does not involve agency policy considerations, is factual, and does not risk chilling future agency discussions); Nat. Res. Def. Council v. Nat'l Marine Fisheries Serv., 409 F. Supp. 2d 379, 385 (S.D.N.Y. 2006) (ordering release of documents on basis that "preliminary findings as to objective facts" are not protectable); Dean v. FDIC, 389 F. Supp. 2d 780, 794 (E.D. Ky. 2005) (distinguishing between portions of documents containing opinions of Inspector General investigators and sections that merely discuss substance of investigations); Pub. Citizen v. Dep't of State, No. 91-746, 1991 WL 179116, at *4 (D.D.C. Aug. 27, 1991) (citing Montrose Chem. and noting principle that release of "purely factual matters" generally "would not threaten agency deliberations"); cf. Kubik v. BOP, No. 10-6078, 2011 U.S. Dist. LEXIS 71300, at *23 (D. Or. July 1, 2011) (noting that withholding of factual material was proper because disclosure "has the potential to chill frank discussions").

[119] See, e.g., Waterman v. IRS, 61 F.4th 152, 161 (D.C. Cir. 2023) (finding that a "comprehensive collection of the essential facts" where author did not exercise judgment

deliberative and factual materials can become less clear, however, where the facts themselves reflect the agency's deliberative process[120] — which has prompted the D.C. Circuit to observe "that use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases."[121] In some cases, there has been disagreement about whether to characterize material as "fact" or "opinion" in the first place.[122]

---

does not qualify for deliberative process privilege and must be segregated out for release); Transgender L. Ctr. v. ICE, 46 F.4th 771, 786 (9th Cir. 2022) (remanding for segregability analysis and finding that agencies did not discuss segregability of factual information "although it was their burden 'to establish that all reasonably segregable portions of a document have been segregated and disclosed'" (quoting Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008))); Batton v. Evers, 598 F.3d 169, 183-84 (5th Cir. 2010) (holding that, while IRS agents' opinions and recommendations were properly withheld, government's declarations were insufficient to allow court to determine whether factual information had been properly segregated out and released); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 18-0342, 2021 WL 1209221, at *8-9 (D.D.C. Mar. 31, 2021) (rejecting agency's argument that segregability was too burdensome based on length and complexity of documents and ordering agency to disclose "purely factual information"); Hajro v. USCIS, No. 08-1350, 2011 U.S. Dist. LEXIS 117964, at *44 (N.D. Cal. Oct. 12, 2011) (requiring agency to "isolate the [specific] factual information requested and disclose it"); Unidad Latina en Acción v. DHS, 253 F.R.D. 44, 58 (D. Conn. 2008) (ordering release of "purely factual material" needed to respond to inquiry to agency).

[120] See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1118 (9th Cir. 1988) (rejecting simplistic fact/opinion distinction, and instead focusing on whether documents in question play role in agency's deliberative process); Skelton v. USPS, 678 F.2d 35, 38-39 (5th Cir. 1982) (explaining that focus should be on whether release of documents would reveal agency's evaluative process); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *5 (D.V.I. Mar. 31, 2010) (stating that factual information may be withheld if it "'would indirectly reveal the advice, opinions, and evaluations circulated . . . as part of [the] decisionmaking process'" (quoting Mead Data Cent. Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977))).

[121] Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

[122] Compare Fla. House of Representatives v. U.S. Dep't of Com., 961 F.2d 941, 950 (11th Cir. 1992) (holding that "adjusted" 1990 census figures submitted to, but not used by, Secretary of Commerce constituted protectable "opinion"), with Pub. Citizen Inc. v. OMB, 598 F.3d 865, 876 (D.C. Cir. 2010) (holding that list of agencies allowed to decline to submit materials for OMB clearance was factual information and not protected under Exemption 5), Carter v. U.S. Dep't of Com., 307 F.3d 1084, 1091-92 (9th Cir. 2002) (citing Assembly and issuing similar ruling with regard to statistical estimates created for 2000 census), Assembly of Cal. v. U.S. Dep't of Com., 968 F.2d 916, 922-23 (9th Cir. 1992) (ruling that raw census data was factual in nature and release would not reveal agency's decisionmaking process), and Cornucopia Inst. v. USDA, No. 16-148, 2018 WL 4637004, at *6 (D.D.C. Sept. 27, 2018) (rejecting defendant's position that by "determining what to capture on camera during the trip, agency employees made value judgments about what material might be useful in their several decisionmaking processes").

The D.C. Circuit has declared that factual information should be examined "in light of the policies and goals that underlie" the privilege and in "the context in which the materials are used."[123] Following this approach, for example, one decision of the District Court for the District of Columbia found that even though information may be factual in nature, if that factual information was used by agency personnel in developing recommendations to an agency decisionmaker, that factual information is "precisely the type of pre-decisional documents intended to fall under Exemption 5."[124] The Court of Appeals for the Ninth Circuit has explained why factual information is sometimes protected, stating:

> Opinions on facts and the consequences of those facts form the grist for the policymaker's mill . . . . Before arriving at a final decision, the policymaker may alter his or her opinion regarding which facts are relevant or the likely consequences of these facts, or both. Tentative policies may undergo massive revisions based on a reassessment of these variables . . . . Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent.[125]

---

[123] Wolfe v. HHS, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc); accord Nat'l Wildlife, 861 F.2d at 1119 (explaining that the "ultimate objective" of Exemption 5 is to safeguard agency's deliberative process); Sakomoto v. EPA, 443 F. Supp. 2d 1182, 1192 (N.D. Cal. 2006) (holding that facts may be withheld when they are "directly tied to the deliberative process").

[124] Brannum v. Dominguez, 377 F. Supp. 2d 75, 83 (D.D.C. 2005) (upholding use of Exemption 5 to withhold "vote sheets" that were used in process of determining retirement benefits when utilized as part of agency's decisionmaking process); see also Kan. v. DOD, 320 F. Supp. 3d 1227, 1246 (D. Kan. 2018) (finding that Exemption 5 protects agency's cost estimation for closing Guantanamo Bay because event had not yet occurred); Nat'l Sec. Couns. v. CIA, 206 F. Supp. 3d 241, 275 (D.D.C. 2016) (finding that "both the search terms and results of the agency's preliminary searches in connection with the relevant FOIA requests [are] easily characterized as predecisional" because they "are used to guide the agency's later response to a particular FOIA request and generally cannot be said to 'support a decision already made'" (quoting Petroleum Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))), aff'd on other grounds, 969 F.3d 406 (D.C. Cir. 2020); Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 169 (D.D.C. 2004) (protecting notes taken by SEC officials at meeting with companies subject to SEC oversight; finding that, though factual in form, notes would, if released, "severely undermine" SEC's ability to gather information from its regulatees and in turn undermine SEC's ability to deliberate on best means to address policymaking concerns in such areas).

[125] Nat'l Wildlife, 861 F.2d at 1120 (protecting "working drafts" of forest plan and "working drafts of environmental impact statements").

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts generally allow agencies to withhold factual material in an otherwise "deliberative" document under a few types of circumstances. The first of these is when the author of a document selects specific facts out of a larger group of facts, and this very act is deliberative in nature.[126] The D.C. Circuit has held that the very act of distilling a large volume of public testimony, separating the significant facts from the insignificant facts, constituted an exercise of judgment by agency personnel and thus was part of the agency's

[126] See Almeda v. U.S. Dep't of Educ., No. 20-5087, 2020 U.S. App. LEXIS 26258, at *2 (D.C. Cir. Aug. 18, 2020) (per curiam) (finding that "drafts and corresponding emails were part of a deliberative process, spanning several months, during which the government summarized the benefits process for Filipino veterans from a large universe of facts"); Elec. Priv. Info. Ctr. v. DOJ, 320 F. Supp. 3d 110, 119 (D.D.C. 2018) (noting that "the selection or organization of facts can be part of an agency's deliberative process and so exempt from FOIA"); S. Appalachian Biodiversity Project v. U.S. Forest Serv., 500 F. Supp. 2d 764, 769 (E.D. Tenn. 2007) (holding that agency had demonstrated that release of factual materials would reveal agency's decisionmaking process, and in particular which facts decisionmaker considered most important).

internal deliberative process.[127] Similarly, in Mapother v. DOJ,[128] the D.C. Circuit found that where "the majority of [a report's] factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents

---

[127] Montrose Chem. Corp. v. Train, 491 F.2d 63, 68-71 (D.C. Cir. 1974) (holding that summary of large volume of public testimony compiled to facilitate EPA Administrator's decision on particular matter was part of agency's internal deliberative process); see also, e.g., Poll v. U.S. Off. of Special Couns., No. 99-4021, 2000 WL 14422, at *3 (10th Cir. Oct. 14, 1999) (protecting factual "distillation" which revealed significance that examiner attributed to various aspects of case); Providence J. Co. v. U.S. Dep't of the Army, 981 F.2d 552, 562 (1st Cir. 1992) (revealing IG's factual findings would divulge substance of related recommendations); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979) (disclosing factual segments of summaries would reveal deliberative process by "demonstrating which facts in the massive rule-making record were considered significant by the decisionmaker"); Hardy v. ATF, 243 F. Supp. 3d 155, 169 (D.D.C. 2017) (finding that factual summaries "'culled by [OIG] from [a] much larger universe of facts presented to it' . . . 'reflect an "exercise of judgment as to what issues are most relevant to the pre-decisional findings and recommendations"'" (quoting Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011))); McKinley v. Bd. of Governors of Fed. Res. Sys., 849 F. Supp. 2d 47, 63-64 (D.D.C. 2012) (holding that "purely factual" material was protectable under Exemption 5 because "[defendant] culled selected facts and data from the mass of available information"); ViroPharma Inc. v. HHS, 839 F. Supp. 2d 184, 193-94 (D.D.C. 2012) (noting that "[t]he choice of what factual material and prior final agency opinions to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5"); Columbia Snake River Irrigators Ass'n v. Lohn, No. 07-1388, 2008 WL 750574, at *4 (W.D. Wash. Mar. 19, 2008) (protecting agency documents that included factual information in part because "the process of prioritizing facts and conclusions and weighing their importance and relevance is often an exercise of judgment that can affect Agency policy") (internal quotations omitted); Jud. Watch, Inc. v. DOJ, No. 01-639, 2006 WL 2038513, at *7 (D.D.C. July 19, 2006) (quoting favorably from government declaration explaining that "very act of selecting those facts which are significant from those that are not, is itself a deliberative process"); Env't Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 585 (N.D. W. Va. 2005) (protecting notes of agency investigator who previously had been briefed on investigation and had geared his queries accordingly, thereby making his notes selectively recorded information); Tarullo v. DOD, 170 F. Supp. 2d 271, 278 (D. Conn. 2001) (holding that "the very selection of facts could . . . reveal the nature of . . . recommendations and opinions"); Hamilton Sec. Grp. Inc. v. HUD, 106 F. Supp. 2d 23, 33 (D.D.C. 2000) (protecting facts in draft audit report on grounds that "any factual information that could be [released] would reveal decisions made by the auditor" and thereby chill future agency deliberations), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); Mace v. EEOC, 37 F. Supp. 2d 1144, 1150 (E.D. Mo. 1999) (protecting factual "distillation" in otherwise deliberative EEOC report), aff'd, 197 F.3d 329 (8th Cir. 1999); Farmworkers Legal Servs. v. U.S. Dep't of Lab., 639 F. Supp. 1368, 1373 (E.D.N.C. 1986) (holding that list of farmworker camps was "selective fact" and thus protectable); cf. Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 71 (D.D.C. 2006) (protecting factual information considered, but not utilized in agency's final report, because release of such information "would reveal the editorial judgment" of agency employees).

for the benefit of an official called upon to take discretionary action," those factual portions therefore fell within the deliberative process privilege.[129] Conversely, the court determined that a chronology in the report was not deliberative because, unlike the factual information found to have a connection to a decisionmaking process, the chronology was "neither more nor less than a comprehensive collection of the essential facts" with no information omitted or opinions included, and "reflect[ing] no point of view."[130] In situations where agencies have failed to show that factual studies and their data were used selectively, the D.C. Circuit has ordered release of the documents, regardless of their ultimate connection to a decisionmaking process.[131]

However, some courts have found that factual material is not privileged simply because it was utilized selectively or reflects a choice as to what facts to include in connection with decisionmaking purposes.[132] The Court of Appeals for the Tenth Circuit acknowledged the D.C. Circuit's analysis on factual selection, but declared that "factual materials do not become privileged merely because they represent a summary of a larger body of information."[133]

---

[128] 3 F.3d 1533 (D.C. Cir. 1993).

[129] Id. at 1538-40; see also Phillips v. ICE, 385 F. Supp. 2d 296, 303 (S.D.N.Y. 2005) (citing Mapother and protecting notes taken in an interview that "reflect[ed] a selective recording of information").

[130] Mapother, 3 F.3d at 1539-40; see also D.C. Tech. Assistance Org., No. 98-0280, slip op. at 5 (D.D.C. July 29, 1999) ("The order in which the [factual portions] are listed is apparently random, so that disclosing them reveals nothing of the decision-making process or of the subjective assessment that follows.").

[131] See Am. Radio Relay League Inc. v. FCC, 524 F.3d 227, 238 (D.C. Cir. 2008) (holding that agency erred in withholding studies relied upon in promulgating rule and declaring that Exemption 5 "does not authorize an agency to throw a protective blanket over all information"); Vaughn v. Rosen, 523 F.2d 1136, 1145 (D.C. Cir. 1975) (stating that survey results cannot be protected where they merely "provide the raw data upon which decisions can be made [and] are not themselves a part of the decisional process").

[132] See Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164 (11th Cir. 2019) (determining that "slides contain only a list of factual statements, and 'factual materials do not become privileged merely because they represent a summary of a larger body of information'" (quoting Trentadue v. Integrity Cmte., 501 F.3d 1215, 1232 (10th Cir. 2007))); Playboy Enterprises v. DOJ, 677 F.2d 931, 935 (D.C. Cir. 1982) (finding that "a report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material"); Lacy v. U.S. Dep't of the Navy, 593 F. Supp. 71, 78 (D. Md. 1984) (holding that photographs attached to deliberative report "do not become part of the deliberative process merely because some photographs were selected and others were not").

[133] Trentadue v. Integrity Cmte., 501 F.3d 1215, 1232 (10th Cir. 2007) (finding that disclosure of certain factual information, including historical facts about OIG investigation,

Factual information may also be withheld as deliberative material when it is so thoroughly integrated with deliberative material that its disclosure would expose or cause harm to the agency's deliberations.[134]

---

list of individuals involved in preparing related documents, and agency official's responses to allegations which do not shed light on any internal deliberations would not "expose the deliberative process in any meaningful way").

[134] See Elec. Frontier Found. v. DOJ, 739 F.3d 1, 13 (D.C. Cir. 2014) (finding that "context matters," and here entire document, including factual material, "'reflects the full and frank exchange of ideas'" so that factual portions "'could not be released without harming the deliberative processes of the government'") (internal citation omitted); Quarles v. Dep't of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (withholding factual material because it would expose agency's decisionmaking process and chill future deliberations); see also, e.g., Rein v. U.S. Pat. & Trademark Off., 553 F.3d 353, 375 (4th Cir. 2009) (protecting factual portions of document because such information, when viewed as part of a larger document "would reveal the very predecisional and deliberative material Exemption 5 protects"); Horowitz v. Peace Corps, 428 F.3d 271, 277 (D.C. Cir. 2005) (protecting requested document where the decisionmaker's "thought processes are woven into document to such an extent" that any attempt at segregating out information would reveal agency deliberations); Wolfe v. HHS, 839 F.2d 768, 774-76 (D.C. Cir. 1988) (en banc) (protecting mere "fact" of status of proposal in deliberative process); Goodrich Corp. v. EPA, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (protecting draft model because "evolving iterations" of model may not represent agency's "ultimate opinions . . . . Therefore, even if the data plugged into the model is itself purely factual, the selection and calibration of data is part of the deliberative process"); Reliant Energy Power Generation Inc. v. FERC, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (protecting documents related to factual investigation because release "would allow a reader to probe too deeply into the thought processes of the drafters and would have a chilling effect on communication between agency employees"); Sakamoto v. OPM, No. 06-1215, 2007 WL 1722424, at *8 (E.D. Cal. June 13, 2007) (magistrate's recommendation) (holding factual portions of audits as non-segregable material because release would reveal "mental processes" of auditors), adopted, 2007 WL 2012505 (E.D. Cal. July 6, 2007); Brownstein Zeidman & Schomer v. Dep't of the Air Force, 781 F. Supp. 31, 36 (D.D.C. 1991) (holding that release of summaries of negotiations would inhibit free flow of information, as "summaries are not simply the facts themselves"); Jowett, Inc. v. Dep't of the Navy, 729 F. Supp. 871, 877 (D.D.C. 1989) (determining that disclosing manner of selecting and presenting even most factual segments of audit reports would reveal process by which agency's final decision is made); SMS Data Prods. Grp. Inc. v. U.S. Dep't of the Air Force, No. 88-481, 1989 WL 201031, at *1-2 (D.D.C. Mar. 31, 1989) (holding that technical scores and technical rankings of competing contract bidders were predecisional and deliberative); Nat'l Wildlife Fed'n v. U.S. Forest Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (protecting variables reflected in computer program's mathematical equation); Brinderson Constructors Inc. v. U.S. Army Corps of Eng'rs, No. 85-905, 1986 WL 293230, at *5 (D.D.C. June 11, 1986) (holding that computations made to evaluate claim for compensation "are certainly part of the deliberative process").

In other cases, courts have ruled that factual material is so mixed in with deliberative material that it would not be possible to release meaningful portions of a document.[135]

Applying Deliberative Process Privilege

The D.C. Circuit has held that documents qualify as predecisional and deliberative only if they "reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[136] The key factor, the D.C. Circuit has stressed, is the "'*role*, if any, that the document plays in the process of agency deliberations.'"[137]

---

[135] See, e.g., Gellman v. DHS, 525 F. Supp. 3d 1, 12 (D.D.C. 2021) (holding that facts within briefing materials were inextricably intertwined with deliberative material since "the very purpose of the briefing material is to suggest and recommend facts for DOJ leadership to highlight publicly"); Elec. Priv. Info. Ctr. v. DHS, 892 F. Supp. 2d 28, 49 (D.D.C. 2012) (holding that government must only disclose factual information that is "not inextricably intertwined with deliberative portions of the withheld records"); Kellerhals v. IRS, No. 2009-90, 2011 WL 4591063, at *7 (D.V.I. Sept. 30, 2011) (allowing withholding of factual material because "[w]hile some of the documents contain factual material, that material is so intertwined with the analysis that any attempt to reveal only factual material would reveal the agency's deliberations"); Hawkins v. U.S. Dep't of Lab., No. 05-269J32, 2005 WL 2063811, at *3 (M.D. Fla. Aug. 19, 2005) (protecting factual portions of deliberative document that could not be "segregated in a meaningful way" from deliberative sections); Delta Ltd. v. CBP, 384 F. Supp. 2d 138, 151-52 (D.D.C. 2005) (finding that factual portions of records were too closely mixed in with deliberative portions and therefore were not releasable); Tarullo v. DOD, 170 F. Supp. 2d 271, 278 (D. Conn. 2001) ("Although the document does summarize relevant facts, that summary is so intertwined with . . . recommendations and opinions . . . that production of a redacted version would be incomprehensible.").

[136] Tax'n With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981); see Elec. Frontier Found., 739 F.3d at 10 (holding that recommendation memorandum that "examines policy options available to [an agency]" is "precisely the sort of 'advisory opinion . . . comprising part of a process by which governmental decisions and policies are formulated' that is covered by the deliberative process privilege" (quoting Pub. Citizen, Inc. v. OMB, 598 F.3d 865, 875 (D.C. Cir. 2010))); Pub. Citizen, 598 F.3d at 875 (concluding that "[t]o the extent the documents at issue in this case neither make recommendations for policy change nor reflect internal deliberations on the advisability of any particular course of action, they are not predecisional and deliberative despite having been produced by an agency that generally has an advisory role").

[137] Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987)); see also Huntington v. Dep't of Com., 234 F. Supp. 3d 94, 110 (D.D.C. 2017) (finding that "[t]he challenged documents precede the final patentability decision and are part of the process by which that decision is made; they therefore are predecisional and deliberative"); Jud. Watch, Inc. v. Reno, 154 F. Supp. 2d 17, 18 (D.D.C. 2001) ("It is not enough to say that a memorandum 'expresses the author's views'

on a matter [because the] . . . role played by the document in the course of the deliberative process must also be established.").

Additionally, in Petroleum Information Corp. v. United States Department of the Interior,[138] the D.C. Circuit explained that "[t]o fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*" and held that certain material should be released in part because it did not involve "[a] policy matter."[139] Some courts have applied this concept in finding that various materials are not covered by the privilege when they are not sufficiently connected to "policy."[140] Multiple circuits, following the standard set forth in Petroleum Information Corp., have explained that records discussing matters "peripheral to" policy-oriented judgments fall outside the scope of the privilege.[141] Other courts have placed less emphasis on whether deliberations concern specific agency policies.[142] In part, these varying decisions may stem from differing views about what constitutes "policy,"[143] and whether documents that apply existing policy to new situations are protected.[144]

---

[138] 976 F.2d 1429 (D.C. Cir. 1992).

[139] Id. at 1435.

