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.
Threshold

The “Consultant Corollary”

- The Exemption 5 threshold has been expanded to cover certain 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 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