

*Exemption 5  
The Civil Discovery  
Privileges*

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**Exemption 5 Threshold**

“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.”

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*But, what does this mean?*

- Exemption 5 incorporates civil discovery privileges into the FOIA.
- The exemption has two parts:
  - the “inter-agency or intra-agency” threshold requirement, and
  - the application of privileges.

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**Exemption 5**

**Don't forget the TWO parts -**

1. An inter-agency or intra-agency memorandum or letter (part 1), and
2. There must be an applicable discovery privilege (part 2).

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**Part I: The Exemption 5 Threshold**

- “Inter-agency or intra-agency memorandums or letters.”
- This means any internal government document (including e-mail), whether it has been circulated among multiple agencies, or has remained wholly within the confines of a single agency.

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**The “Consultant Corollary”**

- The Exemption 5 threshold has been expanded to cover situations in which an agency receives documents from an outside party.
- Why? Courts recognize that agencies frequently have “a special need for the opinions and recommendations of temporary consultants.” (Soucie v. David.)

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### The Consultant Corollary

- Interpreted to cover situations where outsiders are functioning as though they were agency employees.
- Consultants can be those who have a formal, contractual, paid relationship with an agency (Hoover v. Dep't of the Interior) as well as those consulted by the agency on an unpaid volunteer basis. (Wu v. NEH, NIMJ v. DOD.)

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### Limitation on the "Consultant Corollary" – the Klamath decision

- In Klamath, the Department of the Interior had consulted local Native American tribes on assignment of water rights. Significantly, the tribes were among many applicants for the water rights.
- The 9<sup>th</sup> Circuit ruled that the tribes could not be consultants to the agency because they had a direct interest in the agency's decision.

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### The Klamath Decision

- On appeal, the Supreme Court ruled that an outsider cannot be a consultant when the outsider is:
  - a) seeking a government benefit
  - b) at the expense of another party.

Subsequent courts have focused only on the degree of self-interest pursued by the outside party.

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### The Klamath Decision

- The Supreme Court left intact two decisions from the DC Circuit in which “interested” consultants were held to have met the threshold standard.
  - The consultants were former Presidents consulting with the National Archives (Public Citizen v. DOJ), and members of the Senate advising the Justice Department. (Ryan v. DOJ.)

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### Related Threshold Issues

- Advice from a consultant must be coming into the agency, not from the agency.
  - Thus, while an agency can protect advice it receives from Congress, it cannot protect advice it provides to Congress. (Dow Jones v. DOJ.)

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### Related Threshold Issues (cont'd)

- **Exception:** An agency may protect advice it provides to a presidentially created commission.
  - It would be “inconceivable” to extend Exemption 5 coverage to situations where the decisionmaker is an agency official, but not where the decisionmaker is the President himself. (Judicial Watch v. DOE.)

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## Part II: Discovery Privileges

- In theory, all privileges available under normal civil discovery rules exist in the FOIA context.
- However, in practice only a few come up with any degree of regularity:
  1. The deliberative process privilege;
  2. The attorney work-product privilege;
  3. The attorney-client privilege.

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## The Deliberative Process Privilege

The deliberative process privilege allows agencies to withhold documents which reflect deliberative, predecisional communications. *History?*

Three purposes underlying the privilege:

- a) to encourage open, frank discussion
- b) to protect against premature disclosure of proposed policies before they are adopted
- c) to guard against public confusion from release of reasons and rationales that were not ultimately the basis for agency decisions.

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## Deliberative Process Privilege

- The privilege exists to protect the integrity of agencies' decision-making processes.
- Thus, it may be invoked to protect documents where release would harm the decisional process.
- An agency's ability to use the privilege is not affected by the passage of time.
- There may be less sensitivity with release of older documents, which may make these documents appropriate for discretionary disclosure.

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### Deliberative Process Privilege

Two requirements to withhold under the deliberative process privilege:

1. Information must be **PREDECISIONAL** and
2. **DELIBERATIVE**.

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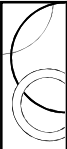
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### “Predecisional” Communications

- “Predecisional” communications are those that are antecedent to the adoption of an agency policy.
- An agency is not required to point to a final agency decision, but should be able to identify a decision-making process.
- Documents may be withheld even in situations where there has been no final agency decision.
  - Courts have recognized that agencies sometimes decide not to decide.

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### Predecisional Communications

- The privilege can extend to documents created by the decision-maker as part of her own deliberative process.
- It also extends to documents that do not end up being considered by the final decision-maker at all. (Moye, O’Brien, O’Rourke, Hogan & Pickert v. Nat’l R.R. Passenger Corp.)

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**“Post-decisional” Documents**

- Post-decisional documents are not protected by the privilege.
- These documents typically reflect an agency’s final position on an issue, or explain an agency’s actions.
- They are not protected because of the public’s right to be informed of official agency positions.

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**Is it Pre-decisional or Post-decisional?**

Things to consider in making determination:

- Did the author of the document possess decision-making authority?
  - Note that courts may look “beneath formal lines of authority to the reality of the decision-making process.” (Schlefer v. United States.)
- In what direction does the document travel along the decision-making chain?
  - Documents that go from subordinate to superior are more likely to be predecisional.

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**Losing Predecisional Status:  
*Incorporation/Adoption***

- **Incorporated:**The decision-maker expressly cites a previously predecisional document as the rationale for an agency’s decision.
- **Adopted:**A previously predecisional document comes to be used by the agency as the embodiment of agency policy.