[140] See, e.g., Hennessey v. AID, No. 97-1133, 1997 WL 537998, at *5 (4th Cir. Sept. 2, 1997) (unpublished disposition) (determining that "report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5" (citing Petroleum Info., 976 F.2d at 1437)); Nat. Res. Def. Council v. EPA, No. 17-5928, 2020 WL 6891537, at *3 (S.D.N.Y. Nov. 24, 2020) (holding that agency failed to demonstrate that documents were "actually exercises of the EPA's 'essential *policymaking* role' in and of themselves" or "would 'reflect[ ] internal agency deliberation on matters of *substantive policy* prior to . . . public announcement of those decisions'") (citations omitted); BuzzFeed, Inc. v. DOJ, 419 F. Supp. 3d 69, 76-79 (D.D.C. 2019) (holding that draft fill-in-the blank forms seeking purely factual information were not protectable because "they do not reflect 'recommendations or express[ ] opinions on legal or policy matters'" (quoting Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975))); Citizens for Resp. & Ethics in Wash. v. DHS, 648 F. Supp. 2d 152, 160 (D.D.C. 2011) (requiring release of portion of emails not discussing policy); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 301-02 (D.D.C. 2007) (refusing to allow agency to withhold document containing "predecisional guidance relating to upcoming events" because agency had not shown connection to "any type of governmental policy formulation or decision"); Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1277-78 (S.D. Fla. 2006) (refusing to protect email communications containing advice to agency director because these messages contained recommendations on press relations, not on matters relating to agency's "mission") ; Legal & Safety Emp. Rsch., Inc. v. U.S. Dep't of the Army, No. 00-1748, 2001 WL 34098652, at *6 (E.D. Cal. May 4, 2001) (concluding that contractor performance evaluations, which were required to be considered in future government contract award determinations, were not "the type of policy decision contemplated by Exemption 5"); Chi. Trib. Co. v. HHS, No. 95-3917, 1997 U.S. Dist. LEXIS 2308, at *50 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (holding that scientific judgments are not protectable when they do not address agency policymaking), adopted, 1997 U.S. Dist. LEXIS 23548 (N.D. Ill. Mar. 28, 1997); Larue v. IRS, No. 3-93-423, 1994 WL 315750, at *2 (E.D. Tenn. Jan. 27, 1994) (holding that privilege covers documents "actually related to the process by which policy is formed").

[141] Accord Petroleum Info., 976 F.2d at 1436 (discussing that materials that "do not embody agency judgments—for example, materials relating to standard or routine computations or measurements over which the agency has no significant discretion—[are] unlikely to diminish officials' candor or otherwise injure the quality of agency decisions").; see Nat. Res. Def. Council v. EPA, 19 F.4th 177, 189-90 (2d Cir. 2021) (explaining that agency exercises "policy-oriented judgment" when communicating its policies externally and therefore messaging records could be protected, but noting that some records "'peripheral to' that communication decision, such as what time of day an agency will be available to deliver that message or which conference room to use for a press briefing, lie outside the scope of the privilege" (quoting Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999))); Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994) (concluding that "privilege does not protect a document [that] is merely peripheral to actual policy formulation").

[142] See, e.g., Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1095 (9th Cir. 1997) (ignoring issue of "policy" and protecting letter in which employee was "fighting to preserve his job and reputation" by offering his "candid and confidential responses . . . to the head of his agency in order to rebut the charges made against him"); Providence J. Co. v. U.S. Dep't of the Army, 981 F.2d 552, 560 (1st Cir. 1992) (citing Nat'l Wildlife and ruling that agency's decision to discipline personnel for alleged misconduct is no less "deliberative task . . . than the formulation or promulgation of agency disciplinary policy"); Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1118 (9th Cir. 1988) (rejecting plaintiff's claim that record must "contain recommendations on law or policy to qualify as 'deliberative'") (internal citation omitted); Neese v. DOJ, No. 19-01098, 2022 WL 898827, at *8 (D.D.C. Mar. 28, 2022) (noting that "an agency need only demonstrate that the information is predecisional and deliberative to some policy *or decision*" (citing Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001))); Touarsi v. DOJ, 78 F. Supp. 3d 332, 346 (D.D.C. 2015) (finding CBP officer's notes withholdable because "[t]he deliberative process privilege . . . 'protect[s] materials that concern individualized decisionmaking' as well as 'the development of generally applicable policy' and thus protects routine decisionmaking" (quoting Hinckley v. United States, 140 F.3d 277, 284 (D.C. Cir. 1998))); Ctr. for Biological Diversity v. Norton, No. 01-409, 2002 WL 32136200, at *2 (D. Ariz. 2002) (holding that limiting privilege to "'policy' decisions is overly narrow" and inconsistent with Ninth Circuit law); Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 1164 v. HHS, 63 F. Supp. 2d 104, 109 (D. Mass. 1999) (rejecting plaintiff's contentions that document must be related to "essential function" of agency to be protected); Citizens Comm'n on Hum. Rts. v. FDA, No. 92-5313, 1993 WL 1610471, at *11 (C.D. Cal. May 10, 1993) (citing Nat'l Wildlife and holding that appropriate test is simply whether document in question contributes to agency's deliberative process), aff'd in pertinent part & remanded in part, 45 F.3d 1325 (9th Cir. 1995).

[143] See, e.g., N.Y. Times Co. v. DOJ, No. 16-6120, 2017 WL 4712636, at *8 (S.D.N.Y. Sept. 29, 2017) (finding that threat assessments of Guantanamo Bay detainees are deliberative "because they are related to the formulation of policy, *i.e.* they 'includ[e] express advice and recommendations regarding the proper disposition determination for each detainee'") (internal citation omitted); Shapiro v. CIA, 247 F. Supp. 3d 53, 64 (D.D.C. 2017) ("Logistical details around funeral arrangements are far from the 'conclusions, recommendations, or opinions' that Congress intended to protect under the exemption." (quoting Playboy Enters.,

Inc. v. DOJ, 677 F.2d 931 (D.C. Cir. 1982))); Habeus Corpus Res. Ctr. v. DOJ, No. 08-2649, 2008 WL 5000224, at *2 (N.D. Cal. Nov. 21, 2008) (rejecting use of privilege for document found "peripheral to . . . substantive policy development" and document found not prepared to assist agency decisionmaker "in arriving at a substantive policy decision"); Cowdery, Ecker & Murphy, LLC v. Dep't of the Interior, 511 F. Supp. 2d 215, 221 (D. Conn. 2007) (holding that employee's self-assessment and supervisor's recommendations concerning employee's performance do not constitute "deliberations on Department policy, personnel or otherwise"). Compare Reps. Comm. For Freedom of the Press v. CBP, 567 F. Supp. 3d 97, 115 (D.D.C. 2021) (noting that "[t]he eventual response to outside inquiries, whether from Congress, the press, or an inspector general, qualifies as an agency policy"), Fox News Network, LLC v. Dep't of Treasury, No. 09-3045, 2012 WL 5931808, at *10 (S.D.N.Y. Nov. 26, 2012) (allowing withholding of public relations documents when "their release would reveal the status of internal agency deliberations or substantive policy matters" rather than mere messaging regarding past events), Jud. Watch, Inc. v. DOJ, 800 F. Supp. 2d 202, 218-19 (D.D.C. 2011) (citing Petroleum Info. and protecting emails discussing internal report designed to prepare agency officials prior to public statements and interviews), ACLU v. DHS, 738 F. Supp. 2d 93, 108-09 (D.D.C. 2010) (allowing withholding of documents discussing development of talking points because agency "must be allowed to make discretionary judgments and consider policy choices in an environment protected from public scrutiny and unnecessary disclosures or otherwise the environment 'would tend to "discourage candid discussion within an agency."'" (quoting Petroleum Info., 976 F.2d at 1434)), Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 522 (D. Minn. 2008) (approving use of privilege for documents involving "policy-related . . . process of how to . . . address the possible public perception that would flow from [agencies'] actions"), and ICM Registry, LLC. V. U.S. Dep't of Com., 538 F. Supp. 2d 130, 136 (D.D.C. 2008) (holding that "deliberations regarding public relations policy are deliberations about policy, even if they involve 'massaging' the agency's public image") (internal citation omitted), with Transgender L. Ctr. v. ICE, 46 F.4th 771, 783 (9th Cir. 2022) (analyzing draft press statements and holding that "[g]overnment 'deliberations regarding how best to address public relations matters or possible responses to an inquiry received from an outside entity' are not necessarily the type of policy decisions the privilege covers") (internal citation omitted), and Mayer, Brown, Rowe & Maw, LLP v. IRS, 537 F. Supp. 2d 128, 136 (D.D.C. 2008) (ruling that agency could not withhold documents reflecting deliberations about how much information should be "conveyed" to general public because such deliberations were "too removed from an actual policy decision").

[144] Compare Boundy v. U.S. Pat. & Trademark Off., No. 21-1366, 2023 WL 2567350, at *9 (E.D. Va. Mar. 17, 2023) (holding that email discussions about "the application of existing policy to specific situations posed by specific patent applications are covered by the deliberative process privilege"), and 100Reporters v. U.S. Dep't of State, 602 F. Supp. 3d 41, 69 (D.D.C. 2022) (holding that "[e]xemption 5 does not merely protect deliberations over the formulation of generally applicable agency policies; it also protects deliberations regarding discrete agency decisions applying those policies, at least where those decisions involve some exercise of discretion"), with N.Y. Times Co. v. Dep't of Educ., 658 F. Supp. 3d 171, 187 (S.D.N.Y. 2023) (noting that agency document which "focuses on how existing policy applies to specific cases" is not predecisional) (internal quotation marks and citation omitted), and Austin Sanctuary Network v. ICE, No. 20-01686, 2022 WL 4356732, at *15 (S.D.N.Y. Sept. 19, 2022) (holding that "'determinations of how ICE applies' these general

There are several categories of documents that are routinely protected by the deliberative process privilege. Among them are "'all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'"[145] They are protected because, by their very nature, their release would likely "stifle honest and frank communication within the agency."[146] Materials of this nature go to the

---

policies in 'specific cases' would not fall 'within the protection of the deliberative-process privilege'") (internal citation omitted).

[145] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (internal citations omitted); accord Tax'n With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981) (noting that "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated" are routinely protected by deliberative process privilege); see, e.g., Solers, Inc. v. IRS, 827 F.3d 323, 330 (4th Cir. 2016) (protecting agent's notes consisting of thoughts, impressions, possible direction of examination, and preliminary evaluation of issues); AIDS Healthcare Found. v. Leavitt, 256 F. App'x 954, 956 (9th Cir. 2007) (protecting deliberations concerning grant applications); Nat'l Wildlife, 861 F.2d at 1121 ("Recommendations on how to best deal with a particular issue are themselves the *essence* of the deliberative process."); Asian L. Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *6 (N.D. Cal. Nov. 24, 2008) (protecting email exchanges reflecting deliberations on whether to create new agency procedure); Ctr. for Medicare Advoc. v. HHS, 577 F. Supp. 2d 221, 236 (D.D.C. 2008) (protecting documents containing "advice, recommendations, and suggestions"); Carter, Fullerton & Hayes, LLC v. FTC, 520 F. Supp. 2d 134, 144 (D.D.C. 2007) (protecting handwritten meeting notes of senior FTC employee as representative of his "thoughts and impressions of the meeting") (internal quotations omitted); Dorsett v. Dep't of the Treasury, 307 F. Supp. 2d 28, 37-38 (D.D.C. 2004) (protecting Secret Service document evaluating threats presented by plaintiff and others to Secret Service protectees); Jud. Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 70 (D.D.C. 2004) (protecting "handwritten notes" on an invitation to the Attorney General, because disclosure "would reveal what the staff member who wrote the notes considered to be important . . . and how the decision to attend the event may have been reached" (quoting agency declaration)); Warren v. SSA, No. 98-0116E, 2000 WL 1209383, at *2 (W.D.N.Y. Aug. 22, 2000) (protecting applicant scoresheets on basis that "[t]he decisions of a hiring panel to emphasize certain types of skills or how many points to award to an applicant for a particular educational experience or previous employment experience are deliberative decisions in that they set the policy for the hiring process"), aff'd in part & remanded on other grounds, 10 F. App'x 20 (2d Cir. 2001); see also Jud. Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (protecting notes taken by Attorney General at campaign finance task force meeting, but not shared with any other person, because their release "could reveal how the [Attorney General] prioritized different facts and considerations in deliberating whether or not to appoint an independent counsel . . . [and] reveal her interpretation of public policies which she deemed relevant" to decision whether to appoint independent counsel).

[146] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); see also Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs, 147 F.3d 708, 711 (8th Cir. 1998) (holding that "it was not improper for the [agency] to conclude that open and frank intra-agency discussion would be 'chilled' by public disclosure") (internal citation omitted); Schell v. HHS, 843 F.2d 933, 942 (6th Cir. 1988) ("It is the free flow of advice, rather than the value of any particular

very heart of the privilege, because, as the Supreme Court has stated, "[t]he deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news."[147]

Of a similar nature are "briefing materials" – reports or other documents that summarize issues and advise superiors, either generally or in preparation for an event such as congressional testimony.[148] Similarly, talking points and materials regarding how

---

piece of information, that Exemption 5 seeks to protect."); Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 133 (D.D.C. 2009) (protecting documents whose release "'would have the effect of inhibiting the free flow of recommendations and opinions'") (internal citation omitted); Reliant Energy Power Generation Inc. v. FERC, 520 F. Supp. 2d 194, 205 (D.D.C. 2007) ("Disclosure of internal communications . . . can hamper the candid exchange of views and the ultimate policy-making process.") (citation omitted); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *10 (D. Minn. Aug. 23, 2007) ("Premature disclosure of . . . recommendations or comments 'would discourage free ranging criticism and consideration of alternatives within an agency.'" (quoting Missouri ex rel. Shorr, 147 F.3d at 710)); Fortson v. Harvey, 407 F. Supp. 2d 13, 16-17 (D.D.C. 2005) (rejecting plaintiff's argument that subordinate's report did not qualify as deliberative simply because it would be either accepted or rejected, and not debated, by superior). Compare Prop. of the People v. OMB, 330 F. Supp. 3d 373, 383 (D.D.C. 2018) (releasing names of meeting attendees "would expose no suggestions, no recommendations, no proposals, and no other aspect of the agency communications, and it is not apparent how disclosure . . . might in any way discourage candid discussion within the agency"), with Jud. Watch, Inc. v. U.S. Dep't of State, 875 F. Supp. 2d 37, 44-46 (D.D.C. 2012) (protecting emails discussing which agency employees to invite to meeting because "the presence or absence of a name conveys an agency's or employee's opinion about a potential attendee's value to the meeting" and stating that "[d]isclosure of potential invitees would also have a chilling effect on . . . interagency discussions").

[147] Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001); accord Casad v. HHS, 301 F.3d 1247, 1251 (10th Cir. 2002) (quoting Klamath, 532 U.S. at 8-9); see, e.g., Competitive Enter. Inst. v. Dep't of Treasury, 308 F. Supp. 3d 109, 118 (D.D.C. 2018) (finding that "the need for staff to speak candidly and confidentially is perhaps most important when the discussion concerns unmapped and unexplored terrain at the border of agency authority").

[148] See, e.g., Access Reps. v. DOJ, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991) (holding that memorandum written for purpose of preparing senior agency officials for Congressional testimony was protected under deliberative process privilege); Hall & Assocs. v. EPA, No. 18-1749, 2021 WL 1226668, at *9 (D.D.C. Mar. 31, 2021) (holding that draft legal briefing was properly withheld under deliberative process privilege since staff were "engaged in the process of strategizing about how best to respond to an inquiry about the agency's policy . . . even if the ultimate communication and underlying policy are not [withholdable]"); Gellman v. DHS, 525 F. Supp. 3d 1, 12-14 (D.D.C. 2021) (holding that agency properly withheld "briefing materials written to help then-Attorney General Holder and other senior DOJ officials prepare for conversations with journalists" under deliberative process privilege); Competitive Enter. Inst. v. EPA, 12 F. Supp. 3d 100, 120 (D.D.C. 2014) (holding

to respond to outside inquiries are often found to be predecisional and deliberative.[149] While some district courts have found that messaging discussions regarding how to

---

that internal agency communications discussing "'*how* to communicate with members of Congress . . . and *how* to prepare for potential points of debate or discussion [in upcoming congressional testimony],'" and "'related to . . . how to prepare for potential points of debate or discussion'" are predecisional) (internal citations omitted); Jud. Watch, Inc. v. DHS, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012) (holding that deliberations regarding "how to present [a previously decided] policy in the press" qualified as a decisionmaking process for purposes of the deliberative process privilege and finding that documents prepared in advance of that type of press statement were predecisional); Performance Coal Co. v. U.S. Dep't of Lab., 847 F. Supp. 2d 6, 15-16 (D.D.C. Mar. 7, 2012) (allowing withholding of documents that discussed how to respond to certain allegations made against government agency); Metro. St. Louis Sewer Dist. v. EPA, No. 10-2103, 2012 WL 685334, at *18 (E.D. Mo. Mar. 2, 2012) (holding that agency properly asserted deliberative process privilege to withhold email communications, "press releases, talking points and 'Q & A,'" drafts, and briefing materials); Jud. Watch, Inc. v. DOJ, 800 F. Supp. 2d 202, 218-19 (D.D.C. 2011) (finding that records created in order to prepare public statements about litigation, and to respond to media and Congressional inquiries on issues related to dismissal of case are covered by deliberative process privilege); Bd. of Cnty. Comm'rs v. Dep't of the Interior, No. 06-209, 2007 WL 2156613, at *12 (D. Utah July 26, 2007) (protecting "bullet-point list discussing potential courses of action" prepared for Secretary of Interior), aff'd in part, rev'd in part on other grounds sub nom., Stewart v. U.S. Dep't of Interior, 554 F.3d 1236 (10th Cir. 2009); Jud. Watch, 306 F. Supp. 2d at 71-72 (protecting email created to prepare FERC chairman for upcoming congressional testimony); Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1026 (W.D. Mich. 1998) (holding paper prepared to brief commissioner for meeting protectable); Thompson v. Dep't of the Navy, No. 95-347, 1997 WL 527344, at *4 (D.D.C. Aug. 18, 1997) (protecting materials created to brief senior officials who were preparing to respond to media inquiries, on basis that "disclosure of materials reflecting the process by which the Navy formulates its policy concerning statements to and interactions with the press" could stifle frank communication within the agency), aff'd, No. 97-5292, 1998 WL 202253, at *1 (D.C. Cir. Mar. 11, 1998) (per curiam); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 52 (D.D.C. 1996) (holding "point papers" compiled to assist officers in formulating decision protectable). But see Nat'l Sec. Archive v. FBI, No. 88-1507, 1993 WL 128499, at *2-3 (D.D.C. Apr. 15, 1993) (finding briefing papers not protectable).

[149] See N.H. Right to Life v. HHS, 778 F.3d 43, 54 (1st Cir. 2015) (protecting documents that "deal with the Department's decision of how and what to communicate to the public, which is a decision in and of itself"); Am. Immigr. Council v. CBP, No. 19-2965, 2023 WL 2755412, at *4-6 (D.D.C. Apr. 3, 2023) (holding that talking points were withholdable under deliberative process privilege); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of the Treasury, No. 20-2256, 2022 WL 3042180, at *5 (D.D.C. Aug. 2, 2022) (holding that emails concerning strategy to address media inquiries were protected by deliberative process privilege); Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of State, Nos. 19-1344 & 19-2125, 2022 WL 1801054, at *9-10 (D.D.C. June 2, 2022) (holding that communications regarding media inquiries were protected by deliberative process privilege since they "depict the 'give-and-take of the consultative process'" (quoting Coastal States, 617 F.2d at 866)); Gellman, 525 F. Supp. 3d at 8 (holding that draft statements to the press were protected by deliberative process privilege); Cath. Legal Immigr. Network, Inc. v. USCIS, No. 19-1511,

present already-decided policy decisions, as opposed to policy decisions that have not been finalized yet, are not protected by the deliberative process privilege,[150] several Courts

---

2020 WL 5747183, at *8, 10 (D. Md. Sept. 25, 2020) (determining that deliberative process privilege applies to "nonfinal recommendations of junior staff to senior management about how policy decisions should be communicated to the public" because they concern the formulation or exercise of policy-oriented judgment); Manatt v. DHS, 473 F. Supp. 3d 409, 420 (E.D. Pa. 2020) (holding that "documents about potential statements to Congressional inquiries, press inquiries, or public communication are all deliberative, even if they do not relate to the adoption of a 'Policy'"); Leopold v. Off. of Dir. of Nat'l Intel., 442 F. Supp. 3d 266, 276 (D.D.C. 2020) (concluding that "[g]overnmental decisions and policies can include the formulation of an agency's statements to the public and other outside entities" and rejecting argument that "discussions about how to articulate policy decisions already made" should not be protected); Am. Ctr. for L. & Just. v. DOJ, 392 F. Supp. 3d 100, 106 (D.D.C. 2019) (finding talking points both predecisional and deliberative because they constitute recommendations by staff for Attorney General advising how to respond to inquiries and reflect give-and-take between drafter and superior leading up to external interactions with the public and the press); Am. Ctr. for L. & Just. v. DOJ, 334 F. Supp. 3d 13, 21 (D.D.C. 2018) (finding that talking points at issue "can fairly be categorized as predecisional because they were 'drafted before and in preparation for communications with the press and public' and are 'a critical aspect of the decision-making process'" (quoting agency declaration)); Protect Democracy Project, Inc. v. DOD, 320 F. Supp. 3d 162, 177 (D.D.C. 2018) (concluding that talking points "qualify as predecisional and deliberative" because "[r]evealing their contents would expose the process by which agency officials crafted a strategy for responding to the press and to Congress"); ACLU v. DHS, 738 F. Supp. 2d 93, 112 (D.D.C. 2010) (concluding that talking points are also predecisional because "the document itself suggests that a public statement was anticipated at the time of its creation, and given that no official statement has yet been made, the talking points remain ripe recommendations that are ready for adoption or rejection by the Department"). But see Transgender L. Ctr. v. ICE, 46 F.4th 771, 783 (9th Cir. 2022) (analyzing draft press statements and holding that "[g]overnment 'deliberations regarding how best to address public relations matters or possible responses to an inquiry received from an outside entity' are not necessarily the type of policy decisions the privilege covers") (internal citation omitted); People for Ethical Treatment of Animals v. HHS, 464 F. Supp. 3d 385, 396 (D.D.C. 2020) (concluding that even though the deliberative process privilege may apply to responses to press inquiries and Congressional inquiries, it does not apply to these responses to inquiries from non-profits because these communications "do not constitute 'the process by which policy is formulated,' nor could they 'reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment'" (quoting Petroleum Info. Corp. v. U.S. Dept. of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))).

[150] See Nat'l Pub. Radio, Inc. v. U.S. Int'l Dev. Fin. Corp., No. 20-08307, 2021 WL 5507215, at *4 (C.D. Cal. Nov. 24, 2021) (holding that "deliberations about how an agency will communicate an already-made policy decision to the public" are not protected by deliberative process privilege); Stevens v. DHS, No. 14-3305, 2020 WL 1701882, at *6, 8 (N.D. Ill. Apr. 8, 2020) (finding that an agency's "internal communications about its responses to outside inquiries from the press, Congress, advocacy groups, and the public are not protected by the deliberative process privilege" because these "merely reflect[] 'deliberations about what "message" should be delivered to the public about an already-

of Appeals have come to the opposite conclusion, protecting deliberations about how to publicly message previously-decided policies.[151]

Draft documents have frequently been found exempt under the deliberative process privilege.[152] Many courts have found that the very process by which a "draft"

---

decided policy decision'" (quoting New York v. U.S. Dep't of Com., No. 18-2921, 2018 WL 4853891, at *3 (S.D.N.Y. Oct. 5, 2018))); ACLU of Mass., Inc. v. ICE, 448 F. Supp. 3d 27, 38 (D. Mass. 2020) (determining that central inquiry should be whether materials reflect deliberations about what message should be delivered to public about already-decided policy decision or whether communications would reveal deliberative process underlying not-yet-finalized policy decision).

