

***Exemption 5:  
It's a Privilege***

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**Exemption 5**

“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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**Exemption Five Basics**

- ↳ Incorporates civil discovery privileges into the FOIA.
- ↳ Two steps:
  - ↓ “Inter-agency or intra-agency” threshold requirement, and
  - ↓ Application of privileges.

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**Step One: Is it Inter or Intra-Agency?**

- ↳ “Inter-agency or intra-agency memorandums or letters.”
- ↳ 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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**Government Consultants**

- ↳ 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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**Government Consultants**

- ↳ 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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### Limits on Exemption 5 for Consultants

- ¶ 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.
- ¶ So, no Exemption 5

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### *Dept. of Interior vs. Klamath Water Users Protective Ass'n*

- ¶ On appeal, the Supreme Court affirmed the 9<sup>th</sup> Circuit Court of Appeals (but on a narrower basis), finding that the tribes did not qualify for Exemption 5 protection because an outsider cannot be a consultant when the outsider is:
  - ↳ seeking a government benefit
  - ↳ 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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### *Klamath, con't.*

- ¶ The Supreme Court left intact two decisions from the DC Circuit in which "interested" consultants were held to have met the threshold standard.
  - ↳ Former Presidents consulting with the National Archives (Public Citizen v. DOJ)
  - ↳ Members of the Senate advising the Justice Department. (Ryan v. DOJ)

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## Government Consultants, con't

- ⌘ Advice from a consultant must be coming into the agency, not from the agency
- ↳ Example: Agency can protect advice it receives from Congress, it cannot protect advice it provides to Congress. (*Dow Jones v. DOJ.*)
- ⌘ 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 decision-maker is an agency official, but not where the decision-maker is the President himself. (*Judicial Watch v. DOE*)

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## Step Two: Is it Privileged?

- ⌘ In theory, all privileges available under normal civil discovery rules exist in the FOIA context.
- ⌘ But only a few come up regularly:
  1. Deliberative process privilege;
  2. Attorney work-product privilege;
  3. Attorney-client privilege.

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## Deliberative Process Privilege

Allows agencies to withhold documents which reflect deliberative, predecisional communications.

Three purposes:

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

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### Deliberative Process Privilege - Time Limits

- ⌄ An agency’s legal ability to use the privilege is generally not affected by the passage of time... except for documents that are 25 years old (or older) at the date of request
  - ↳ 25 year sunset in FOIA Improvement Act
- ⌄ But before 25 years 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 - Prongs

- ⌄ Two Prongs - documents must be:
  - ↳ Predecisional
  - ↳ Deliberative

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### Deliberative Process - Prong 1 - “Predecisional”

- ⌄ “Predecisional” communications: those that are antecedent to the adoption of an agency policy.
- ⌄ 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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### Deliberative Process - Prong 1 - "Predecisional"

- ⌄ The privilege can extend to documents created by the decision-maker as part of her own deliberative process.
- ⌄ 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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### Deliberative Process - Prong 1 - "Predecisional"

Post-decisional documents:

- ↪ Not protected by the privilege.
- ↪ These documents typically reflect an agency's final position on an issue or explain an agency's actions
- ↪ Not protected because of the public's right to be informed of official agency positions - no secret laws

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### Deliberative Process - Prong 1 - "Predecisional"

Is it predecisional or postdecisional?

- ⌄ Did the author of the document possess decision-making authority?
  - ↪ 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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### Deliberative Process - Prong 1 - "Predecisional"

Documents lose predecisional status if they are incorporated or adopted:

- ⌄ **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 - Prong 2 - "Deliberative"

- ⌄ Must be predecisional AND deliberative
- ⌄ Fact? Or Opinion?
  - ↔ Facts are generally not deliberative
  - ↔ Opinions sometimes are
    - ↓ Withheld information must be tied to some agency decision or decision-making process.
    - ↓ The privilege does not extend to every expression of opinion

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### Deliberative Process - Prong 2 - "Deliberative"

Deliberative Documents, Examples:

- ⌄ **Briefing materials** - documents that summarize issues and advise superiors
- ⌄ **Drafts** - draft documents, by their very nature, are typically predecisional and deliberative, and may be appropriate for discretionary disclosure

