



UNITED STATES DEPARTMENT *of* JUSTICE

**Exemption 5**  
*The Civil Discovery*  
*Privileges*



## Exemption 5

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.”



## Exemption 5

Incorporates civil discovery privileges into the FOIA.

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



## Exemption 5

Two requirements:

1. Threshold

and

2. Applicable discovery privilege



# Exemption 5

Two requirements:

**1. Threshold**

and

2. Applicable discovery privilege



# Threshold

## *Basic Definition*

- “Inter-agency or intra-agency memorandums or letters”
- This includes all forms of written communications—emails, reports, etc.<sub>6</sub>



## Threshold

### *The “Consultant Corollary”*

- The Exemption 5 threshold has been expanded to cover certains situations in which an agency receives documents from an outside party.



## **Consultant Corollary: Who is a Consultant?**

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

- Those who have a formal, contractual, paid relationship with an agency
- Those consulted by the agency on an unpaid volunteer basis





## Consultant Corollary: Who is a Consultant?

### *Dep't of the Interior v. Klamath Water Users Protective Ass'n*

- An outsider cannot be a consultant when the outsider is:
  - Seeking a government benefit
  - At the expense of another party.



## Miscellaneous Threshold Issues

Advice from a consultant must be coming into the agency, not from the agency.



## Miscellaneous Threshold Issues

An agency can protect advice it receives from Congress.

An agency cannot protect advice it provides to Congress.



## Miscellaneous Threshold Issues

### *Common Interest Doctrine:*

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



## Miscellaneous Threshold Issues

### *Common Interest Doctrine:*

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



## Exemption 5

Two requirements:

1. Threshold

and

**2. Applicable discovery privilege**



## Part II: Discovery Privileges

Exemption 5 incorporates certain civil discovery privileges into the FOIA.



## Part II: Discovery Privileges

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

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





# The Deliberative Process Privilege

Purposes of the privilege:

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



# The Deliberative Process Privilege

## *Protects Process*

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



# The Deliberative Process Privilege

## *Elements*

Documents must be:

**1. Predecisional**

and

**2. Deliberative**



# The Deliberative Process Privilege

## *“Predecisional” Defined*

- Antecedent to the adoption of an agency policy.



# The Deliberative Process Privilege

## *Identifying Decisionmaking Processes*

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



# The Deliberative Process Privilege

## *Eligible Information*

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



# The Deliberative Process Privilege

## *Postdecisional Documents*

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



# The Deliberative Process Privilege

*Losing Predecisional Status*

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





# The Deliberative Process Privilege

## *Incorporation*

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



# The Deliberative Process Privilege

## *Adoption*

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



# The Deliberative Process Privilege

*Retaining Predecisional Status:  
No Express Approval*

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



# The Deliberative Process Privilege

## *Elements*

Documents must be:

1. Predecisional

and

**2. Deliberative**



# The Deliberative Process Privilege

## *“Deliberative” Defined*

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



# The Deliberative Process Privilege

## *Deliberative Information*

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



# The Deliberative Process Privilege

## *Duty to Segregate Factual Information*

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



# The Deliberative Process Privilege

## *Duty to Segregate Factual Information*

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





# The Deliberative Process Privilege

## *Duty to Segregate Factual Information*

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



# The Deliberative Process Privilege

## *Examples of Deliberative Documents*

- Briefing materials
- Drafts



# The Deliberative Process Privilege

## *New Sunset Provision*

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



# The Attorney Work-Product Privilege

Protects documents that were:

1. Prepared by or at the direction of an attorney

**AND**

2. Created in reasonable anticipation of litigation



# The Attorney Work-Product Privilege

*Prepared by or at the direction of an attorney*

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



# The Attorney Work-Product Privilege

## *In Reasonable Anticipation of Litigation*

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



# The Attorney Work-Product Privilege

Applies to documents created in:

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



# The Attorney Work-Product Privilege

The privilege does not apply to documents created subsequent to the closing of a claim.





# The Attorney Work-Product Privilege

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



# The Attorney Work-Product Privilege

A document must meet the criteria for the privilege at the time of its creation to be covered by the privilege.



# The Attorney Work-Product Privilege

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



# The Attorney-Client Privilege

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



# The Attorney-Client Privilege

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



# The Attorney-Client Privilege

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



# The Attorney-Client Privilege

For privilege to apply, communications must be:

1. Between an attorney and client

**AND**

2. Confidential



# The Attorney-Client Privilege

*Who is “the Client?”*

➤ Can be a federal agency

and

➤ Must identify client





# The Attorney-Client Privilege

## *“Confidential” Defined*

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



# The Attorney-Client Privilege

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



## Applying the Foreseeable Harm Standard

Should not withhold information under Exemption 5 unless there is a foreseeable harm in disclosure.



## Conclusion: The Rule of 2

Always remember that Exemption 5 has two parts:

1. Threshold

and

2. Applicable Discovery Privilege



## Conclusion: The Rule of 2

Also, each of the three main privileges has two parts.



# Conclusion: The Rule of 2

## *Deliberative Process*

1. Predecisional

and

2. Deliberative



## Conclusion: The Rule of 2

### *Attorney Work-Product*

1. Prepared by or at the direction of an attorney

**AND**

2. Created in reasonable anticipation of litigation



# Conclusion: The Rule of 2

## *Attorney-Client*

1. Communication between an attorney and client

**AND**

2. Confidential