[151] See Nat. Res. Def. Council v. EPA, 19 F.4th 177, 186 (2d Cir. 2021) (finding that "[b]ecause communications decisions involve 'the formulation or exercise of policy-oriented judgment,' deliberations about—and preceding—those decisions are protected by the deliberative process privilege" and that "[a]n agency exercises policy-oriented judgment when communicating its policies 'even when [the] underlying decision or policy has already been established by the agency'") (internal citations omitted); Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 362 (D.C. Cir. 2021) (holding that "the [deliberative process] privilege may extend to internal deliberations over how best to promote or preserve an existing policy in the midst of public debate over whether the government should have such a policy"); N.H. Right to Life, 778 F.3d at 54 (protecting documents that "deal with the Department's decision of how and what to communicate to the public, which is a decision in and of itself"); Krikorian v. U.S. Dep't of State, 984 F.2d 461, 466 (D.C. Cir. 1993) (finding that deliberative process privilege protected draft documents proposing two options for replies to public inquiries); cf. Ecological Rts. Found. v. EPA, No. 19-980, 2021 WL 535725, at *17 (D.D.C. Feb. 13, 2021) (holding that "a set of talking points or similar document, even if focused on an agency's external presentation of a past policy decision, *may* fall within the scope of the deliberative process privilege").

[152] See, e.g., Lewis v. U.S. Dep't of the Treasury, 851 F. App'x 214, 217 (D.C. Cir. 2021) (holding that "drafts of a document eventually published in the Federal Register, containing redline edits and comments conveying the authors' opinions regarding the draft language" were properly withheld under deliberative process privilege); Wadhwa v. VA, 707 F. App'x 61, 63 (3d Cir. 2017) (holding that draft reports and internal communications generated as part of agency decisionmaking may be properly withheld pursuant to Exemption 5); Nat'l Sec. Archive v. CIA, 752 F.3d 460, 465 (D.C. Cir. 2014) (finding draft exempt in its entirety under Exemption 5 because in creating draft, selection of facts thought to be relevant was part of deliberative process); Abdelfattah v. DHS, 488 F.3d 178, 183 (3d Cir. 2007) (protecting draft ICE incident report); City of Va. Beach v. U.S. Dep't of Com., 995 F.2d 1247, 1253 (4th Cir. 1993) (highlighting draft documents as well as recommendations, proposals, and suggestions as protectable material); Town of Norfolk v. U.S. Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992) (protecting draft letter that was never signed and ultimately rejected); Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987) (protecting draft document because disclosure of editorial process would "stifle the creative thinking and candid exchange of ideas necessary to produce good historical work"); Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (withholding draft manuscript because release could lead to "confusion of the public"); Lead

evolves into a "final" document can itself constitute a deliberative process warranting protection.[153] As a result, some courts have noted that a draft document may be protected

---

Indus. Ass'n v. OSHA, 610 F.2d 70, 85-86 (2d Cir. 1979) (protecting draft documents containing factual material as compilation in draft document reflected deliberative process); Pub. Emps. for Env't Resp. v. DHS, 575 F. Supp. 3d 34, 44 (D.D.C. 2021) (holding that document labeled "fully-adjudicated draft" was withholdable under deliberative process privilege when evaluated "in the context of the administrative process which generated [the document]"); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 18-0342, 2021 WL 1209221, at *11 (D.D.C. Mar. 31, 2021) (holding that documents labeled "final" were "functionally drafts because they left 'agency decisionmakers free to change their minds'" (quoting U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 269 (2021))); Weigel Broad. Co. v. FCC, No. 11-236, 2012 U.S. Dist. LEXIS 37065, at *8 (N.D. Ill. Feb. 17, 2012) (protecting draft decisions and orders regarding broadcasting license transfer applications); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1012 (D. Mont. 2011) (protecting draft documents); Antonelli v. BOP, 623 F. Supp. 2d 55, 59 (D.D.C. 2009) (holding that draft of administrative adjudication was properly withheld); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at *16 (N.D. Cal. Sept. 26, 2008) (protecting draft letters); Donham v. U.S. Forest Serv., No. 07-111, 2008 WL 2157167, at *5 (S.D. Ill. May 21, 2008) (finding draft documents to be "precisely the kind of documents that Exemption 5 and the deliberative process privilege seek to protect from disclosure"); Ebersole v. United States, No. 06-2219, 2007 WL 2908725, at *5 (D. Md. Sept. 24, 2007) (protecting draft Memorandum of Understanding, noting that draft "does not memorialize a final agency decision").

[153] See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1122 (9th Cir. 1988) ("To the extent that [requester] seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft[s] prepared by lower-level [agency] personnel and those actually adopted, . . . it is attempting to probe the editorial and policy judgments of the decisionmakers."); Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987) (noting the "exemption protects not only the opinions, comments and recommendations in the draft, but also the process itself"); Dudman, 815 F.2d at 1569 ("[T]he 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."); Russell, 682 F.2d at 1048 ("Failure to apply the protections of Exemption (b)(5) to the . . . editorial review process would effectively make such discussion impossible."); Hooker v. HHS, 887 F. Supp. 2d 40, 59 (D.D.C. 2012) (withholding documents discussing development of draft because disclosure would reveal "ongoing, collaborative dialogue about the manuscript"), aff'd, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); Pub. Emps. for Env't Resp. v. Off. of Sci. & Tech. Pol'y, 881 F. Supp. 2d 8, 17 (D.D.C. 2012) (protecting draft documents because they would reveal specifics of how agency working group makes decisions); Sussman v. DOJ, No. 03-3618, 2008 WL 2946006, at *4 (E.D.N.Y. July 29, 2008) (upholding agency's decision to withhold draft policy document, noting that release of it would allow public "to compare the draft and final versions of the policy"); Nevada v. DOE, 517 F. Supp. 2d 1245, 1264 (D. Nev. 2007) (citing Dudman and Russell and noting that meaningful inquiry into nature of "draft" document is required); Skull Valley Band of Goshute Indians v. Kempthorne, No. 04-339, 2007 WL 915211, at *14 (D.D.C. Mar. 26, 2007) (citing Russell and noting that "the drafting process is itself deliberative in nature"); Parker v. USDA, No. 05-0469, 2006 WL 4109672, at *6 (D.N.M. July 30, 2006) (finding draft document "part of

regardless of whether it differs from its final version.[154] At the same time, however, multiple circuits have declared that the designation of a document as a "draft" is not dispositive,[155] and have denied protection.[156]

---

the internal process by which the Forest Service generates a final version of the document"); Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 1164 v. HHS, 63 F. Supp. 2d 104, 109 (D. Mass. 1999) (holding draft indoor air quality survey protectable because release would "enable a careful reader to determine the substance of HHS's proposed and adopted changes" and thereby "discourage candid discussion within the agency"). But see Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 528 (D. Minn. 2008) (upholding agency's withholding of drafts, but noting, in dicta, its rejection of idea that documents can be withheld simply "because they are successive versions of a document and as such, would tend to show the internal development of an agency's decision on a policy matter").

[154] See Reliant Energy Power Generation Inc. v. FERC, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (noting that agency not required to show how draft differed from final document because doing so would expose agency's deliberative process); Exxon Corp. v. DOE, 585 F. Supp. 690, 698 (D.D.C. 1983) ("[T]here is no merit to Exxon's argument that in order to establish the privileged character of a draft, DOE must show to what extent the draft *differs* from the final document."); see also Tigue v. DOJ, 312 F.3d 70, 79 (2d Cir. 2002) (protecting documents discussing which parts of draft to include in final, public version because "editorial decisions such as determining which parts, if any, of a confidential document to include in a public record are precisely the type of internal agency decisions that Exemption 5 was designed to protect"); Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta) (noting that "deliberative process privilege protection under exemption 5 is available to a draft document regardless of whether it differs from its final version"); Canning v. U.S. Dep't of State, 453 F. Supp. 3d 332, 338 (D.D.C. 2020) (finding that agency need not compare draft document to final decision because doing so might expose deliberative process taking place between creation of draft and final documents).

[155] See Transgender L. Ctr. v. ICE, 46 F.4th 771, 783 (9th Cir. 2022) (holding that "simply designating a document as a 'draft' does not automatically make it privileged under the deliberative process privilege" (quoting Wilderness Soc'y v. Dep't of Interior, 344 F. Supp. 2d 1, 14 (D.D.C. 2004))); Arthur Andersen & Co. v. IRS, 679 F.2d 254, 257 (D.C. Cir. 1982) (holding that "the designation of the documents here as 'drafts' does not end the inquiry"); see also Nevada, 517 F. Supp. 2d at 1264-65 (declaring that "the word 'draft' is not talismanic" and therefore an inquiry into the nature of the document is required).

[156] See, e.g., ACLU v. DOJ, No. 09-0642, 2012 U.S. Dist. LEXIS 137204, at *4 (W.D. Wash. Sept. 21, 2012) (declining protection for four documents withheld in full "solely on the ground that they are drafts"); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007) (holding that agency had not demonstrated role draft documents played in decisionmaking process); Heartwood Inc. v. U.S. Forest Serv., 431 F. Supp. 2d 28, 37 (D.D.C. 2006) (ruling that draft reports prepared by Federal Advisory Committee Act committee for defendant agency could not be protected because evidence showed that agency viewed draft reports as merely factual, not as containing "recommendations or policy judgments"); Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 261 (D.D.C. 2004) (citing Arthur Andersen for proposition that "drafts are not presumptively privileged"); Lee v. FDIC, 923 F. Supp. 451, 458 (S.D.N.Y. 1996) (declaring that document's draft status is not

Notably, under some circumstances, disclosure of even the identity of the author of a deliberative document has been found to chill the deliberative process, thus warranting protection of that identity under Exemption 5.[157] Of additional note, the deliberative process privilege may apply with special force to deliberations relating to foreign relations.[158]

The deliberative process privilege has been found to protect spreadsheets, software, and similar analytical tools where their disclosure could reveal the deliberative process for data analysis.[159] Conversely, courts have found that routine computations not

---

sufficient reason "to automatically exempt" it from disclosure where it has not been shown that disclosure would "inhibit the free flow of information" between agency personnel); cf. Hansen v. U.S. Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (concluding that unpublished internal document lost its draft status when consistently treated by the agency as finished product over many years).

[157] See, e.g., AIDS Healthcare Found. v. Leavitt, 256 F. App'x 954, 957 (9th Cir. 2007) (holding that if names of reviewers of grant applications were released, "[i]t would be impossible to have any frank discussions of . . . policy matters in writing" (quoting EPA v. Mink, 410 U.S. 73, 87 (1973))); Brinton v. Dep't of State, 636 F.2d 600, 604 (D.C. Cir. 1980) (protecting identities of attorneys who provided legal advice to Secretary of State); Pub. Citizen, Inc. v. U.S. Dep't of Educ., 388 F. Supp. 3d 29, 44 (D.D.C. 2019) (protecting identity of author of emails under deliberative process privilege because releasing name would reveal information about decisionmaking process and instill reluctance to explore all options and request other opinions in the future); Cofield v. City of LaGrange, 913 F. Supp. 608, 616-17 (D.D.C. 1996) (finding internal routing notations possibly leading to identification of employees involved in decisionmaking protectable); Miscavige v. IRS, No. 91-1638, 1993 WL 389808, at *3 (N.D. Ga. June 15, 1992) (protecting handwritten signatures of agency employees involved in ongoing examination of church's claim of exempt status); cf. Wolfe v. HHS, 839 F.2d 768, 775-76 (D.C. Cir. 1988) (en banc) (discussing how particularized disclosure can chill agency discussions); Greenberg v. Dep't of the Treasury, 10 F. Supp. 2d 3, 16 n.19 (D.D.C. 1998) (holding that mere redaction of authors' names would not remove chilling effect on decisionmaking process).

[158] See Canning, 453 F. Supp. 3d at 337 (finding "use of translations is presumably most common when the Executive Branch focuses on matters relating to foreign relations and foreign commerce, areas where the deliberative process privilege applies with special force"); Fulbright & Jaworski v. Dep't of Treasury, 545 F. Supp. 615, 620 (D.D.C. 1982) (discussing the particular sensitivity around disclosure where the decision in question implicates foreign relations).

[159] See Reliant, 520 F. Supp. 2d at 205-06 (protecting the "spreadsheets and tables that 'analyze raw data,'" because even though materials "are not themselves deliberative, their use by agency employees in writing the Staff Report renders them part of the deliberative process") (internal citation omitted); Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (holding "that the computer programs reflect their creator's mental processes, and therefore fall under Exemption 5").

involving agency discretion are not covered.[160] The government interest in withholding technical data has been found to be heightened if such material is requested at a time when disclosure of a scientist's "nascent thoughts . . . would discourage the intellectual risk-taking so essential to technical progress."[161]

Adoption and Incorporation

Finally, the Supreme Court has ruled that even if a document is protected from disclosure by the deliberative process privilege, it may lose this protection if a final decisionmaker "chooses expressly to adopt or incorporate [it] by reference."[162] Courts consider recommendations to be adopted when an agency decisionmaker accepts the rationale of a recommendation as the agency's policy.[163] Relatedly, courts consider

---

[160] See Nat. Res. Def. Council v. EPA, 954 F.3d 150, 157 (2d Cir. 2020) (determining core model is akin to a specialized calculator and is therefore not withholdable because releasing standard computations over which the agency has no significant discretion is unlikely to injure the quality of agency decisionmaking); Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (finding "release of materials that do not embody agency judgments – for example, materials relating to standard or routine computations or measurements over which the agency has no significant discretion – is unlikely to diminish officials' candor or otherwise injure the quality of agency decisions").

[161] Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984).

[162] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975); see, e.g., Jud. Watch, Inc. v. DOD, 847 F.3d 735, 739 (D.C. Cir. 2017) (explaining that "[t]o adopt a deliberative document, it is not enough for an agency to make vague or equivocal statements . . . instead, the agency must make an '*express*[ ]' choice to use a deliberative document as a source of agency guidance") (internal citation omitted); Elec. Frontier Found. v. DOJ, 739 F.3d 1, 10 (D.C. Cir. 2014) (explaining that adoption occurs when it is evident that "'reasoning in the report is adopted by the [agency] as *its* reasoning,'" which is different showing than simply demonstrating that agency "'agrees with the conclusion of a report'" (quoting Sears, 421 U.S. at 168)); Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of "underlying memorandum" that was "expressly relied on in a final agency dispositional document"); Bhd. of Locomotive Eng'rs v. Surface Transp. Bd., No. 96-1153, 1997 WL 446261, at *4-5 (D.D.C. July 31, 1997) (concluding that staff recommendation was adopted in both written decision and commission vote and therefore must be released); Burkins v. United States, 865 F. Supp. 1480, 1501 (D. Colo. 1994) (holding that final report's statement that findings are same as those of underlying memorandum constituted adoption of that document).

[163] See Sears, 421 U.S. at 161 (holding that when a recommendation is "adopted, the reasoning becomes that of the agency"); Nat'l Day Laborer Org. Network v. ICE, 827 F. Supp. 2d 242, 252-53 (S.D.N.Y. 2011) (holding that recommendation of agency employee becomes adopted when agency accepts conclusion and rationale of recommendation as its own).

recommendations to be incorporated into the final decision when an agency decisionmaker references a particular recommendation in the public statement of the agency's final decision.[164]

In general, courts do not find "approval" of a document's conclusion to constitute express incorporation of the underlying rationale within it,[165] and courts have not

---

[164] See Sears, 421 U.S. at 161 (holding that "if an agency chooses [to] expressly . . . incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion" that memorandum loses its predecisional status); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980) ("[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public."); Am. Soc'y of Pension Actuaries v. IRS, 746 F. Supp. 188, 192 (D.D.C 1990) (ordering disclosure on basis that IRS's budget assumptions and calculations were "relied upon by the government" in making its final estimate for President's budget); cf. Ecological Rts. Found. v. EPA, No. 19-980, 2021 WL 535725, at *19 (D.D.C. Feb. 13, 2021) (determining that "if the context surrounding a final talking-points document indicates that it was provided to an agency decisionmaker for actual use in a public communication as the agency's representative, the document is not protected under Exemption 5's deliberative process privilege"). But cf. Pub. Emps. For Env't Resp. v. EPA, No. 18-2219, 2021 WL 2515007, at *11 (D.D.C. June 18, 2021) (finding that "brief testimony by an agency head responsible for the administration of an entire executive branch agency . . . about the status of a particular report within a specific agency program, made in the context of responding to a query at a Senate hearing – and couched with the caveat that the information must be checked – is simply less credible than, and must give way to, EPA's affidavits in this case").

[165] See, e.g., Jud. Watch, Inc., 847 F.3d at739-40 (finding that Secretary's signing of letters is not necessarily ratification of memo's reasoning and therefore memo is not decisional document subject to disclosure); Abtew v. DHS, 808 F.3d 895, 899 (D.C. Cir. 2015) (determining that "[i]nitialing a memo may suggest approval of the memo's bottom-line recommendation, but it would be wrong and misleading to think that initialing necessarily indicates adoption or approval of all of the memo's reasoning"); Energy Pol'y Advocs. v. U.S. Dep't of State, No. 19-03307, 2023 WL 4198200, at *4 (D.D.C. June 27, 2023) (explaining that while Secretary's initials on approve lines of memo indicate his agreement with conclusion of memo, his signature does not necessarily endorse subordinates' preliminary advice and therefore Secretary did not adopt redacted recommendations of his staff); Azmy v. DOD, 562 F. Supp. 2d 590, 604 (S.D.N.Y. 2008) (finding that decision maker's "signature indicating his decision says nothing about how he arrived at the decision or what information he found compelling or persuasive in making his choice" and therefore "none of these assessments and recommendations can be deemed incorporated by reference"); Ahearn v. U.S. Army Materials & Mechs. Rsch. Ctr., 580 F. Supp. 1405, 1407 (D. Mass. 1984) (holding that fact that general officer reached same conclusion as report of investigation did not constitute incorporation of report's reasoning).

generally inferred incorporation on the agency's part.[166] This is consistent with the Supreme Court's ruling in Renegotiation Board v. Grumman Aircraft Engineering Corp.,[167] where the Court refused to order release of a document where the "evidence utterly fail[ed] to support the conclusion" that the decisionmakers had incorporated the reasoning contained in recommendations prepared for them, even where they agreed with the recommendations themselves.[168]

---

[166] See, e.g., Casad v. HHS, 301 F.3d 1247, 1252-53 (10th Cir. 2002) (refusing to order disclosure where there was "no indication in the record" of express incorporation of underlying rationale of recommendations); Mayer, Brown, Rowe & Maw, LLP v. IRS, 537 F. Supp. 2d 128, 134-35 (D.D.C. 2008) (refusing to rule that incorporation had taken place where there was "an absence of proof" on this question, rejecting plaintiff's claim that agency bore burden of proof on this issue); Hawkins v. U.S. Dep't of Lab., No. 05-269J32, 2005 WL 2063811, at *4 (M.D. Fla. Aug. 19, 2005) (protecting documents that were used as part of basis for final agency decision, because there was no evidence of "clear adoption or incorporation" by agency); Trans Union, LLC v. FTC, 141 F. Supp. 2d 62, 70 (D.D.C. 2001) (following Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168 (1975) and rejecting argument that burden is on agency to prove that documents were not adopted as basis for policy); N. Dartmouth Props. Inc. v. HUD, 984 F. Supp. 65, 69-70 (D. Mass. 1997) (holding that fact that agency ultimately reached conclusion advocated by author of withheld document did not constitute adoption of author's reasoning); Perdue Farms Inc. v. NLRB, No. 96-27, 1997 U.S. Dist. LEXIS 14579, at *20-23 (E.D.N.C. Aug. 5, 1997) (holding that fact that document was created only two days before issuance of final decision was insufficient to give rise to inference of adoption); Greyson v. McKenna & Cuneo, 879 F. Supp. 1065, 1069 (D. Colo. 1995) (deciding that use of phrase "the evidence shows" not enough for inference of adoption); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (concluding that record did not suggest either "adoption" or "final opinion" of agency); see also Am. Fed'n of Gov't Emps., AFL-CIO v. Dep't of the Army, 441 F. Supp. 1308, 1311 (D.D.C. 1977) (holding that decisionmaker's letter setting forth reasons for decision, not underlying report, constituted final agency decision).

[167] 421 U.S. 168 (1975).

[168] Id. at 184-85; see also Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 370 (D.C. Cir. 2020) (holding that "a recommendation does not lose its predecisional or deliberative character simply because a final decisionmaker later follows or rejects it without comment"); Afshar v. Dep't of State, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983) (holding that "only express adoption in a nonexempt memorandum explaining a final decision will serve to strip [otherwise predecisional] memoranda of their predecisional character. . . [because if] the agency merely carried out the recommended decision without explaining its decision in writing, [the court] could not be sure that the memoranda accurately explained the decisionmaker's thinking" but ultimately concluding that, in instant case, "substantial evidence" existed indicating that adoption had occurred and remanding case for further findings) (citations omitted); Advancement Project v. DHS, 549 F. Supp. 3d 128, 137-38 (D.D.C. 2021) (explaining that while plaintiff "asserts that any draft document whose position ICE ultimately approved cannot be predecisional," plaintiff "points to no evidence of adoption other than ICE's high-level decision to enact visa sanctions" which is not enough because decisionmaker ultimately acting in accordance with recommendation by itself does not mean that agency adopted document).