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### Deliberative Process - Prong 2 - "Deliberative"

- ⌄ Generally, facts must be segregated out and released.
- ⌄ Exceptions (when factual materials can be withheld):
  - 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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### Attorney Work Product Privilege

Two prongs - documents must be:

- 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 Privilege

- ⌄ Prepared by or at the direction of an attorney: Straight forward test.
- ⌄ Real test is "in anticipation of litigation"
  - ↪ No lawsuit has to have actually been filed, but must be foreseeable
  - ↪ Includes criminal prosecutions

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### Attorney Work Product Privilege

No fact/opinion distinction:

- ↳ The privilege covers both factual and deliberative materials.
- ↳ 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

- ↳ Protects:
  - ↳ Confidential information supplied from client to attorney, and
  - ↳ Attorney's advice based upon the client supplied information.

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### Attorney-Client Privilege

- ↳ Does not have to be in anticipation of litigation
- ↳ No fact/opinion distinction
- ↳ But... cannot withhold final, authoritative interpretations of law
  - ↳ No secret law!

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### Foreseeable Harm Analysis

FOIA Improvements Act of 2016: 5 U.S.C. § 552(a)(8)

- ↪ Agencies “shall withhold information . . . 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.”
- ↪ Theoretically applies to all non discretionary exemptions, but usually applied to Exemption 5

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### Foreseeable Harm Analysis

¶ Rosenberg v. DOD, 342 F.Supp.3d 62 (D.D.C. 2018).

- ¶ **Factual background:** General Kelly up for appointment by Trump Administration.
  - ↪ Request for General Kelly’s communications
  - ↪ Withholdings under Exemptions 1, 3, 5, 6, 7
  - ↪ Plaintiff challenged Exemption 5 foreseeable harm analysis

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### Foreseeable Harm Analysis

- ¶ Rosenberg v. DOD, 342 F.Supp.3d 62 (D.D.C. 2018).
- ¶ **Holding:** categorical approach is okay, but must do more than perfunctory statements of harm.
- ¶ *To be clear, the court does not read the statutory “foreseeable harm” requirement to go so far as to require the government to identify harm likely to result from disclosure of each of its Exemption 5 withholdings. A categorical approach will do. But the court agrees with Plaintiffs that the government must do more than perfunctorily state that disclosure of all the withheld information—regardless of category or substance—“would jeopardize the free exchange of information between senior leaders within and outside of the [DOD]”*

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### Foreseeable Harm Analysis

- ¶ Judicial Watch v. U.S. Dept. of Commerce, 375 F. Supp. 3d 93 (D.D.C. 2019)
- ¶ *“The Court finds the analysis in Rosenberg persuasive and agrees that the text and purpose of the Act both support a heightened standard for an agency’s withholdings under Exemption 5.”*
- ¶ In both cases, the agency was given another bite at the apple (to redraft declarations).

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### Foreseeable Harm Analysis

- ¶ Reporters Committee for Freedom of Press v. FBI, DC Circuit, No. 20-5091 (July 2, 2021)
- ¶ **Factual background:** an FBI agent impersonated an AP editor and created a fake news article to deliver malware to the computer of a juvenile who was suspected of making anonymous bomb threats to his Seattle-area high school.
  - ↳ Request for communications and other documents related to the FBI’s internal investigation of this impersonation
  - ↳ Agency withheld materials under Exemption 5 Deliberative Process Privilege

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### Foreseeable Harm Analysis

- ¶ Reporters Committee for Freedom of Press v. FBI, DC Circuit, No. 20-5091 (July 2, 2021)
- ¶ **Holding:**
  - ↳ In creating the foreseeable harm standard, Congress was particularly focused on Exemption 5
  - ↳ The foreseeable harm “imposes an independent and meaningful burden on agencies” if they are to withhold records from the public; “generalized assertions” are not sufficient, nor are “mere speculative or abstract fears, or fear of embarrassment.”