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**Deliberative Process:  
“Deliberative” Documents**

- In addition to being predecisional, withheld information must reflect deliberative communications.
- Withheld information must be tied to some agency decision or decision-making process.
- The privilege does not extend to every expression of opinion (e.g. your e-mail saying how much you hate your co-worker’s new haircut isn’t protected!).

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**Deliberative Documents**

- Other examples of deliberative documents that are generally withholdable include:
  - a) **Briefing materials** – documents that summarize issues and advise superiors.
  - b) **Drafts** – draft documents, by their very nature, are typically predecisional and deliberative, and may be appropriate for discretionary disclosure.

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**Deliberative Documents**

- Agencies may also withhold information where disclosure would reveal some protected aspect of the agency’s deliberative process.
- Similarly, in some circumstances an agency may be able to protect the identity of the author of a deliberative document, if disclosure of this information might chill agency deliberations.

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**Segregating Out Factual Materials**

- The deliberative process privilege only applies to deliberative portions of documents.
- An agency withholding documents under this privilege has an obligation to segregate out and release factual portions.

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**Segregating Facts**

There are certain situations in which factual materials can be protected:

- a) when factual portions of a document are “inextricably intertwined” with deliberative portions
- b) when the selection and inclusion of some factual material constitutes a deliberative judgment by a document’s author (Mapother v. DOJ)
- c) “elastic facts” – when “facts” are not really set in stone, such as prices in a contract bid.

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**The Attorney Work-Product Privilege**

Two criteria for asserting the attorney work-product privilege. Information must have been:

- a) created by or at the direction of an attorney, and
- b) created in reasonable anticipation of litigation.

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### Attorney Work-Product

- Prepared by or at the direction of an attorney: Straight forward test.
- Real test is “in anticipation of litigation”

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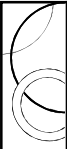
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### Attorney Work-Product

- The privilege covers both factual and deliberative materials, so unlike with the deliberative process privilege, agencies are not required to segregate out and release factual portions of attorney work-product documents. (Judicial Watch v. DOJ.)

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### Attorney-Client Privilege

- This privilege protects confidential information supplied from client to attorney, as well as the attorney's advice based upon the client supplied information.
- Unlike attorney work-product, the attorney-client privilege is not limited to situations involving litigation.
- As with work-product, the attorney-client privilege applies to both factual and deliberative materials.

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**Foreseeable Harm Standard**

- Agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”
- Agencies shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.”
- Agencies shall “take reasonable steps necessary to segregate and release nonexempt information.”
- This provision does not require disclosure of information “that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under [Exemption] 3.”

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**Foreseeable Harm Standard**

- Universal Factors to Consider:
  - The sensitivity of the document’s content
  - The age of the document
  - Consult with author of document or program office to determine harm

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**25 Year Limit**

Exemption 5 of the FOIA amended 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.”

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## Exercises

- **From:** thomas.eugene.ogc@federalagency.gov
- **To:** joan.shields.ogc@federalagency.gov
- **Date:** October 2, 2005
- **Subject:** Draft Declaration
- **Joan:** Please review the attached draft declaration and let me know if you have any questions. This declaration is due on October 5.
- Tom
- **From:** joan.shields.ogc@federalagency.gov
- **To:** thomas.eugene.ogc@federalagency.gov
- **Date:** October 5, 2005
- **Subject:** Draft Declaration
- **Tom:** I have made some revisions to Section A of the declaration. The revised version is attached. Please review and let's discuss.
- Joan

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## Exercises (cont.)

- **From:** jane.flannery@federalagency.gov
- **To:** wilma.willow.ogc@federalagency.gov
- **Cc:** tim.nealon@federalagency.gov
- **Date:** May 3, 2005
- **Subject:** Environmental Impact Act of 2007
- **Wilma:** Can you give me some details on the reporting requirements that are placed on the government under section 214 of the new law? My program people and I are trying to develop guidelines for implementation of new requirements, but we are not clear on how we are to deal with the additional reporting requirements when we are already into the second quarter of the fiscal year.
- Thanks,
- Jane

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## Exercises (cont.)

- **From:** wilma.willow.ogc@federalagency.gov; carol.hogan.ogc@federalagency.gov
- **To:** jane.flannery@federalagency.gov; tim.nealon@federal agency.gov
- **Date:** May 4, 2005
- **Subject:** Environmental Impact Act of 2007
- **Jane:** We are currently in the process of reviewing the new reporting provisions, but we are still working on guidance for reporting our stats for the next two quarters. The simple answer is that the new reporting requirements will apply only to the next two quarters of the fiscal year, and that we will report this quarter's statistics as we have done in the past. However, this approach is still under consideration. It would probably be a good idea to discuss. Let me know when you are available.
- Wilma
- **From:** tim.nealon@federalagency.gov
- **To:** wilma.willow.ogc@federalagency.gov; carol.hogan.ogc@federalagency.gov; ;
- **jane.flannery@federalagency.gov;**
- **Date:** May 4, 2006
- I like that approach.
- Tim

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**Exemption 5 Conclusion:**

**The Rule of 2**

- To summarize, always remember that Exemption 5 has 2 parts (threshold and privileges).
  
- **Each of the three main privileges has 2 parts:**
  - a) **Deliberative process** – predecisional and deliberative
  - b) **Attorney work-product** – prepared by or at the direction of an attorney in reasonable anticipation of litigation
  - c) **Attorney-client** – protects confidential facts and advice given based on this confidential information.

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