The Court of Appeals for the Second Circuit found adoption to have occurred when DOJ had relied on a memorandum as a statement of agency policy, making repeated public references to the document in justifying its position on the matter in question.[169] The Second Circuit found that this evidence of adoption went beyond "mere speculation," which would have been insufficient.[170] Furthermore, the Second Circuit pointed out that "casual reference[s]" to an otherwise privileged document would not be enough to demonstrate adoption, nor would the privilege have been lost had DOJ merely adopted the memorandum's conclusions.[171] Rather, the court found DOJ had "publicly and repeatedly depended on the Memorandum as the primary legal authority justifying and driving . . . [its policy decision] and the legal basis therefor."[172] In contrast, when a document does not operate as functionally binding authority, the Second Circuit has found that adoption has not occurred.[173]

---

[169] Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 360-61 (2d Cir. 2005) (ordering release of OLC memorandum concerning enforcement of immigration law by state and local law enforcement because DOJ made public use of it as DOJ's policy); accord Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ, 697 F.3d 184, 205 (2d Cir. 2012) (explaining that when an agency "referenc[es] a protected document as authoritative, it cannot then shield the authority upon which it relies from disclosure"); see also Nat'l Day Laborer Org. Network v. ICE, 827 F. Supp. 2d 242, 259 (S.D.N.Y. 2011) (discussing and applying La Raza to hold that memorandum was adopted because "agency has continually relied upon and repeated in public the arguments made in the Memorandum").

[170] See La Raza, 411 F.3d at 359 (comparing substantial evidence of adoption of memorandum in present case, as compared to other cases where such evidence was lacking).

[171] See id. at 358 ("Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis. . . ."); see also Elec. Frontier Found. v. DOJ, 739 F.3d 1, 10 (D.C. Cir. 2014) ("We have thus recognized that 'the Court has refused to equate reference to a report's conclusions with adoption of its reasoning, and it is the latter that destroys the privilege.'" (quoting Access Reps. v. DOJ, 926 F.2d 1192, 1197 (D.C. Cir. 1991))).

[172] La Raza, 411 F.3d at 358 (noting statements by agency official relying on document in question were sole means of explaining agency position on matter at issue and distinguishing this case from Grumman Aircraft, where evidence failed to show reasoning in reports had been adopted); see also Bronx Defs. v. DHS, No. 04-8576, 2005 WL 3462725, at *4-5 (S.D.N.Y. Dec. 19, 2005) (ordering release of memorandum because government had cited it in multiple public documents as basis for government policy).

[173] N.Y. Times Co. v. DOJ, 939 F.3d 479, 492 (2d Cir. 2019) (holding that "an 'express adoption' inquiry is only relevant insofar as the previously-privileged intra-agency document has become binding 'working law'" and therefore finding recommendations to the Attorney General on whether to formally investigate or prosecute, even if expressly adopted by the Attorney General in his final decision, are not binding on the public, and thus cannot constitute "working law"); ACLU v. NSA, 925 F.3d 576, 593 (2d Cir. 2019) (noting that

Other courts have rejected claims of adoption in the absence of sufficient evidence that it has occurred.[174] For instance, the D.C. Circuit held that an opinion written by DOJ's OLC was not adopted by the FBI because the FBI never publicly invoked or relied upon the OLC opinion as the basis for an agency decision.[175]

"'working law' describes a category of post-decisional material, and 'express adoption' and 'incorporation by reference' describe two methods by which pre-decisional material can become post-decisional" and finding no evidence that agency ever adopted the OLC memorandum as binding nor incorporated it by reference); see also ACLU v. DOD, 435 F. Supp. 3d 539, 570 (S.D.N.Y. 2020) (explaining that "'mere agreement with a document's reasoning and conclusion is insufficient to transform advice into law'" but rather "'document must be treated as binding by the agency (i.e. "[express] adoption") or explicitly relied upon in a formal decision (i.e. "incorporation by reference")'" (quoting ACLU v. NSA, 925 F.3d at 598) and finding that document did not bind public).

[174] See, e.g., Elec. Frontier Found., 739 F.3d at 11 (finding that plaintiff failed to "point to any evidence supporting its claim" of adoption); Robert v. HHS, 217 F. App'x 50, 52 (2d Cir. 2007) (rejecting plaintiff's claim of adoption or incorporation where there was "no evidence in the record" of either); Gellman v. DHS, 525 F. Supp. 3d 1, 10 (D.D.C. 2021) (holding that agency reasonably looked to "the four corners" of the records when determining that there were no leads suggesting adoption); Elec. Frontier Found. v. DOJ, 890 F. Supp. 2d 35, 45 (D.D.C. 2012) (rejecting argument that deliberative process privilege may not apply to documents recommending negotiating position because "there is no indication that the agencies that participated in the [High Level Contact Group (HLCG)] negotiations . . . formally or expressly adopted the [HLCG's] negotiating positions in any publicly-available document or publication"); cf. 100Reporters v. U.S. Dep't of State, 602 F. Supp. 3d 41, 63 (D.D.C. 2022) (concluding "that garden-variety deliberative records will not, in most cases, invite a reasonable inference that the draft or recommendation was ultimately adopted by the agency and, accordingly, will not put the agency to the 'burden' of tracing the records' lineage to put any doubt to rest"); Advancement Project v. DHS, 549 F. Supp. 3d 128, 138 (D.D.C. 2021) (noting that "the burden to prove adoption lies with the FOIA requester, not the agency"); Protect Democracy Project, Inc. v. DOJ, No. 20-172, 2021 WL 1167094, at *6 (D.D.C. Mar. 26, 2021) (determining that "[w]hile an agency bears the burden of demonstrating that a FOIA exemption applies, the requester bears the burden of establishing that the agency adopted a document as working law"); Sec. Fin. Life Ins. Co. v. Dep't of Treasury, No. 03-102, 2005 WL 839543, at *7 (D.D.C. Apr. 12, 2005) (determining that agency "does not carry the burden of proving that each withheld document was not adopted formally or informally"). But cf. Sussman v. DOJ, No. 03-3618, 2006 WL 2850608, at *18 (E.D.N.Y. Sept. 30, 2006) (denying summary judgment where government had "not addressed" whether predecisional, deliberative documents were adopted); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (citing Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 261 (D.D.C. 2004), for same proposition); Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 261 (D.D.C. 2004) (ruling that agency had affirmative obligation to explicitly deny that draft documents had been adopted as agency policy).

[175] Elec. Frontier Found., 739 F.3d at 11-12 (explaining that while DOJ's Office of the Inspector General had referenced OLC opinion in public report, and FBI had answered

Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation.[176] As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny,[177] the Court of Appeals for the District of Columbia Circuit has held that the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.[178] The privilege is not limited to civil proceedings, but rather extends to administrative

---

Congressional inquiries about OLC opinion, this did not demonstrate that FBI adopted OLC opinion "as *its own* reasoning"); see also Samahon v. DOJ, No. 13-6462, 2015 WL 857358, at *23 (E.D. Pa. Feb. 27, 2015) (finding that two OLC opinions "do not constitute 'working law'" because "[t]hey are not an expression of final agency policy because they are advisory and cannot bind the President in his decisionmaking") (internal citation omitted).

[176] See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947) (non-FOIA case); Wisdom v. USTP, 266 F. Supp. 3d 93, 108 (D.D.C. 2017) ("Because the 'need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress,' . . . the Court has little difficulty finding that the discussions between the AUST and the Acting AUST about Plaintiff's ongoing related litigation are exempt from disclosure." (quoting FTC v. Grolier Inc., 462 U.S. 19, 30 (1983))); Adionser v. DOJ, 811 F. Supp. 2d 284, 297 (D.D.C. 2011) (concluding that EOUSA properly invoked attorney work-product privilege "to protect records reflecting 'such matters as trial preparation, trial strategy, interpretations, and personal evaluations and opinions pertinent to Plaintiff's criminal case'" (quoting Coastal States Gas Corp. v. DOE, 617 F.2d 854, 864 (D.C. Cir. 1980))); Jud. Watch, Inc. v. DOJ, 800 F. Supp. 2d 202, 212-13 (D.D.C. 2011) (concluding that documents created in reasonable anticipation of motion to be filed in ongoing case were properly withheld under work-product privilege); Amnesty Int'l USA v. CIA, No. 07-5435, 2010 WL 5421928, at *4 (S.D.N.Y. Dec. 21, 2010) (holding that attorney work-product privilege protects documents constituting mental impressions of federal prosecutor about anticipated or ongoing litigation); Citizens for Resp. & Ethics in Wash. v. NARA, 715 F. Supp. 2d 134, 138-39 (D.D.C. 2010) (protecting "'documents prepared in contemplation of litigation'" (citing Coastal States, 617 F.2d at 864)); Wolfson v. United States, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (concluding that attorney work-product privilege was properly invoked to withhold information whose disclosure "would reveal . . . attorneys' thought processes and litigation strategy and would reveal the agency's deliberations prior to the decision to seek authorization for continued monitoring of oral communications"); see also Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure).

[177] See Jordan v. DOJ, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc); Stein v. DOJ, 134 F. Supp. 3d 457, 479 (D.D.C. 2015) (determining that if opposing party could obtain monographs that contain legal strategies, it would give them benefit of agency's legal and factual analysis and reasoning and thus an unfair advantage in litigation).

[178] Coastal States, 617 F.2d at 865.

proceedings[179] and to criminal matters as well.[180] Similarly, the privilege has also been held applicable to documents generated in preparation of an amicus brief.[181]

---

[179] See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 159-60 (1975) (assuming without analysis that proceeding before NLRB constitutes litigation for purposes of attorney work product privilege); Schoenman v. FBI, 573 F. Supp. 2d 119, 143 (D.D.C. 2008) (upholding use of privilege for documents "created by an attorney in the context of an ongoing administrative proceeding that eventually resulted in litigation"); Nevada v. DOE, 517 F. Supp. 2d 1245, 1260 (D. Nev. 2007) (noting that privilege applies to administrative proceedings, as long as they are "adversarial"); Env't Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 586 (N.D. W. Va. 2005) (protecting documents prepared in advance of EPA administrative enforcement proceeding); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999) (allowing withholding of documents prepared by attorneys in anticipation of INS deportation proceeding); Williams v. McCausland, No. 90-7563, 1994 WL 18510, at *10 (S.D.N.Y. Jan. 18, 1994) (MSPB proceeding); Exxon Corp. v. DOE, 585 F. Supp. 690, 700 (D.D.C. 1983) (upholding use of privilege for documents prepared for regulatory audits and investigations); see also Jud. Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 30-31 (D.D.C. 2003) (applying privilege to memorandum written by IRS associate chief counsel that discussed private financial information concerning prospective IRS employee).

[180] See, e.g., Liounis v. Krebs, No. 18-5351, 2019 WL 7176453, at *1 (D.C. Cir. Dec. 19, 2019) (per curiam) (finding that "government properly invoked Exemption 5 to withhold the draft indictment, draft information, and handwritten attorney notes on the indictment under the attorney work-product privilege as those documents were prepared by attorneys in connection with a criminal prosecution"); Sorin v. DOJ, 758 F. App'x 28, 32 (2d Cir. 2018) (per curiam) (holding that emails concerning legal theories and litigation strategies and attorney notes "fall within the work-product privilege as communications within and among federal law enforcement agencies created in anticipation of a criminal prosecution and for the purpose of furthering that prosecution"); Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (applying privilege in case involving prosecution of environmental crimes); Nadler v. DOJ, 955 F.2d 1479, 1491-92 (11th Cir. 1992) (applying privilege in bribery investigation); Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983) (ruling privilege applicable in bank-fraud prosecution); Lazaridis v. DOJ, 766 F. Supp. 2d 134, 143 (D.D.C. 2011) (holding that agency properly asserted Exemption 5 to withhold "predominantly as attorney work-product but also as deliberative process material" various records prepared by the U.S. Attorney's Office pertaining to plaintiff's "'pending kidnapping case'") (internal citations omitted); Miller v. DOJ, 562 F. Supp. 2d 82, 113 (D.D.C. 2008) (protecting documents created in considering whether to bring criminal charges against requester); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 517 (S.D.N.Y. 2007) (protecting documents that "'provid[ed] guidance for responding to motions made in criminal litigation'") (internal citation omitted); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at *5-6 (D.D.C. Jan. 30, 2007) (upholding use of privilege to withhold criminal case history report); Butler v. DOJ, 368 F. Supp. 2d 776, 785-86 (E.D. Mich. 2005) (applying privilege to prosecution memorandum and draft indictment prepared as part of narcotics investigation); Slater v. EOUSA, No. 98-1663, 1999 U.S. Dist. LEXIS 8399, at *9 (D.D.C. May 24, 1999) (protecting portions of letter from Assistant United States Attorney to FBI revealing investigative strategy in criminal case).

[181] See Strang v. DeSio, 899 F.2d 1268, 1268 (D.C. Cir. 1990) (unpublished table decision).

To fall within the protection of the attorney work-product privilege litigation need not have actually commenced, so long as specific claims have been identified which make litigation probable.[182] Significantly, the D.C. Circuit has ruled that the privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."[183] The privilege also has been held to attach to records of law

---

[182] See, e.g., Margolin v. NASA, No. 09-00421, 2011 WL 1303221, at *9 (D. Nev. Mar. 31, 2011) (holding that communications between agency attorneys produced "in the course of [the development of] an agency's response to administrative claims against the agency and in contemplation of potential litigation against the agency are not 'normally' or 'routinely' subject to disclosure in civil litigation and therefore are exempt from mandatory disclosure under Exemption 5, without regard to the status of any litigation") (internal citations omitted); Citizens for Resp. & Ethics in Wash. v. NARA, 583 F. Supp. 2d 146, 160 (D.D.C. 2008) (allowing use of privilege in situation where agency "could reasonably have anticipated litigation over" status of requested records); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 80 (D.D.C. 2003) (applying privilege in situation where potential claimants had discussed possibility of pursuing claims); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 19 (D.D.C. 2001) (protecting document written to assess "whether a particular case should be designated for litigation"), aff'd in part, rev'd in part on other grounds, & remanded, 294 F.3d 71 (D.C. Cir. 2002); Blazy v. Tenet, 979 F. Supp. 10, 24 (D.D.C. 1997) (observing that communication between agency employee review panel and agency attorney throughout process of deciding whether to retain plaintiff "at the very least demonstrates that the [panel] was concerned about potential litigation"), aff'd, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); Chemcentral/Grand Rapids Corp. v. EPA, No. 91-4380, 1992 WL 281322, at *5 (N.D. Ill. Oct. 6, 1992) (applying privilege to legal advice regarding specific agency cleanup sites where agency believed statutory violations occurred, although agency later declined to prosecute); Savada v. DOD, 755 F. Supp. 6, 7 (D.D.C. 1991) (finding threat of litigation by counsel for adverse party sufficient).

[183] Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992); see also ACLU of N. Cal. v. DOJ, 880 F.3d 473, 487-88 (9th Cir. 2018) (concluding that portions of USABook that detail DOJ's developed legal arguments regarding process of obtaining court authorization for certain investigative techniques fall within attorney work product privilege, and declining to hold that attorney work product must be prepared in anticipation of specific litigation to be privileged); Nat'l Ass'n of Crim. Def. Laws. v. EOUSA, 844 F.3d 246, 255 (D.C. Cir. 2016) (finding that "in the case of a document like the Blue Book, prepared entirely for use in wholly foreseeable (even inevitable) litigation, there is no need to apply any specific-claim test to conclude that litigation is sufficiently likely to warrant application of the work-product privilege"); Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (holding that privilege extends to documents prepared when identity of prospective litigation opponent unknown); Docufreedom Inc. v. DOJ, No. 17-2706, 2019 WL 3858166, at *8 (D. Kan. Aug. 16, 2019) (upholding the withholding of certain records because "[t]hey are 'veritable "how to" manuals for building defenses and litigating' challenges") (internal citation omitted); Media Rsch. Ctr. v. DOJ, 818 F. Supp. 2d 131, 141 (D.D.C. 2011) (concluding that "when government attorneys act as 'legal advisors' to an agency considering litigation that may arise from challenge to a government program, a specific claim is not required to justify the assertion of [the attorney work-product]

enforcement investigations, when the investigation is "based upon a suspicion of specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer."[184]

However, the mere fact that it is conceivable that litigation might occur at some unspecified time in the future will not necessarily be sufficient to protect attorney-generated documents; it has been observed that "the policies of the FOIA would be largely defeated" if agencies were to withhold any documents created by attorneys "simply because litigation *might* someday occur."[185] But when litigation is reasonably regarded as inevitable under the circumstances, a specific claim need not yet have arisen before courts have found the attorney work-product privilege applicable.[186]

---

privilege") (internal citation omitted); James Madison Project v. CIA, 607 F. Supp. 2d 109, 130 (D.D.C. 2009) (protecting documents concerning agency's review of factual material in fictional manuscripts to ensure nondisclosure of classified material, which agency frequently litigated, although no specific claim was contemplated when documents created); Hertzberg, 273 F. Supp. 2d at 79 (protecting documents generated in light of "'strong probability of tort claims'" (quoting agency declaration)).

[184] SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991); see, e.g., Bagwell v. DOJ, 588 F. Supp. 3d 58, 74-75 (D.D.C. 2022) (holding that emails by prosecutors "prepared as part of an active investigation into specific misconduct" were properly withheld under attorney work-product privilege); Darui v. Dep't of State, 798 F. Supp. 2d 32, 39 (D.D.C. 2011) (holding that emails "prepared by attorneys for DOJ and State," which "'were prepared in connection with a law enforcement proceeding'" are protected by the attorney work-product privilege) (internal citations omitted); Durrani v. DOJ, 607 F. Supp. 2d 77, 84-85 (D.D.C. 2009) (applying privilege to materials prepared as part of criminal prosecution of requester); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *9 (D. Minn. Aug. 23, 2007) (upholding use of privilege to protect documents created as part of investigation into possible violations of securities laws); Winterstein v. DOJ, 89 F. Supp. 2d 79, 81 (D.D.C. 2000) (protecting prosecution memorandum "prepared for the purpose of pursuing a specific claim"); Germosen v. Cox, No. 98-1294, 1999 WL 1021559, at *14 (S.D.N.Y. Nov. 9, 1999) (protecting correspondence between United States Attorney's Office and Postal Inspection Service regarding criminal investigative and prosecution strategy); Pentagen Techs. Int'l v. United States, No. 98-4831, 1999 WL 378345, at *3 (S.D.N.Y. June 9, 1999) (upholding application of privilege to attorney notes regarding qui tam suit in which government ultimately declined to intervene); Sousa v. DOJ, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at *20 (D.D.C. June 18, 1997) (protecting documents that agency sufficiently demonstrated were prepared during murder investigation); Feshbach v. SEC, 5 F. Supp. 2d 774, 783 (N.D. Cal. 1997) (protecting documents pertaining to preliminary examination "based upon a suspicion of specific wrongdoing and represent[ing] an effort to obtain evidence and to build a case against the suspected wrongdoer").

[185] Senate of P.R. v. DOJ, 823 F.2d 574, 587 (D.C. Cir. 1987) (emphasis added) (citing Coastal States Gas Corp. v. DOE, 617 F.2d 854, 865 (D.C. Cir. 1980)).

[186] See, e.g., McKinley v. Bd. of Governors of the Fed. Rsrv. Sys., 647 F.3d 331, 341 (D.C. Cir. 2011) (holding that defendant properly asserted attorney work-product privilege to withhold

In a situation where a document may have been created for more than one purpose, the work-product privilege has been found to apply if the agency can show that the document was created at least in part because of the prospect of litigation.[187] However,

---

document that was prepared by defendant's consultant's attorneys in anticipation of litigation by another party against defendant); Delaney, 826 F.2d at 127 (protecting "agency's attorneys' assessment of [a] program's legal vulnerabilities" crafted before specific litigation arose); Animal Welfare Inst. v. NOAA, 370 F. Supp. 3d 116, 136 (D.D.C. 2019) (determining that "it does not matter that Plaintiff had not made a specific threat of litigation against Defendants at the time the draft memorandum was prepared" because Defendants reasonably anticipated litigation with full knowledge of Plaintiff's interest and position); Hertzberg, 273 F. Supp. 2d at 78 (protecting documents concerning investigation where agency has determined that claims were likely to arise); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1289 (D. Kan. 2001) (protecting documents containing guidance for agency attorneys on litigation of environmental law cases); Heggestad v. DOJ, 182 F. Supp. 2d 1, 8 (D.D.C. 2000) (noting that the privilege applies "even without a case already docketed or where the agency is unable to identify the specific claim to which the document relates"); Bhd. of Locomotive Eng'rs v. Surface Transp. Bd., No. 96-1153, 1997 WL 446261, at *6 (D.D.C. July 31, 1997) (finding future litigation "probable" when agency is aware that its legal interpretation will be contested in court); Lacefield v. United States, No. 92-1680, 1993 WL 268392, at *8 (D. Colo. Mar. 10, 1993) (holding that agency's knowledge that adversary plans to challenge agency position constitutes sufficient anticipation of articulable claim).

[187] See Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 67 (1st Cir. 2002) (amended opinion) (overturning district court ruling that litigation had to be "primary motivating factor" behind document creation for privilege to apply); see also Shapiro v. DOJ, 239 F. Supp. 3d 100, 126 (D.D.C. 2017) (holding that "[g]iven that the records at issue were created 'because of' [a specific] litigation; the evidence that those records differ in at least certain material respects from the records that would have been generated in the absence of the litigation; and the inherent difficulty in determining how the pendency of the litigation affected each specific entry," work-product privilege applies); Woods v. Elec. Surveillance Unit, 155 F. Supp. 3d 54, 60 (D.D.C. 2016) (finding that even though logging notes have a partially administrative character, fact that they were compiled in anticipation of a specific criminal prosecution qualifies them as attorney work product); Thompson v. DOJ, 146 F. Supp. 3d 72, 84-86 (D.D.C. 2015) (noting that D.C. Circuit employs a because-of test and holding that work-product privilege protects these quasi-administrative records because they were compiled in anticipation of a specific criminal prosecution and are not generic agency records); Hertzberg, 273 F. Supp. 2d at 80 (rejecting "'primary motivating purpose'" test) (internal citation omitted); Bhd. of Locomotive Eng'rs, 1997 WL 446261, at *6 (holding that privilege applies where document was created "in part" for litigation). But see Pub. Citizen, Inc. v. Dep't of State, 100 F. Supp. 2d 10, 30 (D.D.C. 2000) (requiring that litigation be "'primary motivating purpose'" in document's creation) (internal citation omitted), aff'd in part & rev'd in part on other grounds, 276 F.3d 634 (D.C. Cir. 2002).

documents prepared in an agency's ordinary course of business, not under circumstances sufficiently related to litigation, may not be accorded protection.[188]

The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation.[189] It has also been used to protect the recommendation to close a litigation or pre-litigation matter.[190] Conversely, documents

---

[188] See ACLU of N. Cal., 880 F.3d at 486 (finding that "[t]he portions of the USABook that provide instructions to investigators regarding obtaining court authorization for electronic surveillance would have been created in 'substantially similar form' regardless of whether those investigations ultimately lead to criminal prosecutions" and therefore privilege does not apply to those portions) (internal citation omitted); Hennessey v. AID, No. 97-1113, 1997 WL 537998, at *6 (4th Cir. Sept. 2, 1997) (unpublished disposition) (declining to apply privilege to report concerning building of university because that "is a non-litigation purpose," despite threat of lawsuit) (internal citation omitted); Louise Trauma Ctr. LLC v. DOJ, No. 20-3517, 2023 WL 6646335, at *6 (D.D.C. Oct. 12, 2023) (holding that attorney training materials containing "'neutral accounts of government policy that merely pertain to the subject of litigation in the abstract may not be privileged' unless in context the information 'would tend to reveal the lawyer's thoughts about which authorities are important and for which purposes'" (quoting Louise Trauma Ctr. LLC v. DOJ, No. 20-3517, 2023 WL 2663007, at *3-4 (D.D.C. Mar. 28, 2023))); Zander v. DOJ, 885 F. Supp. 2d 1, 11 (D.D.C. 2012) (finding "two e-mails do not fall under the attorney work product doctrine because the e-mails are communications to and from clients regarding litigation, rather than actual preparation by attorneys for litigation (or anticipated litigation)"); Hill Tower Inc. v. Dep't of Navy, 718 F. Supp. 562, 567 (N.D. Tex. 1988) (declining to apply privilege after concluding that aircraft accident investigation information in JAG Manual report was not created in anticipation of litigation); cf. Nevada v. DOE, 517 F. Supp. 2d 1245, 1260-61 (D. Nev. 2007) (refusing to apply privilege to license permit applications because the proceedings were not adversarial and thus not "'akin to . . . litigation'") (internal citation omitted).