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## Foreseeable Harm Analysis

¶ **Reporters Committee for Freedom of Press v. FBI, DC Circuit, No. 20-5091 (July 2, 2021)**

¶ *[T]he foreseeability requirement means that agencies must concretely explain how disclosure “would” – not “could” – adversely impair internal deliberations. ... A “perfunctory state[ment] that disclosure of all the withheld information – regardless of category or substance – would jeopardize the free exchange of information between senior leaders within and outside of the [agency]” will not suffice. ... Instead, what is needed is 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. Naturally, this inquiry is context specific.*

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## Foreseeable Harm Analysis

¶ **Machado Amadis v. DOJ, D.C. Circuit, No. 19-5088, Aug. 21, 2020**

- ¶ **Background:** Request for records, including “Blitz Forms,” which OIP uses to adjudicate FOIA appeals. Line attorneys fill out the forms to identify issues presented in an appeal, to analyze those issues, and to make recommendations to senior attorneys. In turn, senior attorneys review the Blitz Form for an appeal before finally adjudicating it.
- ¶ Agency produced the Blitz Forms for Machado’s prior appeals, but it redacted the fields for recommendations, discussion, and search notes.
- ¶ Withheld portions under Exemption 5 Deliberative Process

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## Foreseeable Harm Standard

¶ **Machado Amadis v. DOJ, D.C. Circuit, No. 19-5088, Aug. 21, 2020**

- ¶ **Holding:** OIP’s affidavits were sufficiently detailed to meet the foreseeable harm standard.
- ¶ *OIP’s affidavit adequately explained that full disclosure of the Blitz Forms would discourage line attorneys from “candidly discuss[ing] their ideas, strategies, and recommendations,” thus impairing “the forthright internal discussions necessary for efficient and proper adjudication of administrative appeals.” J.A. 272. Such chilling of candid advice is exactly what the privilege seeks to prevent.*
- ¶ *OIP specifically focused on “the information at issue” in the Blitz Forms under review, and it concluded that disclosure of that information “would” chill future internal discussions.*

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## Foreseeable Harm Analysis

### What not to do:

- ↪ **Reporter's Committee: Don't use boilerplate**
  - ↓ Declaration submitted by the FBI's FOIA chief in a different case in 2009 was almost identical to the one submitted in this case, even after the change in the law in 2016
  - ↓ Agency's declarations were "scanty," "cookie-cutter," and "perfunctory"
- ↪ **Roseberg: Don't rely on generalized harms**
  - ↓ Don't just say that release would harm candor, discussion, etc.
- ↪ **Judicial Watch: Don't treat withholding as though no foreseeable harm test has been added - not business as usual**

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## Foreseeable Harm Analysis

### What to do:

- ↪ **Rosenberg:** Categories are okay, but don't make them overly broad
- ↪ **Reporter's Committee:** Focus on security, confidentiality, harm to specific investigations
- ↪ **Reporter's Committee: Provide a 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.

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## Examples

From: thomas.eugene.ogc@federalagency.gov  
 To: joan.shields.ogc@federalagency.gov  
 Date: October 2, 2021  
 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, 2021  
 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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## Examples

**From:** jane.flannery@federalagency.gov  
**To:** wilma.willow.ogc@federalagency.gov;  
**Cc:** tim.nealon@federalagency.gov  
**Date:** May 3, 2021  
**Subject:** Government Contracting Accountability Act of 2020

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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## Examples

**From:** wilma.willow.ogc@federalagency.gov; carol.hogan.ogc@federalagency.gov  
**To:** jane.flannery@federalagency.gov; tim.nealon@federalagency.gov  
**Date:** May 4, 2021  
**Subject:** Government Contracting Accountability Act of 2020

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, 2021

I like that approach.  
 - Tim

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## Exemption 5: Summary

- ↳ To summarize, always remember that Exemption 5 has two parts:
  - ↳ Inter/Intra agency
  - ↳ Privileged
- ↳ Each of the three main privileges has 2 parts:
  - ↳ Deliberative process - predecisional and deliberative
  - ↳ Attorney work-product - prepared by or at the direction of an attorney in reasonable anticipation of litigation
  - ↳ Attorney-client - protects confidential facts and advice given based on this confidential information.

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