[189] United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040, 1044-45 (8th Cir. 1992) (holding that it is "beyond doubt that draft consent decrees prepared by a federal government agency involved in litigation" are covered by attorney work-product privilege, but remanding to determine if privilege was waived); see also Fischer v. DOJ, 723 F. Supp. 2d 104, 113-14 (D.D.C. 2010) (protecting drafts of settlement agreement related to plaintiff's criminal case which were prepared by U.S. Attorney's Office); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 19 (D.D.C. 2001) (protecting recommendations concerning settlement of case), aff'd in part, rev'd in part on other grounds, & remanded, 294 F.3d 71 (D.C. Cir. 2002); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984) ("attorney's notes or working papers which relate to . . . possible settlement discussions . . . are protected under the attorney work-product privilege"), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (unpublished table decision).

[190] See, e.g., Rutigliano v. DOJ, 847 F. App'x 86, 87 (2d Cir. 2021) (holding that prosecution declination memorandum was properly withheld under attorney work-product privilege); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 146-47 (2d Cir. 1994) (concluding that work-product privilege still was applicable even if staff attorney was considering or recommending closing investigation); Kishore v. DOJ, 575 F. Supp. 2d 243, 259 (D.D.C.

prepared subsequent to the closing of a case are presumed, absent some specific basis for concluding otherwise, not to have been prepared in anticipation of litigation.[191] Moreover, courts have found that documents not originally prepared in anticipation of litigation cannot assume the protection of the work-product privilege merely through their later placement in a litigation-related file.[192]

Regarding the requirement that the information be prepared by an attorney, courts have found that not only do documents prepared by agency attorneys who are responsible for the litigation of a case which is being defended or prosecuted by DOJ qualify for the privilege,[193] but also documents prepared by an attorney "not employed as a litigator,"[194]

2008) (applying privilege to document explaining government's reasons for declining prosecution); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *9 (D. Minn. Aug. 23, 2007) (approving use of privilege for documents recommending closing of SEC investigations); Heggestad, 182 F. Supp. 2d at 10-11 (holding privilege applicable to prosecution-declination memoranda); cf. Grecco v. DOJ, No. 97-0419, slip op. at 12 (D.D.C. Apr. 1, 1999) (holding privilege applicable to records concerning determination whether to appeal lower court decision).

[191] See Senate of P.R. v. DOJ, 823 F.2d 574, 586 (D.C. Cir. 1987) (finding that "absent *any* additional support, [the court is] reluctant to credit a claim that documents generated while there was no active investigation underway were prepared 'in anticipation of litigation'" (emphasis added)) (internal citation omitted); Rashid v. DOJ, No. 99-2461, 2001 U.S. Dist. LEXIS 26353, at *12-13 (D.D.C. June 11, 2001) (holding privilege inapplicable to documents drafted after case was settled); Canning v. Dep't of the Treasury, No. 94-2704, slip op. at 12 (D.D.C. May 7, 1998) (holding prosecutor's letter setting forth reasons relied upon in declining to prosecute case and "written after the conclusion of the investigation and after the decision to forgo litigation was made," not covered by privilege); Dow Jones & Co. v. DOJ, 724 F. Supp. 985, 989 (D.D.C. 1989) (finding that referral letter to Congress was not in anticipation of litigation since it was prepared after DOJ decided not to prosecute), aff'd in part & rev'd in part on other grounds, 917 F.2d 571 (D.C. Cir. 1990). But see Senate of P.R. v. DOJ, No. 84-1829, 1992 WL 119127, at *8 (D.D.C. May 13, 1992) (finding reasonable anticipation of litigation still existed after case was formally closed, because agency was reevaluating it in light of new evidence).

[192] See MacLean v. DOD, No. 04-2425, slip op. at 13 n.13 (S.D. Cal. June 6, 2005) (finding that "the occurrence of litigation cannot magically transform every attorney prepared document into a document prepared in anticipation of litigation").

[193] See, e.g., Antonelli v. ATF, 555 F. Supp. 2d 16, 24-25 (D.D.C. 2008) (protecting memo from Assistant U.S. Attorney to BOP officials discussing litigation strategy for upcoming case); Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983) (protecting documents "prepared in contemplation of pending litigation and in an obvious effort to influence or discuss litigation strategy").

[194] Ill. State Bd. of Educ. v. Bell, No. 84-337, slip op. at 9-10 (D.D.C. May 31, 1985).

or even documents prepared by someone not employed primarily as an attorney.[195] Courts have also accorded work-product protection to materials prepared by non-attorneys who are supervised by attorneys.[196] Conversely, in the absence of a showing that the non-attorney was acting as the agent of the attorney, the work-product privilege has not been extended to protect the material prepared by the non-attorney.[197]

---

[195] See Hanson v. AID, 372 F.3d 286, 293 (4th Cir. 2004) (upholding privilege even though attorney in question testified that he had been hired as engineer, not as attorney; finding that it was clear that despite being hired as engineer, attorney had exercised legal judgment in undertaking his analysis).

[196] See, e.g., Am. Oversight v. DOJ, 45 F.4th 579, 591-98 (2d Cir. 2022) (holding that documents "prepared by law enforcement agents who were memorializing interviews conducted by federal prosecutors or by agents working under the substantial direction of prosecutors" were protected by attorney work-product privilege); Jud. Watch, Inc. v. DOJ, 806 F. App'x 5, 7 (D.C. Cir. 2020) (holding that "the government has adequately demonstrated that the FD-302s [FBI forms used by agents to summarize important facts and statements made by witnesses during interviews] fit within the attorney work-product privilege" when the interviews conducted by agents are done in conjunction with federal prosecutors); Leopold v. DOJ, 487 F. Supp. 3d 1, 14-15 (D.D.C. 2020) (concluding that FBI FD-302 interview forms were appropriately withheld pursuant to the attorney work product privilege when attorneys participated in certain interviews because attorneys must often rely on the assistance of investigators in preparing cases for potential prosecution); Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at *22 (D. Colo. Sept. 8, 2009) (extending privilege to documents created by paralegals for agency attorneys in anticipation of litigation); Antonelli v. BOP, 623 F. Supp. 2d 55, 59 (D.D.C. 2009) (protecting documents prepared in connection with tort claim investigations, including staff memoranda and documents prepared by investigators working at behest of agency counsel); Shacket v. United States, 339 F. Supp. 2d 1092, 1096 (S.D. Cal. 2004) (holding it "irrelevant" that report withheld pursuant to work-product privilege was prepared by IRS Special Agent, not attorney; observing that privilege extends to an attorney "or other representative of a party"); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 76 (D.D.C. 2003) (rejecting claim that privilege is limited to materials prepared by attorney, and citing Federal Rule of Civil Procedure 26(b)(3) for proposition that privilege extends to documents created at direction of attorney); Davis v. FTC, No. 96-9324, 1997 WL 73671, at *2 (S.D.N.Y. Feb. 20, 1997) (protecting material prepared by economists for administrative hearing); Creel v. U.S. Dep't of State, No. 92-559, 1993 U.S. Dist. LEXIS 21187, at *27 (E.D. Tex. Sept. 29, 1993) (magistrate's recommendation) (protecting special agent's notes made while assisting attorney in investigation), adopted, (E.D. Tex. Dec. 30, 1993), aff'd, 42 F.3d 641 (5th Cir. 1995) (unpublished table decision); Durham v. DOJ, 829 F. Supp. 428, 432-33 (D.D.C. 1993) (protecting material prepared by government personnel under prosecuting attorney's direction); Joint Bd. of Control v. Bureau of Indian Affs., No. 87-217, slip op. at 9-10 (D. Mont. Sept. 9, 1988) (protecting water studies produced by contract companies).

[197] See Boyd v. USMS, No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *8-9 (D.D.C. Mar. 15, 2002) (rejecting attorney work-product applicability where documents were prepared by non-attorney who merely "may" have been acting at direction of attorney); Hall v. DOJ, No. 87-474, 1989 WL 24542, at *7-8 (D.D.C. Mar. 8, 1989) (magistrate's recommendation) (concluding that agency's affidavit failed to show that prosecutorial report of investigation

The work-product privilege has been held to remain applicable when the information has been shared with a party holding a common interest with the agency.[198] (For a further discussion of the common interest doctrine, see "Inter-Agency or Intra-Agency" Threshold Requirement, Common Interest, above.)

In FTC v. Grolier Inc.,[199] the Supreme Court held that the "test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance."[200] Factual work-product enjoys qualified immunity from civil discovery, and therefore such materials are discoverable "only upon a showing that the party seeking discovery has substantial need" of materials which cannot be obtained elsewhere without "undue hardship."[201] Because the rules of civil discovery require a showing of "substantial need" and "undue hardship" in order for a party to obtain any factual work-product,[202]

---

was prepared by Marshals Service personnel under direction of attorney), adopted, (D.D.C. July 31, 1989); Nishnic v. DOJ, 671 F. Supp. 776, 810-11 (D.D.C. 1987) (holding that summaries of witness statements taken by USSR officials for DOJ are not protectable because agency failed to demonstrate that USSR officials acted as agency agents).

[198] See, e.g., Georgia v. DOJ, 148 F.4th 724, 731 (D.C. Cir. 2025) (holding that privileged attorney work product exchanged with aligned parties under common-interest arrangement can be withheld pursuant to Exemption 5); Hunton & Williams, LLP v. DOJ, 590 F.3d 272, 288 (4th Cir. 2010) (holding that communications between government and private corporation made subsequent to a common interest agreement were protected by Exemption 5); Akin, Gump, Strauss, Hauer & Feld, LLP v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007) (finding a common interest when the government shares documents with a private party with whom it is jointly prosecuting a qui tam suit); Nishnic, 671 F. Supp. at 775 (protecting documents shared with foreign nation because DOJ and foreign government were involved in litigation against common adversary); cf. Rashid v. DOJ, No. 99-2461, 2001 U.S. Dist. LEXIS 26353, at *12 (D.D.C. June 11, 2001) (holding privilege inapplicable because agency failed to even allege common interest with third parties to whom it disclosed documents).

[199] 462 U.S. 19 (1983).

[200] Id. at 26; accord NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 146 & n.16 (1975) (noting that Exemption 5 was intended to allow disclosure of documents that would "routinely be disclosed" in civil litigation); Wood v. FBI, 312 F. Supp. 2d 328, 338-39 (D. Conn. 2004) (noting that because in civil discovery context work-product privilege can be overcome only upon showing of substantial need, such documents are never "routinely disclosed" and hence are always protected in FOIA context), aff'd in part, rev'd in part on other grounds, & remanded, 232 F.3d 78 (2d Cir. 2005).

[201] Fed. R. Civ. P. 26(b)(3).

[202] Id.; see, e.g., Maine v. Norton, 208 F. Supp. 2d 63, 66-67 (D. Me. 2002) (holding, in civil discovery context, that civil litigants seeking discovery can show "particularized need" for documents withheld under deliberative process privilege, and "substantial need and undue

such materials are not "routinely" or "normally" discoverable and, as a result, the Supreme Court has held that factual material is protected under the attorney work-product privilege recognized under the FOIA.[203] As a result, courts have found that no segregation of factual information is required for information falling within the privilege.[204] Nonetheless, the Courts of Appeals for the District of Columbia and Ninth

---

hardship" for documents withheld under attorney work-product privilege, in order to overcome opponent's assertion of privilege).

[203] Grolier, 462 U.S. at 27 (holding that "the work-product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and would thus fall within the scope of Exemption 5"); accord Jud. Watch, Inc. v. DOJ, 432 F.3d 366, 371 (D.C. Cir. 2005) ("[F]actual material is itself privileged when it appears within documents that are attorney work-product."); see also Krocka v. EOUSA, No. 17-2171, 2019 WL 690341, at *5 (D.D.C. Feb. 19, 2019) (holding that factual summaries created by prosecutors and investigators in preparation for criminal proceedings were properly withheld in full under the attorney work-product privilege); Jud. Watch, Inc. v. DOJ, 118 F. Supp. 3d 266, 274 (D.D.C. 2015) (finding that "[w]here time records are not only created by legal personnel but also reference the subject of legal research, persons contacted and interviewed by the attorney, or other issues bearing on the mental impressions of the attorneys, those portions of the time records are protected work product").

[204] See Pac. Fisheries Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008) (noting that "if a document is covered by the attorney work-product privilege, the government need not segregate and disclose its factual contents"); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 147 (2d Cir. 1994) ("The work-product privilege draws no distinction between materials that are factual in nature and those that are deliberative."); Norwood v. FAA, 993 F.2d 570, 576 (6th Cir. 1993) (holding that work-product privilege protects documents regardless of status as factual or deliberative); Nadler v. DOJ, 955 F.2d 1479, 1492 (11th Cir. 1992) ("[U]nlike the deliberative process privilege, the work-product privilege encompasses factual materials."); Martin v. Off. of Special Couns., 819 F.2d 1181, 1187 (D.C. Cir. 1987) ("The work-product privilege simply does not distinguish between factual and deliberative material."); Meza v. DOJ, 719 F. Supp. 2d 1, 6 (D.D.C. 2010) (holding that "'if [as shown here] a document is fully protected as work-product, then segregability is not required'" (quoting Jud. Watch, 432 F.3d at 371)); Trentadue v. CIA, No. 08-788, 2010 U.S. Dist. LEXIS 29324, at *10-11 (D. Utah Mar. 26, 2010) (holding that CIA was not required to segregate and release factual materials, "because attorney work-product 'shields both opinion and factual work-product from discovery'") (internal citation omitted); Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 5 (D.D.C. 2009) (holding that "factual material is itself privileged when it appears within documents that are attorney work-product" (citing Jud. Watch, 432 F.3d at 371)); Berger v. IRS, 487 F. Supp. 2d 482, 500 (D.N.J. 2007) (citing Martin for point that privilege applies to both factual and deliberative material); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1292 (D. Kan. 2001) (rejecting plaintiff's contention that agency must segregate and release factual work-product material); Rugiero v. DOJ, 35 F. Supp. 2d 977, 984 (E.D. Mich. 1998) ("[T]he law is clear that . . . both factual and deliberative work-product are exempt from release under FOIA."), aff'd in part & rev'd in part on other grounds, 257 F.3d 534, 552-53 (6th Cir. 2001); Manchester v. DEA, 823 F. Supp. 1259, 1269 (E.D. Pa. 1993) (deciding that segregation not required where "factual information is incidental to, and bound with,

Circuits have required agencies to address whether nonexempt material can be reasonably segregated if found in longer documents with reasonably divisible sections.[205]

The work-product privilege also has been found applicable even when the document has become the basis for a final agency decision. In NLRB v. Sears, Roebuck & Co.,[206] the Supreme Court allowed the withholding of an agency decision that had real operative effect on the basis that it was shielded by the work-product privilege because the decision only directed the filing of a complaint, which did not finally dispose of the matter, and contained case theory and litigation strategy.[207] At the same time, the

---

privileged" information), aff'd, 40 F.3d 1240 (3d Cir. 1994); United Techs. Corp. v. NLRB, 632 F. Supp. 776, 781 (D. Conn. 1985) ("[I]f a document is attorney work-product the *entire* document is privileged."); see also, e.g., Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997) (holding that district court was in error to limit protection to "the mental impressions, conclusions, opinions, or legal theories of an attorney"); Allnutt v. DOJ, No. 98-901, 2000 WL 852455, at *9 (D. Md. Oct. 23, 2000) (recognizing that attorney work-product privilege encompasses both deliberative materials and "all factual materials prepared in anticipation of the litigation"), aff'd, 8 F. App'x 225, 225 (4th Cir. 2001); May v. IRS, 85 F. Supp. 2d 939, 950 (W.D. Mo. 1999) (protecting both "the factual basis for [a] potential prosecution and an analysis of the applicable law"); Manna v. DOJ, 815 F. Supp. 798, 814 (D.N.J. 1993) (following Martin). But see Nickerson v. United States, No. 95-7395, 1996 WL 563465, at *3 (N.D. Ill. Oct. 1, 1996) (ruling that facts must be segregated under privilege); Fine v. U.S. DOE, 830 F. Supp. 570, 574-76 (D.N.M. 1993) (refusing to follow Martin).

[205] See ACLU of N. Cal. v. DOJ, 880 F.3d 473, 488-89 (9th Cir. 2018) (recognizing that government need not segregate and disclose factual contents of attorney work product, but finding that where only portions of documents are covered by privilege, nonexempt portions that are not attorney work product may be appropriately segregated); Nat'l Ass'n of Crim. Def. Laws. v. EOUSA, 844 F.3d 246, 257 (D.C. Cir. 2016) (finding it appropriate to assess whether Blue Book contains nonexempt statements of government's discovery policy that are reasonably segregable from protected attorney work product); Louise Trauma Ctr., LLC v. DOJ, No. 20-3517, 2022 WL 278771, at *7 (D.D.C. Jan. 30, 2022) (requiring agency to reevaluate training materials to determine "whether each document is in fact *fully* protected as work product" or "whether it contains more neutral and educational portions that could be partially released") (internal quotation marks and citation omitted); see also Docufreedom Inc. v. DOJ, No. 17-2706, 2019 WL 3858166, at *12 (D. Kan. Aug. 16, 2019) (agreeing that "'[i]n cases involving voluminous or lengthy work-product records . . . it [is] generally preferable for courts to make at least a preliminary assessment of the feasibility of segregating nonexempt material'" (quoting Nat'l Ass'n of Crim. Def. Laws., 844 F.3d at 256-57)).

[206] 421 U.S. 132, 155 (1975) (holding that "Exemption 5 does not apply to those Appeals and Advice Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party; but that Exemption 5 does protect from disclosure those Appeals and Advice Memoranda which direct the filing of a complaint and the commencement of litigation before the Board").

[207] Id. at 160.

Supreme Court concluded that a decision *not* to file a complaint should be disclosed because it constituted an unreviewable final agency decision, and the Court expressed reluctance to "construe Exemption 5 to apply to documents described in [FOIA subsection (a)(2)]"[208] Any potential confusion caused by this opinion was cleared up by the Supreme Court in Federal Open Market Committee v. Merrill.[209] In Merrill, the Court explained its statements in Sears,[210] and stated that even if a document is a final opinion, and therefore falls within subsection (a)(2)'s mandatory disclosure requirements, it still may be withheld if it falls within the work-product privilege.[211] (For a discussion of the proactive disclosure requirements of subsection (a)(2), see Proactive Disclosures, Subsection (a)(2): Public Inspection in an Electronic Format.)

A collateral issue is the applicability of the attorney work-product privilege to witness statements. Within the civil discovery context, the Supreme Court has recognized at least a qualified privilege from civil discovery for such documents – such material was

---

[208] Id. at 153-54 (discussing proactive disclosure provision of the FOIA); see also OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 03/16/2015) (discussing Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) and discussing that (a)(2) document could still be withheld pursuant to work-product privilege).

[209] 443 U.S. 340 (1979).

[210] Id. at 360 n.23 (clarifying that Sears observations were made in relation to privilege for predecisional communications only).

[211] Id. ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."); see also ACLU of N. Cal. v. DOJ, 880 F.3d 473, 490 (9th Cir. 2018) (holding that "[w]e agree with the D.C. Circuit that the same rule extends to working law, and that an agency therefore 'need not segregate and release agency working law from [documents] withheld in their entirety pursuant to the attorney work product privilege'" (quoting Tax Analysts v. IRS, 294 F.3d 71, 76 (D.C. Cir. 2002))); Tax Analysts v. IRS, 294 F.3d 71, 76 (D.C. Cir. 2002) (holding that "the District Court correctly determined that IRS need not segregate and release agency working law from [intradivisional technical assistance memorandums] withheld in their entirety pursuant to the attorney work product privilege"); ACLU v. DOJ, 210 F. Supp. 3d 467, 480 (S.D.N.Y. 2016) (holding that "[f]ollowing this long line of precedent, beginning with the Supreme Court's decision in Sears, the Court must conclude that the working law doctrine cannot overcome the work product privilege"); Iglesias v. CIA, 525 F. Supp. 547, 559 (D.D.C. 1981) ("It is settled that even if a document is a final opinion or is a recommendation which is eventually adopted as the basis for agency action, it retains its exempt status if it falls properly within the work-product privilege."); cf. N.Y. Times Co. v. DOJ, 939 F.3d 479, 492 (2d Cir. 2019) (noting that "working law" and "express adoption" are related concepts, and holding that the "'express adoption' inquiry is only relevant insofar as the previously-privileged intra-agency document has become binding 'working law'") (internal citations omitted).

held discoverable only upon a showing of necessity and justification.[212] Applying the "routinely and normally discoverable" test of Grolier and United States v. Weber Aircraft Corp.,[213] the D.C. Circuit has held that witness statements are protectable by the attorney work-product privilege of Exemption 5.[214] A particular category of witness statements, aircraft accident witness statements, are protected by a distinct common law privilege first announced in Machin v. Zuckert[215] and applied under the FOIA in Weber Aircraft.[216] (For further discussion on this privilege, see Additional Privileges, Other Privileges, below.)

Finally, the Supreme Court's decision in Grolier resolved a split in the circuits by ruling that the termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work-product.[217] Thus, under the Supreme Court's ruling, there is no temporal limitation on work-product protection under the

---

[212] See Hickman v. Taylor, 329 U.S. 495, 511-13 (1947) ("Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.") (non-FOIA case).

[213] 465 U.S. 792 (1984).

[214] See Martin v. Off. of Special Couns., 819 F.2d 1181, 1187 (D.C. Cir. 1987) (applying Hickman and Weber Aircraft to hold that witness statements are protected under attorney work-product privilege); see also Am. Oversight v. DOJ, 45 F.4th 579, 595 (2d Cir. 2022) holding that interview records including FD-302s were protected by attorney work-product privilege and rejecting plaintiff's theory that government can waive attorney work-product privilege before documents exist by interviewing targets and subjects); N.Y. Times Co. v. DOJ, 138 F. Supp. 3d 462, 472 (S.D.N.Y. 2015) (finding that witness statements are work product when they reveal an attorney's strategic impressions and mental processes), aff'd in part, rev'd in part, & remanded, 939 F.3d 479 (2d Cir. 2019). But see Uribe v. EOUSA, No. 87-1836, 1989 U.S. Dist. LEXIS 5691, at *7 (D.D.C. May 23, 1989) (declaring that statements made by plaintiff during his interrogation did not "represent the attorney's conclusions, recommendations and opinions"); Wayland v. NLRB, 627 F. Supp. 1473, 1476 (M.D. Tenn. 1986) (reasoning that because witness statements in question were not shown to be other than objective reporting of facts, they "do not reflect the attorney's theory of the case and his litigation strategy" and therefore cannot be protected).

[215] 316 F.2d 336, 338 (D.C. Cir. 1963).

[216] Weber Aircraft, 465 U.S. at 799; see also Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 185 (D.C. Cir. 1987) ("[T]he disclosure of 'factual' information that may have been volunteered would defeat the policy on which the Machin privilege is based.").

[217] FTC v. Grolier Inc., 462 U.S. 19, 28 (1983); cf. Clark-Cowlitz Joint Operating Agency v. FERC, 798 F.2d 499, 502-03 (D.C. Cir. 1986) (en banc) (reaching same result under Government in the Sunshine Act, 5 U.S.C. § 552b (2006)).

FOIA.[218] The D.C. Circuit has found that such protection may be vitiated if the withholding of attorney work-product material would also shield from disclosure the unprofessional practices of an attorney by whom or under whose direction the material was prepared.[219] Otherwise, the District Court for the District of Columbia has held that there is no "public interest" exception to the application of the work-product privilege under Exemption 5.[220]

Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."[221] Unlike the attorney work-product

---

[218] See Grolier, 462 U.S. at 26; see also Gutman v. DOJ, 238 F. Supp. 2d 284, 294-95 (D.D.C. 2003) (holding that attorney work-product privilege applies to documents prepared to advise Attorney General that government had appealed judge's decision to release requester on bond, even though by time of FOIA litigation requester had been convicted and was serving prison sentence); see also FOIA Update, Vol. IV, No. 3, at 1-2 (Exemption 5 Upheld in Grolier) (discussing Supreme Court's rejection in Grolier of any temporal limitation on attorney work-product privilege).

[219] See Moody v. IRS, 654 F.2d 795, 801 (D.C. Cir. 1981) (remanding to district court for evaluation of attorney's conduct and, "if it is found [to be] in violation of professional standards, a determination of whether his breach of professional standards vitiated the work-product privilege" otherwise applicable to withheld material); see also Rashid v. DOJ, No. 99-2461, 2001 U.S. Dist. LEXIS 26353, at *7-9 (D.D.C. June 11, 2001) ("While there are cases in which a lawyer's conduct may render inapplicable the work-product privilege . . . this is clearly not one of them.").

[220] See Winterstein v. DOJ, 89 F. Supp. 2d 79, 82 (D.D.C. 2000) (noting that by enacting specific FOIA exemptions, Congress determined what is in the public interest).

[221] Mead Data Cent. Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977); see, e.g., Conservation Force v. Jewell, No. 15-5131, 2015 WL 9309920, at *1 (D.C. Cir. Dec. 4, 2015) (finding that agency met its burden of demonstrating that communications between DOI employees and DOJ's Federal Programs Office were properly withheld under attorney-client privilege because they reflected confidential communications involving attorneys that related to legal advice and strategy); Rein v. U.S. Pat. & Trademark Off., 553 F.3d 353, 377 (4th Cir. 2009) (noting confidentiality requirement for privilege); Animal Welfare Inst. v. NOAA, 370 F. Supp. 3d 116, 127-28 (D.D.C. 2019) (finding that "draft memorandum served not as a controlling statement of policy" but instead "constituted legal advice . . . advising [NOAA] of the legal ramifications of continuing their policy" and "provid[ing] legal support for a policy that [NOAA] had adopted in practice since approximately 1994"); Nat'l Sec. Couns. v. CIA, 206 F. Supp. 3d 241, 285-86 (D.D.C. 2016) (determining that legal advice provided by CIA attorney to client and then memorialized by client in database and legal advice provided by CIA OGC attorneys to assist in preparation of training materials for CIA employees responsible for processing FOIA requests were properly withheld under attorney-client privilege); Elec. Priv. Info. Ctr. v. DHS, 117 F. Supp.

privilege, the attorney-client privilege is not limited to the context of litigation.[222] Although it fundamentally applies to facts divulged by a client to their attorney,[223] courts have found that this privilege "also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts,"[224] as well as "communications

---

3d 46, 65 (D.D.C. 2015) (finding no question that redaction was properly exempted under attorney-client privilege because "the particular portion [of an email chain] redacted by the Government contains a communication between a DHS employee and a DHS attorney seeking legal review and advice"); Sensor Sys. Support Inc. v. FAA, No. 10-262, 2012 WL 1658235, at *5 (D.N.H. May 11, 2012) (concluding that attorney-client privilege was properly applied to email which "was sent [by FAA employee] to an agency attorney for the purpose of obtaining legal advice" and was not shared with third parties); Families for Freedom v. CBP, 837 F. Supp. 2d 287, 302-03 (S.D.N.Y. 2011) (protecting, under attorney client privilege, memorandum prepared by Assistant U.S. Attorney discussing standards applicable to immigration checks performed by Border Patrol agents); Families for Freedom v. CBP, 797 F. Supp. 2d 375, 395-96 (S.D.N.Y. 2011) (finding that training memoranda "fall squarely within the attorney client privilege" because they "were created by attorneys . . . and contain legal analysis and guidance to Border Patrol agents regarding the use of race or ethnicity in executing their duties, and [finding that] analysis of case law concerning racial profiling in law enforcement" constituted attorney-client documents and were not a body of "secret law"); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *6 (D.V.I. Mar. 31, 2010) (applying attorney-client privilege to communications between IRS agent and IRS and DOJ counsel where agent was seeking advice on development and interpretation of law); Harrison v. BOP, 681 F. Supp. 2d 76, 82 (D.D.C. 2010) (noting that attorney-client privilege "exists to protect 'open and frank communication' between counsel and client") (internal citation omitted).

[222] See, e.g., Rein, 553 F.3d at 377 (noting that privilege "extends beyond communications in contemplation of particular litigation to communications regarding 'an opinion on the law'") (internal citation omitted); Mead Data, 566 F.2d at 252-53 (distinguishing attorney-client privilege from attorney work-product privilege, which is limited to litigation context); Elec. Priv. Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 114 (D.D.C. 2005) (noting that attorney-client privilege is not limited to context of litigation (citing Mead Data and Crooker v. IRS)); Crooker v. IRS, No. 94-0755, 1995 WL 430605, at *7 (D.D.C. Apr. 27, 1995) ("Unlike [with] the work-product privilege, an agency may claim the attorney-client privilege for information outside the context of litigation.").

[223] Vento v. IRS, 714 F. Supp. 2d 137, 151 (D.D.C. 2010) (stating that attorney-client privilege protects facts given to attorney by client).

[224] Elec. Priv. Info. Ctr., 384 F. Supp. 2d at 114; see Louise Trauma Ctr. LLC v. DOJ, No. 20-3517, 2023 WL 6646335, at *5-7 (D.D.C. Oct. 12, 2023) (holding that training materials including advice or "questions and answers to those questions that implicate professional responsibility issues that DOJ attorneys face" were protected by attorney-client privilege, but materials containing "purely neutral information or a restatement of ethical rules without any basis to believe that the information shared is based on confidential communications from the client" were not protected by attorney-client privilege); McKinley v. Bd. of Governors of Fed. Res. Sys., 849 F. Supp. 2d 47, 65 (D.D.C. 2012) (finding that attorney-client privilege covers facts divulged by client to attorney and opinions given by

between attorneys that reflect client-supplied information."[225] The Court of Appeals for the District of Columbia Circuit, however, has also noted that "it is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged" unless they reflect client confidences.[226] Finally, while the privilege typically involves a single client (even where the "client" is an agency) and their attorneys,

---

attorney to client based on those facts (citing Elec. Priv. Info. Ctr.)); Jud. Watch, Inc. v. Dep't of the Army, 466 F. Supp. 2d 112, 121 (D.D.C. 2006) (same); see, e.g., Jernigan v. Dep't of the Air Force, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998) (holding that agency attorney's legal review of internal agency "Social Action" investigation "falls squarely within the traditional attorney-client privilege"); Schlefer v. United States, 702 F.2d 233, 244 n.26 (D.C. Cir. 1983) (observing that privilege "permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts"); MacLean v. DOD, No. 04-2425, slip op. at 10 (S.D. Cal. June 6, 2005) (noting that privilege applies both to confidential facts supplied by client as well as to attorney's advice based on those facts); W & T Offshore Inc. v. U.S. Dep't of Com., No. 03-2285, 2004 WL 2115418, at *4 (E.D. La. Sept. 21, 2004) (applying privilege to documents reflecting confidential communications where agency employees requested legal advice or agency counsel responded to those requests); Barmes v. IRS, 60 F. Supp. 2d 896, 901 (S.D. Ind. 1998) (protecting material "prepared by an IRS attorney in response to a request by a revenue officer to file certain liens pursuant to collection efforts against the plaintiffs"); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (stating that privilege protects documents "created by attorneys and by the individually-named [defendant] employees for purposes of obtaining legal representation from the government"), aff'd, 1999 WL 985142 (9th Cir. Oct. 18, 1999); Cujas v. IRS, No. 97-00741, 1998 WL 419999, at *6 (M.D.N.C. Apr. 15, 1998) (holding that privilege encompasses "notes of a revenue officer . . . reflecting the confidential legal advice that the agency's District Counsel orally gave the officer in response to a proposed course of action"), aff'd, No. 98-1641 (4th Cir. Aug. 25, 1998); NBC v. Small Business Admin., 836 F. Supp. 121, 124-25 (S.D.N.Y. 1993) (holding that privilege covers "professional advice given by attorney that discloses" information given by client); cf. Lee v. FDIC, 923 F. Supp. 451, 457-58 (S.D.N.Y. 1996) (declaring that documents containing only "standard legal analysis" are not covered by privilege); Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at *3 (D.D.C. Aug. 21, 1995) (finding privilege inapplicable to attorney's memoranda to file which were never communicated to client).

[225] Elec. Priv. Info. Ctr., 384 F. Supp. 2d at 114; see also, e.g., Jud. Watch, Inc. v. U.S. Dep't of Com., 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (applying privilege to documents written by agency attorneys to superiors describing advice given to clients within agency); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999) (protecting portions of memorandum from agency attorney to supervisor that reflect author's legal analysis based upon information supplied by agency "sources"); Buckner v. IRS, 25 F. Supp. 2d 893, 900 (N.D. Ind. 1998) (protecting "documents that are communications among attorneys" where IRS personnel and attorneys were involved in bankruptcy proceeding against requester).

[226] Brinton v. Dep't of State, 636 F.2d 600, 604 (D.C. Cir. 1980).

it also applies in situations where there are multiple clients who share a common interest.[227]

The Supreme Court, in the civil discovery context, has emphasized the public policy underlying the attorney-client privilege – "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[228] To that end, courts have required that the primary purpose of the communication be to seek or provide legal advice.[229] As is set out in detail in the discussion of the attorney work-product privilege above, the Supreme Court held in

---

[227] See, e.g., Hanson v. AID, 372 F.3d 286, 292 (4th Cir. 2004) (holding that privilege applies to documents created by attorney hired by private contractor of agency and, by agreement, then shared between contractor and agency, who had common interest in ongoing contractual dispute); Animal Welfare Inst. v. NOAA, 370 F. Supp. 3d 116, 133 (D.D.C. 2019) (holding that privilege applies to a document created by attorneys of one agency that is shared with two additional agencies, where each agency has a common interest in the proper administration of a statute); Fox News Network, LLC v. U.S. Dep't of the Treasury, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010) (holding that "involvement of . . . a third party to the attorney-client relationship, [] does not destroy the privilege because the communications are covered by the common interest doctrine"); Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *10 (N.D. Cal. May 5, 2009) (finding that "attorney-client privilege [can be extended] to multiple parties who share a common interest in a legal matter"); Akin, Gump Strauss, Hauer & Feld, LLP v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007) (noting that attorney-client privilege is not waived when government shares documents with private party with whom it is jointly prosecuting qui tam action).

[228] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also Pub. Citizen, Inc. v. Dep't of Educ., 388 F. Supp. 3d 29, 43 (D.D.C. 2019) (upholding use of privilege where "[d]isclosure of such information . . . creates the risk that agency clients may feel constrained from reaching out to legal counsel for required legal advice due to fear of public disclosure" and "[t]his chilling effect would render it more difficult for agency attorneys to provide sound legal support and advice, which would inhibit the proper functioning of governmental departments"); FOIA Update, Vol. VI, No. 2, at 3-4 ("OIP Guidance: The Attorney-Client Privilege").

[229] See Jordan v. U.S. Dep't of Lab., 308 F. Supp. 3d 24, 43 (D.D.C. 2018) (holding that attorney-client privilege does not apply to withheld email because it is difficult to say that one of the primary purposes of the email was to obtain legal advice as it was specifically directed to a non-attorney and only seeks information from that non-attorney), aff'd, No. 18-5128, 2018 WL 5819393 (D.C. Cir. Oct. 19, 2018); ACLU v. DOD, No. 15-9317, 2017 WL 4326524, at *7-11 (S.D.N.Y. Sept. 27, 2017) (finding documents in which client is requesting legal advice and documents in which lawyer is providing analysis in response to information provided by client exempted from disclosure under attorney-client privilege but finding that where "predominant purpose of the communication" was not "to render or solicit legal advice," that information is not covered by attorney-client privilege (quoting In re Cty. of Erie, 473 F.3d 413, 420 (2d Cir. 2007))).

United States v. Weber Aircraft Corp.[230] and in FTC v. Grolier Inc.[231] that the scopes of the various privileges are coextensive in the FOIA and civil discovery contexts.[232] Finally, just as in the discovery context, the privilege can be waived by the client, who owns it, but it cannot be waived unilaterally by the attorney.[233]

The D.C. Circuit has held that confidentiality between an attorney and client may be inferred when the communications suggest that "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests,"[234] but in other cases the D.C. Circuit — as well as other courts – has required the government to demonstrate the confidentiality of the attorney-client communications.[235] In Upjohn Co.

---

[230] 465 U.S. 792 (1984).

[231] 462 U.S. 19 (1983).

[232] 465 U.S. at 799-800; 462 U.S. at 26-28.

[233] See Hanson v. AID, 372 F.3d 286, 294-94 (4th Cir. 2004) (holding that agency attorney's unauthorized release of otherwise privileged document, though it breached document's confidentiality, did not prevent agency from invoking privilege because "an attorney may not unilaterally waive the privilege that his client enjoys").

[234] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 863 (D.C. Cir. 1980).

[235] See Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 71-72 (1st Cir. 2002) (amended opinion) (holding that district court did not err in finding privilege inapplicable where defendants failed to show confidentiality of factual communications); Brinton v. Dep't of State, 636 F.2d 600, 604 (D.C. Cir. 1980) (holding district court record insufficient to support claim of privilege because it contained "no finding that the communications are based on or related to confidences from the client"); Mead Data Cent. Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977) (requiring government to make affirmative showing of confidentiality for privilege to apply); Nat'l Press Club Journalism Inst. v. ICE, No. 18-2932, 2023 WL 9001337, at *13 (D.D.C. Dec. 28, 2023) (holding that "a party invoking the attorney-client privilege must demonstrate a communication's 'confidentiality both at the time of the communication' and that such confidentiality has been '*maintained since*'" (quoting Coastal States, 617 F.2d at 863)); Louise Trauma Ctr. LLC v. DOJ, No. 20-3517, 2023 WL 2663007, at *6 (D.D.C. Mar. 28, 2023) (holding that agency failed to demonstrate certain training materials were protected by attorney-client privilege since "explanation does not indicate that the communication from the presenter, who is in the role of the attorney, 'rests on confidential information obtained from the client'" (quoting Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997))); Ams. for Fair Treatment v. USPS, No. 22-1183, 2023 WL 2610861, at *11 (D.D.C. Mar. 23, 2023) (noting that "[a]rising from a request for legal advice is not the same thing as resting on a confidential communication"); Protect Democracy Project, Inc. v. DOD, 320 F. Supp. 3d 162, 175-76 (D.D.C. 2018) (finding that because "there is no evidence that the specific legal advice provided in the [outline] was disclosed beyond that group[,]" confidentiality was maintained and document is protected by attorney-client privilege); Chesapeake Bay Found. Inc. v. U.S. Army Corps of Eng'rs, 722 F. Supp. 2d 66, 73-74 (D.D.C. 2010) (requiring agency to establish "that the purported 'legal

v. United States,[236] the Supreme Court held that the attorney-client privilege covers attorney-client communications when the specifics of the communication are confidential, even though the underlying subject matter is known to third parties.[237] The privilege has been found not to apply to the fact that a client did or did not request advice about an issue unless confirming the existence or nonexistence of responsive records would in effect unveil a confidential communication between client and attorney.[238]

The Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-level employees.[239] This broad construction of the attorney-client privilege acknowledges the reality that such lower-level personnel often

---

advice' was conveyed 'as part of a professional relationship in order to provide [the agency] with advice on the legal ramifications of its actions'" (citing Mead Data, 566 F.2d at 253)); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005) (noting that privilege requires agency to demonstrate that withheld documents reflect confidential communication between agency and its attorneys, not merely that they be exchanges between agency and its attorneys).

[236] 449 U.S. 383, 389 (1981).

[237] Id. at 395-96; see also ACLU v. NSA, 925 F.3d 576, 590 (2d Cir. 2019) (finding that "*informational* disclosures have no effect on whether a *communication* is protected by the attorney-client privilege" because "[t]he attorney-client privilege 'protects communications rather than information'" (quoting In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984) (emphasis added by circuit court))); United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) ("[W]e do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information."); In re Diet Drugs Prods. Liab. Litig., No. 1203, 2000 WL 1545028, at *5 (E.D. Pa. Oct. 12, 2000) ("While the underlying facts discussed in these communications may not be privileged, the communications themselves are privileged."); In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388 (D.D.C. 1978) (holding that privilege applies even where information in question was not confidential, so long as client intended that information be conveyed confidentially). But see Tax Analysts v. IRS, 117 F.3d 607, 618-20 (D.C. Cir. 1997) (following rule contrary to Upjohn); Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983) (same).

[238] W. Values Project v. DOJ, 317 F. Supp. 3d 427, 434 (D.D.C. 2018) (finding that Exemption 5 Glomar response based on attorney-client privilege would only be justified if confirming the existence or nonexistence of responsive records would in effect unveil confidential communication between OLC and particular agency client related to legal advice sought by that client and here it would not).

[239] 449 U.S. at 392-97.

possess information relevant to an attorney's advice-rendering function.[240] The District Court for the District of Columbia has ruled that an agency is required to identify who its client is in order to sustain a claim of this privilege.[241] As with the other privileges, the quality of an agency's declaration and Vaughn Index has been found to be crucial to the agency's ability to withhold records under Exemption 5.[242]

The D.C. Circuit has held that otherwise confidential agency memoranda are not protected under the attorney-client privilege if they are authoritative interpretations of agency law because "[E]xemption 5 and the attorney-client privilege may not be used to protect . . . agency law from disclosure to the public."[243] This holding was reinforced by the Court of Appeals for the Second Circuit, which likewise has denied protection for documents adopted as, or incorporated into, an agency's policy.[244]

---

[240] See id.; see also Sherlock v. United States, No. 93-0650, 1994 WL 10186, at *3 (E.D. La. Jan. 12, 1994) (holding privilege applicable to communications from collection officer to district counsel); Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (holding that circulation of information within agency to employees involved in matter for which advice sought does not breach confidentiality); LSB Indus. v. Comm'r, 556 F. Supp. 40, 43 (W.D. Okla. 1982) (protecting information provided by agency investigators and used by agency attorneys).

[241] See Elec. Priv. Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 80 (D.D.C. 2008) (declining to apply privilege to certain documents because agency failed to "indicate what agency or executive branch entity is the client for purposes of the attorney-client privilege").

[242] See Buckovetz v. Dep't of the Navy, No. 15-838, 2016 WL 1529901, at *3 (S.D. Cal. Apr. 14, 2016) (finding agency failed to meet its burden of showing that responsive documents are subject to Exemption 5 because Vaughn index only stated that defendant "was informed [withheld records] were all communications with an attorney and that the attorney exerted privilege" and court cannot grant summary judgment based on conclusory statements); Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (determining that agency failed to show documents involved provision of specific legal advice or that they were intended to be confidential).

[243] Tax Analysts v. IRS, 117 F.3d 607, 619 (D.C. Cir. 1997).

[244] See Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 360-61 (2d Cir. 2005) (stating that attorney-client privilege's rationale of protecting confidential communications is inoperative for documents that reflect actual agency policy); see also Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ, No. 09-8756, 2011 WL 4001146, at *7 (S.D.N.Y. Aug. 30, 2011) (concluding that memoranda from the Office of Legal Counsel to HHS and USAID that would otherwise be covered by the attorney-client privilege lost that protection when HHS and USAID adopted the OLC memoranda as agency policy), aff'd in part, rev'd in part on other grounds, & remanded, 697 F.3d 184 (2d Cir. 2012); Robert v. HHS, No. 01-4778, 2005 WL 1861755, at *4-5 (E.D.N.Y. Aug. 1, 2005) (finding that documents could be protected under attorney-client privilege as they were not adopted or incorporated as agency policy).

Additional Privileges

The Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.[245] Rule 501 of the Federal Rules of Evidence[246] allows courts to create privileges as necessary,[247] and new privileges are recognized from time to time by federal courts,[248] and occasionally are thereafter recognized under Exemption 5.[249]

Presidential Communications Privilege

---

[245] See United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier Inc., 462 U.S. 19, 26-27 (1983).

[246] Fed. R. Evid. 501.

[247] See Jaffee v. Redmond, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized).

[248] See, e.g., Trammel v. United States, 445 U.S. 40, 47 (1980) (recognizing spousal testimonial privilege) (non-FOIA case); Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc., 332 F.3d 976, 980 (6th Cir. 2003) (recognizing, in non-FOIA case, settlement negotiation privilege, which "fosters a more efficient, more cost-effective, and significantly less burdened judicial system"); Dellwood Farms Inc. v. Cargill Inc., 128 F.3d 1122, 1124-25 (7th Cir. 1997) (recognizing judge-fashioned "law enforcement investigatory privilege") (non-FOIA case); Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570, 571-73 (E.D. Mo. 1991) (recognizing "ombudsman privilege" under Rule 501 of Fed. R. Evid.) (non-FOIA case); Shabazz v. Scurr, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (same) (non-FOIA case); see also In re Sealed Case, 121 F.3d 729, 751-52 (D.C. Cir. 1997) (recognizing "presidential communications privilege" that applies to "communications made by presidential advisers in the course of preparing advice for the President . . . even when these communications are not made directly to [the] President") (non-FOIA case). But see In re Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (declining to recognize proposed "protective function privilege") (non-FOIA case); Carman v. McDonnell Douglas Corp., 114 F.3d 790, 794 (8th Cir. 1997) (finding record unconvincing and thus not recognizing an ombudsman privilege) (non-FOIA case); Performance Aftermarket Parts Grp., Ltd. v. TI Grp. Auto. Sys. Inc., No. 05-4251, 2007 WL 1428628, at *3 (S.D. Tex. May 11, 2007) (declining to recognize settlement negotiation privilege, further noting that Goodyear Tire "has not been widely followed") (non-FOIA case); In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 211-12 (D.D.C. 2005) (deciding against recognition of settlement privilege) (non-FOIA case).

[249] See Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (stating that Exemption 5 "incorporates . . . generally recognized civil discovery protections"); see also Ass'n for Women in Sci. v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977) ("The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.") (non-FOIA case).

The privileges incorporated within Exemption 5 include the presidential communications privilege.[250] The Supreme Court has explained that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."[251] The Court of Appeals for the District of Columbia Circuit has found that this privilege, which protects the confidentiality of Presidential decisionmaking,[252] is unique among those recognized under Exemption 5 of the FOIA in that it is "'inextricably rooted in the separation of powers under the Constitution.'"[253] Although similar to the deliberative process privilege, it is broader in its coverage because it "'applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.'"[254] Nevertheless, the privilege is limited to "documents 'solicited and received' by the President or his immediate White House advisers who have 'broad and significant responsibility for investigating and formulating the advice to be given to the President.'"[255]

---

[250] Protect Democracy Project, Inc. v. NSA, 10 F.4th 879, 885 (D.C. Cir. 2021) (noting that Exemption 5 incorporated privileges recognized as part of executive privilege, including deliberative process privilege and presidential communications privilege).

[251] United States v. Nixon, 418 U.S. 683, 708 (1974) (non-FOIA case); see also Protect Democracy Project, Inc., 10 F.4th at 885 (citing Nixon for endorsement of presidential communications privilege and explanation that President must be free to explore alternatives when making decisions).

[252] Jud. Watch, Inc. v. DOJ, 365 F.3d 1108, 1123-24 (D.C. Cir. 2004) (applying presidential communications privilege to protect DOJ records regarding President's exercise of their constitutional power to grant pardons only when such records are "solicited and received" by President or his immediate advisers, which balances protection of confidentiality of Presidential decisionmaking with government transparency).

[253] Id. at 1113 (quoting Nixon, 418 U.S. at 708).

[254] Jud. Watch, 365 F.3d at 1114 (quoting In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997))); see also Protect Democracy Project, Inc., 10 F.4th at 885-87 (noting that privilege covers entire documents, including postdecisional and factual material within record, and therefore such documents are not segregable); Am. First Legal Found. v. USDA, No. 22-3029, 2023 WL 4581313, at *7-8 (D.D.C. July 18, 2023) (determining that segregability analysis does not apply to documents protected by this privilege because of entire-document rule), aff'd, 126 F.4th 691 (D.C. Cir. 2025); Elec. Priv. Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 81 (D.D.C. 2008) (citing In re Sealed Case on greater breadth of presidential communications privilege).

[255] Jud. Watch, 365 F.3d at 1114 (quoting In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997)); see Jud. Watch, Inc. v. DOD, 913 F.3d 1106, 1113-14 (D.C. Cir. 2019) (finding that five memoranda were solicited and reviewed by president and his national security advisors, prepared for purpose of advising president regarding raid on terrorist's compound, and reflected presidential decisionmaking and thus that presidential communications privilege applies); Am. Ctr. for L. & Just. v. Dep't of State, 535 F. Supp. 3d 23, 28 (D.D.C. 2021)

Several other cases have further explored the contours of this privilege. These decisions have rejected claims that (1) the privilege must be invoked by the President;[256] (2) the privilege could be waived by not invoking it at the time of an inter-agency

---

(finding no evidence that President participated in meeting or that it was convened to advise him or that it related to his decisionmaking, and thus agency failed to demonstrate that email among State, National Security Council, and White House officials concerning Iran press guidance and strategy was covered by presidential communications privilege); Campaign Legal Ctr. v. DOJ, No. 18-1771, 2020 WL 2849909, at *8 (D.D.C. June 1, 2020) (rejecting DOJ's use of the presidential communications privilege where agency declaration "falls short of asserting that the President was actually involved or would be involved in [the] decision" underlying the communications); Prop. of the People, Inc. v. OMB, 394 F. Supp. 3d 39, 44-49 (D.D.C. 2019) (upholding use of privilege to protect calendar communications concerning NSC meetings because "the NSC is a purely advisory entity" and it's "structure gives the Court confidence that the meetings 'occurred in conjunction with the process of advising the President'" (quoting In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997))); Protect Democracy Project, Inc. v. DOD, 320 F. Supp. 3d 162, 174 (D.D.C. 2018) (explaining that "even if the legal analysis in the memorandum was not communicated to the President," the fact that "the staff of a close national security adviser leading up to an important military decision" solicited the opinion "shows that the document was created for the purpose of advising the President"); Samahon v. DOJ, No. 13-6462, 2015 WL 857358, at *13 (E.D. Pa. Feb. 27, 2015) (holding that memorandum "falls squarely within the presidential communications privilege because it was communicated to one of the President's senior advisors – the Counsel for the President – in connection with the President's deliberations and use of his appointment power"); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (finding "that all twenty documents reflect or memorialize communications between senior presidential advisers and other United States government officials and are therefore properly withheld"); Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *8 (N.D. Cal. May 5, 2009) (protecting "any document which is a draft of a presentation or memorandum for the President or his senior advisors[,]" but not intra-agency communications pertaining to such documents); Elec. Priv. Info. Ctr., 584 F. Supp. 2d at 80-81 (citing In re Sealed Case and protecting documents that were either received by President or his immediate advisors).

[256] See Elec. Priv. Info. Ctr., 320 F. Supp. 3d at 117 (finding that agency has authority to invoke presidential communications privilege when making Exemption 5 withholdings); Elec. Priv. Info Ctr., 584 F. Supp. 2d at 80 (noting that "[t]here is no indication in the text of FOIA that the decision to withhold documents pursuant to Exemption 5 must be made by the President"); Berman v. CIA, 378 F. Supp. 2d 1209, 1220-21 (E.D. Cal. 2005) (concluding that such requirement "would expose the President to considerable burden").

disclosure;[257] (3) the privilege can be lost simply due to the passage of time;[258] (4) the privilege only covers documents whose release would "reveal the President's mental processes;"[259] (5) the privilege does not apply to documents that memorialize otherwise protected communications;[260] (6) the privilege was overridden by Congress's enactment of a statute, after a report had been created, providing a specific date the report had to be published;[261] and (7) the privilege is limited to records concerning the President's inherent Article II power.[262] Some courts have considered whether the documents are

---

[257] See Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 237-38 (D.D.C. 2009) (finding that "failure to formally invoke any executive privileges [at the time of Vice President's disclosure of information at issue to Special Counsel] did not preclude the White House's future reliance on those privileges").

[258] See Berman, 378 F. Supp. 2d at 1221 (protecting documents created during the Administration of President Lyndon B. Johnson).

[259] Elec. Priv. Info Ctr., 584 F. Supp. 2d at 81.

[260] See Citizens for Resp. & Ethics in Wash. v. DHS, No. 06-0173, 2008 WL 2872183, at *2-3 (D.D.C. July 22, 2008).

[261] Cause of Action Inst. v. U.S. Dep't of Com., 513 F. Supp. 3d 116, 130 (D.D.C. 2021) (holding that presidential communications privilege applies to Report and that statute's later-imposed requirement that Report be made public by specific deadline does not diminish privilege in context of FOIA because Congress cannot override it by imposing a mandatory, retroactive condition on grant of authority that Executive Branch already executed).

[262] See Jud. Watch, Inc. v. DOJ, 365 F.3d 1108, 1123 (D.C. Cir. 2004) (noting that "qualification that the protection of the presidential communications privilege would attach only if the advice is on a 'quintessential and nondelegable Presidential power' . . . draws an arbitrary line) (internal citation omitted); Cause of Action Inst. v. U.S. Dep't of Com., No. 19-2698, 2022 WL 4130813, at *6 (D.D.C. Sept. 12, 2022) (rejecting argument that inherent Article II powers must be implicated because President must faithfully execute the laws, including laws that do not implicate core Article II powers, otherwise President would be deprived of candid advice when executing some laws but not others, but noting limiting principle that privilege should not shield information about governmental operations that do not ultimately call for direct decisionmaking by President); Cause of Action Inst., 513 F. Supp. 3d at 126 (noting that "D.C. Circuit has consistently cautioned that limiting the protection of the presidential communications privilege to only 'quintessential and nondelegable Presidential power . . . draws an arbitrary line'" and "[c]ourts in this district have therefore consistently refused to narrow the scope of the privilege to only communications relating to the President's exercise of core Article II powers") (internal citation omitted); cf. Am. First Legal Found. v. USDA, 126 F.4th 691, 698 (D.C. Cir. 2025) (concluding that presidential communications privilege applies to strategic plans solicited by President through EO 14019 and received by his immediate White House advisors and that informed presidential decisionmaking); Found. for Gov't Accountability v. DOJ, No. 22-252, 2024 WL 5111659, at *6 (M.D. Fla. Dec. 13, 2024) (determining that DOJ Strategic Plan developed under EO 14019 was prepared to aid presidential decisionmaking, and

distributed widely for non-advisory purposes as a factor in the applicability of this privilege.[263] In the context of visitor log records, the District Court for the District of Columbia has suggested that the privilege only covers "communications."[264] In the civil discovery context, the privilege can be overcome by a showing of need, however, the D.C. Circuit has found that no need can overcome the presidential communications privilege in the FOIA context "because 'the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure.'"[265]

Other Privileges

In 1979, in Federal Open Market Committee v. Merrill,[266] the Supreme Court found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause [shown] . . . a trade secret or other confidential research, development or commercial information" is protected from

---

acknowledging that although court was skeptical that voter registration plan implicates Article II authority, some courts suggest privilege can apply even where decision at issue does not arise directly from Article II powers).

[263] Council on Am.-Islamic Rels.-Conn. v. USCIS, 669 F. Supp. 3d 64, 78, 81 (D. Conn. 2023) (noting that "Second Circuit has not considered whether the dissemination of a document within the Executive Branch for non-advisory purposes defeats the presidential communications privilege" and finding that court cannot discern "whether the information contained in [EO] report has been distributed in a manner that undermines application of the presidential communications privilege"); Knight First Amendment Inst. at Columbia Univ. v. CDC, 560 F. Supp. 3d 810, 829-30 (S.D.N.Y. 2021) (determining that agency failed to meet its burden of demonstrating applicability of presidential communications privilege to three documents given the scope of dissemination of those documents because they were not treated as confidential, distributed throughout Executive Branch, and used to inform employees of current policy rather than to create advice for President); Ctr. for Effective Gov't v. U.S. Dep't of State, 7 F. Supp. 3d 16, 27 (D.D.C. 2013) (explaining that "purposes of the privilege are not furthered by protecting from public disclosure presidential directives distributed beyond the President's closest advisers for non-advisory purposes").

[264] See Citizens for Resp. & Ethics in Wash. v. DHS, 592 F. Supp. 2d 111, 118-19 (D.D.C. 2009) (finding that visitor logs for White House and Vice President's residence "shed[] no light on the content of communications between the visitor and the President or his advisors, whether the communications related to presidential deliberation or decision-making, or whether any substantive communications even occurred").

[265] Jud. Watch, Inc. v. DOD, 913 F.3d 1106, 1112 (D.C. Cir. 2019) (quoting Loving v. DOD, 550 F.3d 32, 40 (D.C. Cir. 2008)); see also Protect Democracy Project, Inc. v. NSA, 10 F.4th 879, 886 (D.C. Cir. 2021) (noting that "once even a qualified privilege like the presidential communications privilege applies to a record claimed exempt from disclosure under Exemption 5, a need showing does not overcome it").

[266] 443 U.S. 340 (1979).

discovery.[267] This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to [the] awarding of a contract" and expires upon the awarding of the contract or upon the withdrawal of the offer.[268] The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by endangering consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should . . . serve as relevant criteria."[269]

This harm rationale has led one court to hold that the commercial privilege may be invoked when a contractor who has submitted proposed changes to the contract requests sensitive cost estimates.[270] The D.C. Circuit has declined to extend this privilege to scientific research, holding that the agency failed to show that such material is "generally protected in civil discovery for reasons similar to those asserted by the agency in the FOIA context."[271]

While the breadth of this privilege is still not fully established, a realty appraisal generated by the government in the course of soliciting buyers for its property has been held to fall squarely within it,[272] as have documents containing communications between agency personnel, potential buyers, and real estate agents concerning a proposed sale of government-owned real estate,[273] an agency's background documents which it used to

---

[267] Fed. R. Civ. P. 26(c)(7).

[268] Merrill, 443 U.S. at 360.

[269] Id. at 363.

[270] See Taylor Woodrow Int'l v. United States, No. 88-429, 1989 WL 1095561, at *3 (W.D. Wash. Apr. 5, 1989) (concluding that disclosure would permit requester to take "unfair commercial advantage" of agency).

[271] Burka v. HHS, 87 F.3d 508, 517 (D.C. Cir. 1996); see also Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 942-43 (D. Ariz. 2000) (rejecting proposed "research data privilege" on basis that such information is routinely discoverable in civil litigation). But see Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 32-33 (D.D.C. 2003) (citing Burka and recognizing privilege for "confidential research information," but refusing to allow withholding of documents under it because agency had not satisfied its burden of demonstrating that privilege was being used in FOIA context for reasons similar to its use in civil discovery context), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).

[272] See Gov't Land Bank v. GSA, 671 F.2d 663, 665 (1st Cir. 1982) ("FOIA should not be used to allow the government's customers to pick the taxpayers' pockets.").

[273] See Marriott Emps. Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478, 1996 WL 33497625, at *2 (E.D. Va. Dec. 24, 1996).

calculate its bid in a "contracting out" procedure,[274] and portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors.[275] By contrast, purely legal memoranda drafted to assist contract-award deliberations have been found not to be encompassed by this privilege.[276]

Broadening the holding of Merrill, the Supreme Court in United States v. Weber Aircraft Corp.[277] held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations, even though that privilege was not specifically mentioned in FOIA's legislative history.[278] This privilege also has been applied to protect statements made in Inspector General investigations.[279]

---

[274] See Morrison-Knudsen Co. v. Dep't of the Army of the U.S., 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

[275] See Hack v. DOE, 538 F. Supp. 1098, 1104 (D.D.C. 1982). But see Am. Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 4 (D.D.C. July 22, 1983) (distinguishing Merrill and ordering release of documents on basis that defendant was not "engage[d] in buying or selling").

[276] See Shermco Indus. v. Sec'y of the Air Force, 613 F.2d 1314, 1319-20 n.11 (5th Cir. 1980); see also News Grp. Boston Inc. v. Nat'l R.R. Passenger Corp., 799 F. Supp. 1264, 1270 (D. Mass. 1992) (finding affidavits insufficient to show why Amtrak payroll information is covered by privilege).

[277] 465 U.S. 792, 799 (1984).

[278] See id. at 798-802 (noting that privilege for accident investigation privilege was first recognized in Machin v. Zuckert, 316 F.2d 336, 338 (D.C. Cir. 1963), and holding that it applies in FOIA context as well because "plain statutory language" and clear legislative intent sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations); see also Badhwar v. U.S. Dep't of Air Force, 829 F.2d 182, 185 (D.C. Cir. 1987) (applying aircraft accident investigation privilege to contractor report); Karantsalis v. Dep't of the Navy, No. 12-23469, 2013 WL 1768659, at *3 (S.D. Fla. Apr. 24, 2013) (recognizing applicability of Machin privilege under Exemption 5 and holding that witness statements and opinions of air crash investigators are protectable under this privilege).

[279] See Ahearn v. U.S. Army Materials & Mechs. Rsch. Ctr., 583 F. Supp. 1123, 1124 (D. Mass. 1984) (holding that "for the same reasons set forth by the Supreme Court in Weber, the confidential witness statements obtained in the course of the Inspector General's investigation are exempt under FOIA Exemption 5"); see also Walsh v. Dep't of the Navy, No. 91-7410, 1992 WL 67845, at *4 (N.D. Ill. Mar. 23, 1992) (protecting investigating officer's opinions since that information would not be discoverable as evidence of wrongdoing in a civil proceeding). But see Nickerson v. United States, No. 95-7395, 1996 WL 563465, at *3 (N.D. Ill. Oct. 1, 1996) (holding privilege not applicable to statements made in course of medical malpractice investigation); Wash. Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp. 602, 606-07 (D.D.C. 1985) (finding privilege inapplicable when report format provided

Although in a non-FOIA case the Court of Appeals for the Sixth Circuit recognized a civil discovery privilege for settlement negotiation documents,[280] the Court of Appeals for the Federal Circuit declined to follow that decision, holding "that settlement negotiations . . . are not protected by a settlement negotiation privilege."[281] To date, in the FOIA context, the privilege has only been recognized once and that was under Exemption 4.[282]

Lastly, courts also have recognized the applicability of other privileges, whether traditional or recently recognized, in the FOIA context.[283] Among those other privileges

---

anonymity to witnesses).

[280] Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc., 332 F.3d 976, 976 (6th Cir. 2003) ("[A]ny communications made in furtherance of settlement are privileged.").

[281] In re MSTG, Inc., 675 F.3d 1337, 1342-48 (Fed. Cir. 2012) (analyzing and declining to follow Goodyear Tire) (non-FOIA case); see also Performance Aftermarket Parts Grp., Ltd. v. TI Grp. Auto. Sys. Inc., No. 05-4251, 2007 WL 1428628, at *3 (S.D. Tex. May 11, 2007) (declining to recognize settlement negotiation privilege, further noting that Goodyear Tire "has not been widely followed") (non-FOIA case); In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 211-12 (D.D.C. 2005) (deciding against recognition of settlement privilege) (non-FOIA case).

[282] M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (applying settlement privilege under Exemption 4); cf. Jud. Watch v. DOJ, 271 F. Supp. 3d 264, 268-73 (D.D.C. 2017) (finding that local district court rule prohibits disclosure of settlement discussions because, while local rule does "not clearly fit within a recognized FOIA exemption," parties are bound by local rules and "[t]he parties agree that 'the proper test for determining whether an agency improperly withholds records [subject to a local rule] is whether the [rule], like an injunction, *prohibits* the agency from disclosing the records'" (quoting Morgan v. DOJ, 923 F.2d 195, 197 (D.C. Cir. 1991))), aff'd, 719 F. App'x 21, 23 (D.C. Cir. 2018) (noting that plaintiff does not challenge district court's conclusion that local rule prohibits disclosure of settlement related documents under FOIA, but instead only challenges that local rule applies to documents, and concluding that district court did not abuse its discretion in concluding that documents sought were covered by local rule, but explicitly reserving judgment on "when (if ever) a district court's collateral interpretation of its local rules can serve as the basis of a FOIA exemption").

[283] See Martin v. Off. of Special Couns., 819 F.2d 1181, 1185 (D.C. Cir. 1987) (stating that Exemption 5 "unequivocally" incorporates "all civil discovery rules into FOIA"). But see Burka v. HHS, 87 F.3d 508, 521 (D.C. Cir. 1996) (refusing to recognize "confidential research information" privilege under the FOIA because it is not yet "established or well-settled . . . in the realm of civil discovery").

that have been recognized for purposes of the FOIA are the presentence report privilege,[284] and the expert witness privilege.[285]

Foreseeable Harm and Other Considerations

As a result of the codification of the "foreseeable harm" standard in the FOIA Improvement Act of 2016, an agency "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or if "disclosure is prohibited by law."[286] Courts have clarified this statutory requirement for agencies in the context of the deliberative process privilege, reasoning that an agency must provide "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward."[287] Put another way, agencies must "connect[] the harms" in a "meaningful way to the information

---

[284] See DOJ v. Julian, 486 U.S. 1, 9 (1988) (recognizing privilege, but finding it applicable to third-party requesters only); United States v. Kipta, No. 97-638-1, 2001 WL 477153, at *1 (N.D. Ill. May 3, 2001) (citing Julian for proposition that, at least in absence of compelling justification, no third party "is to be given access to another person's [presentence investigation] report").

[285] See Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1142 (5th Cir. 1980) (recognizing an expert witness report privilege based on Federal Rule of Civil Procedure 26(b)(4) for an appraiser's report prepared during condemnation proceedings because such a report would not have been routinely discoverable and premature release would jeopardize the bargaining position of the government); Nissei Sangyo Am., Ltd. v. IRS, No. 95-1019, 1998 U.S. Dist. LEXIS 2966, at *2-3 (D.D.C. Jan. 28, 1998) (holding that because the Federal Rules of Civil Procedure "established a separate exception to discovery for expert materials . . . Exemption 5 of the FOIA . . . incorporates" it); cf. Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118-19 (D.D.C. 1984) (observing that Rule 26(b)(4) provides parallel protection in civil discovery for opinions of expert witnesses who do not testify at trial).

[286] 5 U.S.C. § 552(a)(8)(A) (2018).

[287] Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 370 (D.C. Cir. 2021); see also Clemente v. FBI, No. 20-1527, 2022 WL 17092585, at *6 (D.D.C. Nov. 21, 2022) (noting that agency asserted that disclosure of emails discussing FOIA search decisions would chill internal discussions about how to respond to FOIA requests, allow requesters to judge the nature of certain law enforcement investigations, and create public confusion and "has thus provided a 'focused and concrete demonstration of why disclosure of the particular type of material' will cause foreseeable harm 'in the specific context of the agency action at issue'") (internal citation omitted); Jud. Watch, Inc. v. U.S. Dep't of State, 557 F. Supp. 3d 52, 61 (D.D.C. 2021) (finding that agency provided "'a focused and concrete demonstration of why disclosure of the particular type of material at issue' – internal discussions of sensitive legal issues – 'will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward'" (quoting Reps. Comm., 3 F.4th at 370)).

withheld, such as by providing context or insight into the specific decision-making process or deliberations at issue, and how they in particular would be harmed by disclosure."[288] The Court of Appeals for the District of Columbia Circuit has explained that an agency must sufficiently explain how disclosure "'would' chill future internal discussions" and "cannot simply rely on 'generalized' assertions that disclosure 'could' chill deliberations."[289] Boilerplate statements that merely "recite the generic rationale for

---

[288] Jud. Watch, Inc. v. DOJ, No. 19-800, 2020 WL 5798442, at *4 (D.D.C. Sept. 29, 2020) (determining that agency must provide the "link between the alleged harm and the information in the withheld material" (quoting Jud. Watch, Inc. v. DOJ, No. 17-0832, 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019))); see also Jud. Watch, Inc. v. DOJ, No. 19-800, 2023 WL 3055426, at *3 (D.D.C. Apr. 24, 2023) (finding that agency sufficiently articulated "connection between the information at issue—along with its place in the particular processes involved—and the chilling effect of disclosure" by situating exchange of that information within FBI's process for deciding talking points' content and framing); Pub. Emps. for Env't Resp. v. DHS, 575 F. Supp. 3d 34, 51 (D.D.C. 2021) (finding that "agency's declaration here articulates a specific link between the specified harm—public confusion—and the nature of the withheld documents" — draft Strategic National Risk Assessment documents — by explaining that prematurely disclosing threats would cause public confusion and may result in people taking action on potential threats where no action is warranted); Jud. Watch, Inc. v. U.S. Dep't of Com., No. 17-1283, 2020 WL 6939807, at *6 (D.D.C. Nov. 25, 2020) (concluding that agency's explanation is sufficient to satisfy foreseeable harm standard because harms were connected in a meaningful way to information being withheld and explanation does not repeat justifications for withholding information provided in the Vaughn index; for example, disclosure of talking points would cause significant public confusion and those who debate talking points will not be candid, diminishing the quality and vigor of agency discussions); Nat. Res. Def. Council v. EPA, No. 17-5928, 2019 WL 4142725, at *5 (S.D.N.Y. Aug. 30, 2019) (finding "overall that the agency has adequately articulated 'the link between this harm and the specific information contained in the material withheld'") (internal citation omitted).

[289] Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 371 (D.C. Cir. 2020) (explaining that "focus[ing] on 'the information at issue'" and "conclud[ing] that disclosure of that information 'would' chill future internal discussions" is sufficient to meet the "governing legal requirement") (internal citation omitted); see also Reps. Comm., 3 F.4th at 370 (determining that "the foreseeability requirement means that agencies must concretely explain how disclosure 'would'—not 'could'—adversely impair internal deliberations" (quoting Machado Amadis, 971 F.3d at 371)); Vanda Pharms., Inc. v. FDA, No. 22-938, 2023 WL 2645714, at *4 (D.D.C. Mar. 27, 2023) (finding that "agency has not established that the reviewers presently expect their deliberations to be kept private given the meaningful potential for release of both types of reviews" and thus has not established how disclosure would have a chilling effect, and concluding that agency's speculation about public health and safety concerns that "could" happen without concrete explanation of what harm "would" occur does not satisfy the foreseeable harm requirement); Ctr. for Investigative Reporting v. Dep't of the Interior, No. 18-1599, 2020 WL 1695175, at *5 (D.D.C. Apr. 7, 2020) (concluding that agency "must show that disclosure *would* cause reasonably foreseeable harms, not that it *could* cause such harms").

the deliberative process privilege itself" will not suffice.[290] On the other hand, the District Court for the District of Columbia has found that "the mere recitation of similar reasoning in showing harm does not by itself render that reasoning 'boilerplate.'"[291] An agency may group like records together on a category-by-category basis, as long as it explains the foreseeable harm that would result from release for each category.[292] Similar harms can be used to support the withholding of multiple categories of records, as long as an agency specifically explains why the stated reason applies to each category, and connects each harm to the release of the records in each category.[293] The amount of detail needed to

---

[290] Reps. Comm., 3 F.4th at 370; see also Project on Gov't Oversight, Inc. v. DHS, 657 F. Supp. 3d 50, 63 (D.D.C. 2023) (finding that agency failed to explain why disclosure of these specific expert reports would chill deliberations or would cause public confusion and explaining that "fatal flaw . . . is that it is essentially a restatement of the generic rationale for the deliberative process privilege itself") (citation and internal quotation marks omitted); Nat'l Pub. Radio, Inc. v. DHS, No. 20-2468, 2022 WL 4534730, at *8-9 (D.D.C. Sept. 28, 2022) (noting that generic, boilerplate justifications that basically restate a rationale for the privilege itself do not meet the bar for harm and agency has not explained why these specific types of reports would chill deliberations more than any generic documents because agency essentially "turned the generalized justification from Reporters Committee into a game of 'Mad Libs' and filled in the blanks with the name of the agency and the things that it does"); Louise Trauma Ctr. LLC v. DHS, No. 20-01128, 2022 WL 1081097, at *5 (D.D.C. Apr. 11, 2022) (explaining that sole assertation that disclosure would chill employees from engaging in candid and frank discussions is almost identical to assertions of harm that D.C. Circuit has rejected as "too 'boilerplate and generic' to justify withholding under the deliberative process privilege" (quoting Reps. Comm., 3 F.4th at 371)); Ctr. for Investigative Reporting v. CBP, 436 F. Supp. 3d 90, 106 (D.D.C. 2019) (holding that agency did not satisfy the foreseeable harm requirement because it only provided general explanations and boilerplate language).

[291] Leopold v. DOJ, No. 19-2796, 2021 WL 3128866, at *4 (D.D.C. July 23, 2021).

[292] See Reps. Comm., 3 F.4th at 369 (explaining that while agencies may satisfy foreseeable harm requirement "on a category-by-category basis rather than a document-by-document basis. . . the basis and likelihood of that harm must be independently demonstrated for each category"); Jud. Watch, Inc.,2020 WL 6939807, at *6 (concluding that agency explanation was sufficient to satisfy foreseeable harm standard when agency took categorical approach because harms articulated are far from "generic and nebulous" and "these harms are connected in a meaningful way to the information being withheld"); Ctr. for Pub. Integrity v. DOD, 486 F. Supp. 3d 317, 337 (D.D.C. 2020) (finding that agencies categorized withholdings under Exemption 5 and explained particular harm that would be caused by release of information in each category and therefore met requirements of FOIA Improvement Act); Rosenberg v. DOD, 442 F. Supp. 3d 240, 259 (D.D.C. 2020) (concluding that agency "may take a categorical approach" and "group together like records" but "must explain the foreseeable harm of disclosure for each category").

[293] See Leopold, 2021 WL 3128866, at *4 (finding agency "sews a sufficient thread of reasoning between each withheld category of documents and the particular potential harm that would result from its release" and determining that a completely different rationale for each category is not required); Jud. Watch, Inc., 2020 WL 6939807, at *6 (determining

show foreseeable harm may depend on the context or sensitivity of the withheld information.[294] Similarly, the foreseeable harm from release may be more self-evident

---

agency satisfied foreseeable harm standard even when declaration stated that "disclosure of the information being withheld in the first three categories would pose the same foreseeable harm").

[294] See Reps. Comm., 3 F.4th at 372 (determining for certain records that "[t]he very context and purpose of those communications bearing on sensitive undercover operations in the midst of a policy crisis make the foreseeability of harm manifest"); Energy Pol'y Advocs. v. SEC, No. 22-01497, 2023 WL 6976071, at *6 (D.D.C. Oct. 23, 2023) (explaining that "the Court has no bias against brevity—especially when the 'context and purpose' of the withheld information support a finding of foreseeable harm" and finding agency adequately explained sensitive nature of informal discussions about proposed rulemaking contained in withheld text messages, important role these exchanges play in its decisional process, and effect disclosure would have on similar future exchanges) (internal citation omitted); N.Y. Times v. DOJ, No. 22-1539, 2023 WL 4407480, at *7 (S.D.N.Y. July 7, 2023) (concluding portions of emails regarding proposed content of letter from FBI to foreign government were properly withheld and explaining that "[i]t takes little imagination to see why" releasing personal views of some employees rather than ultimate determination of FBI would "cause foreseeable harm in the context of proposed communications with a foreign government"); Greenspan v. Bd. of Governors of Fed. Rsrv. Sys., 643 F. Supp. 3d 176, 200-01 (D.D.C. 2022) (finding that "the 'context and purpose' of some documents within these two declarations support a finding of foreseeable harm" because they contain sensitive, non-public information about international economic matters, and even for documents where agency's description is less specific, "the Court is satisfied that the information within the communications has the power to sow confusion and disrupt financial markets if disclosed") (internal citation omitted); ACLU v. CIA, No. 18-2784, 2022 WL 306360, at *9 (D.D.C. Feb. 2, 2022) (determining that agency has "demonstrated that harm is reasonably foreseeable if agency employees expect that their deliberations about efforts to support future nominations to high profile positions like the Director of the CIA will be publicly disclosed" and that in camera review of certain material supports conclusion that disclosure of material would harm agency going forward); Jud. Watch, Inc. v. U.S. Dep't of State, 557 F. Supp. 3d 52, 64 (D.D.C. 2021) (noting that "the 'context and purpose' of [email exchange regarding sensitive matter] would likely be sufficient to 'make the foreseeability of harm manifest,' even without a detailed written description of the foreseeable harm," but also exercising discretion to review in camera this email exchange to help determine whether release would cause foreseeable harm and concluding that redactions were justified) (internal citations omitted); Selgjekaj v. EOUSA, No. 20-2145, 2021 WL 3472437, at *5 (D.D.C. Aug. 6, 2021) (reiterating that what is needed to meet this burden is "context specific" and may be "satisfied if '[t]he very context and purpose of' the withheld document 'make the foreseeability of harm manifest'" (quoting Reps. Comm., 3 F.4th at 372)), summary affirmance granted, No. 21-5264, 2023 WL 2905019 (D.C. Cir. Apr. 10, 2023); Bonner v. CIA, No. 19-9762, 2021 WL 3193090, at *5 (S.D.N.Y. July 28, 2021) (reiterating that "'[i]n some instances, the withheld information may be so obviously sensitive . . . that a simple statement illustrating why the privilege applies and identifying the harm likely to result from release may be enough'" and concluding that agency met its burden of establishing non-classified portions of Classified Cable Correspondence are protected under deliberative process privilege) (internal citation omitted); Am. Ctr. for Law & Just. v. NSA,

for other privileges, such as the attorney work-product privilege,[295] the attorney-client privilege,[296] and the presidential communications privilege.[297]

---

474 F. Supp. 3d 109, 136 (D.D.C. 2020) (finding that "declarations provide a reasonable basis to think that disclosure of the withheld materials would harm several interests that Exemption 5 protects, such as encouraging candid discussions and guarding against premature disclosure and public confusion" and that "foreseeable harm from disclosure is 'particularly heightened in the context of foreign affairs'") (internal citation omitted); Rosenberg, 442 F. Supp. 3d at 259 (finding that "degree of detail necessary to substantiate a claim of foreseeable harm is context-specific" and when withheld information is obviously sensitive, "a simple statement illustrating why the privilege applies and identifying the harm likely to result from release" may be sufficient).

[295] See, e.g., Louise Trauma Ctr. LLC, 2022 WL 1081097, at *6 (determining that even though agency's explanation provides little clarity on foreseeable harm, "the 'context and purpose' of attorney work product makes self-evident the harm from its disclosure" (quoting Reps. Comm., 3 F.4th at 369)); Selgjekaj, 2021 WL 3472437, at *5 (finding disclosure would harm interests protected by attorney work-product privilege because it is "hardly debatable" that government's ability to prosecute would be impeded if file jacket prepared in contemplation of a complex financial fraud prosecution were released).

[296] See, e.g., Rocky Mountain Wild, Inc. v. U.S. Forest Serv., 56 F.4th 913, 929 (10th Cir. 2022) (noting that "[t]he reasons for protecting attorney communications are long-established" and determining that "declarations sufficiently show that the agency would suffer harm from disclosing documents protected by either the [attorney-client] privilege or the [work-product] doctrine"); Energy Pol'y Advocs. v. U.S. Dep't of State, No. 19-03307, 2023 WL 4198200, at *7 (D.D.C. June 27, 2023) (explaining that "agency's foreseeable harm burden 'may be more easily met when invoking other privileges . . . for which the risk of harm through disclosure is more self-evident and the potential for agency overuse is attenuated'" and that "attorney-client privilege falls within this category") (internal citation omitted); Reps. Comm. for Freedom of the Press v. CBP, 567 F. Supp. 3d 97, 120 (D.D.C. 2021) (observing that attorney-client privilege is "sacrosanct," disclosure "would undoubtably undermine our legal culture," and "[a]gencies would lose an important tool in their decisionmaking process—employees' ability to confidentially consult agency lawyers," and determining that "foreseeable harm requirement may be more easily met when invoking . . . privileges and exemptions for which the risk of harm through disclosure is more self-evident and the potential for agency overuse is attenuated"); cf. OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023) (explaining that "the reasonable likelihood of foreseeable harm may be easier to establish for some Exemption 5 privileges, such as the attorney-client privilege").

[297] See, e.g., Am. First Legal Found. v. USDA, No. 22-3029, 2023 WL 4581313, at *9 (D.D.C. July 18, 2023) (explaining that "[w]hile the D.C. Circuit has yet to consider the adequacy of an agency's foreseeable harm showing under the presidential communications privilege, Judges on this Court have consistently credited declarations describing the potential chilling effects on confidential and candid presidential decision-making as sufficient identification of foreseeable harm"), aff'd, 126 F.4th 691 (D.C. Cir. 2025); Council on Am.-Islamic Rels.-Conn. v. USCIS, 669 F. Supp. 3d 64, 83 (D. Conn. 2023) (finding that agency sufficiently

In 2025, the D.C. Circuit rejected a claim that there is a government misconduct exception to Exemption 5.[298] Prior to that decision, the D.C. District Court had acknowledged the existence of a government misconduct exception in some decisions, but found that it did not apply under the specific circumstances of the cases before them.[299] In other decisions, while taking no position on whether a government misconduct exception exists, the D.C. District Court had concluded that it would not apply in the cases

---

articulated foreseeable harm that would result from disclosure of the EO Report because declaration explains that release would plainly threaten President's ability to receive frank advice concerning sensitive field of immigration policy and border security and that quality of Presidential decisionmaking would be damaged without candid information); Cause of Action Inst. v. U.S. Dep't of Com., No. 19-2698, 2022 WL 4130813, at *8-9 (D.D.C. Sept. 12, 2022) (noting that "[o]nce the 'foreseeable harm' to presidential decisionmaking and/or national security has subsided, FOIA and Section 232 may well require releasing the documents" but agency has properly invoked Exemption 5 here by showing it was reasonably foreseeable that disclosure of document at time it was requested would cause harm) (internal citation omitted).

[298] See Rudometkin v. United States, 140 F.4th 480, 492 (D.C. Cir. 2025) (reasoning that there is "no controlling precedent recognizing a government misconduct exception" and there is no public interest balancing for Exemption 5) (citing Protect Democracy Project, Inc. v. NSA, 10 F.4th 879, 888-89 (D.C. Cir. 2021))).

[299] See Stonehill v. U.S. Dep't of Just. Tax Div., No. 19-03770, 2022 WL 407145, at *19 (D.D.C. Feb. 10, 2022) (holding that "deliberative process privilege may be overcome where 'there is reason to believe the documents sought may shed light on government misconduct'" (quoting In re Sealed Case, 121 F.3d 729, 738 (D.C. Cir. 1997))); Leopold v. DOJ, 487 F. Supp. 3d 1, 14 (D.D.C. 2020) (holding that "[t]o invoke government misconduct as grounds to defeat the attorney work-product privilege, 'the [plaintiffs] must establish more than a bare suspicion in order to obtain disclosure,' but rather 'must produce evidence that would warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred'" (quoting Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174, (2004))); Jud. Watch, Inc. v. Dep't of State, 235 F. Supp. 3d 310, 313-14 (D.D.C. 2017) (rejecting plaintiff's efforts to apply "the narrow government-misconduct exception" and finding that "[e]ven assuming that the conduct hypothesized by [plaintiff] would rise to the level required for the narrow government-misconduct exception, the records show no such acts"); Neighborhood Assistance Corp. of Am. v. HHS, 19 F. Supp. 3d 1, 14 (D.D.C. 2013) (acknowledging a government misconduct exception but noting that "the claimed governmental misconduct must be severe enough to qualify as nefarious or extreme government wrongdoing"); Nat'l Whistleblower Ctr. v. HHS, 903 F. Supp. 2d 59, 66-69 (D.D.C. 2012) (holding that "the Court here finds that the government-misconduct exception may be invoked to overcome the deliberative-process privilege in a FOIA suit" but that "the misconduct necessary to supersede the deliberative-process privilege of Exemption 5 is not present in the reviewed documents").

at issue.[300] In other jurisdictions, a few courts have found that to the extent the government misconduct exception applies in FOIA cases, it is narrow and those asserting it must clear a high bar.[301]

Even after Exemption 5 is found to apply to documents, waiver, when the specific information sought has already been "'officially acknowledged' or is in the 'public domain,'" can affect the use of the privilege.[302] (For a further and more in-depth discussion of Waiver in FOIA, see Waiver and Discretionary Disclosure, Waiver.)

---

[300] See, e.g., Reps. Comm., 567 F. Supp. 3d at 114 (holding that "[t]his Court likewise need not render an opinion on the government misconduct exception because the Committee successfully challenges the agency's foreseeable harm analysis"); Ctr. for Pub. Integrity v. DOD, 486 F. Supp. 3d 317, 334 (D.D.C. 2020) (holding that "[f]or this reason, the government misconduct exception, assuming it exists in the FOIA context, does not apply to the material withheld under FOIA Exemption 5"); Jud. Watch, Inc. v. U.S. Dep't of State, 285 F. Supp. 3d 249, 253-56 (D.D.C. 2018) (holding that the government misconduct exception did not apply after "[a]ssuming arguendo, for purposes of the discussion in this case, that the government misconduct exception applies to FOIA cases").

[301] See Stalcup v. CIA, 768 F.3d 65, 72 (1st Cir. 2014) (explaining that "[t]o the extent that we might similarly recognize a narrow [government misconduct] waiver doctrine in the FOIA context, it would not apply in this case"); Austin Sanctuary Network v. ICE, No. 20-01686, 2022 WL 4356732, at *21-22 (S.D.N.Y. Sept. 19, 2022) (analyzing existence of government misconduct exception, noting that district "does not reach a conclusion on the issue," and holding that government misconduct exception did not apply since "Plaintiffs point to no evidence that any of the particular documents ICE withheld under the deliberative process privilege were themselves egregious"); Mullane v. DOJ, No. 19-12379, 2021 WL 1080249, at *9 (D. Mass. Mar. 19, 2021) (noting that the few courts to apply a government misconduct exception in a FOIA case have described the exception as narrow, and determining that plaintiff "has not made a sufficient showing that the government misconduct exception applies here").

[302] Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992); see also N.Y. Times Co. v. DOJ, 939 F.3d 479, 496-97 (D.C. Cir. 2019) (finding that certain public statements made by former Attorney General Holder about a requested memoranda were "sufficiently specific that they are tantamount to public disclosure" thus having "waived the privilege over the parts of the relevant memoranda relating to those statements," but other statements had not divulged "the content of the memoranda with enough specificity to constitute waiver of the work product privilege," and finding that while waiver occurred with respect to parts of a document, it "does not automatically mean that the government waived the privilege with respect to the whole document"); Council on Am.-Islamic Rels.-Conn., 669 F. Supp. 3d at 64 (holding that presidential communications privilege had not been waived given that "plaintiffs have not shown that any of these official acknowledgments reference the EO Report or that they contain information that is as specific as or matching the report's contents"); Leopold, 487 F. Supp. 3d at 14 (rejecting "plaintiffs' argument that the Department waived the attorney work product privilege because of information contained in the Mueller Report" where "plaintiffs have offered no basis to discredit the Department's representations" that waiver did not occur); Citizens for Resp. & Ethics in Wash. v. Dep't of Com., No. 18-3022, 2020 WL 4732095, at *2 (D.D.C. Aug. 14, 2020) (finding agency waived

the deliberative process privilege over documents sent to a non-governmental third party, even though there was no evidence that the recipient reviewed or disclosed the information, because "the government has failed to demonstrate that it attempted to protect the information after its disclosure"); cf. Am. Oversight v. DOJ, 45 F.4th 579, 594-98 (2d Cir. 2022) (rejecting plaintiff's theory that government can waive attorney work-product privilege before documents exist by interviewing targets and subjects); Cottone v. Reno, 193 F.3d 550, 555 (D.C. Cir. 1999) (finding that an "exemption can serve no purpose once information . . . becomes public").