



American Society of Access Professionals
FOIA-Privacy Act Workshop 2023
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Exemption 5

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FOIA Exemption 5

“[I]nter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]”

Threshold Requirements

1. Inter-agency or intra-agency

- Within an agency
- Between agencies
- Between an agency and its consultants

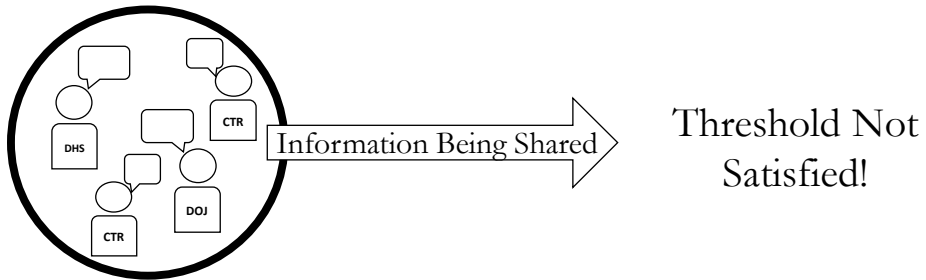
2. Memorandums or letters

- all forms of written communications (e.g. reports, emails, etc.)

3. Incorporation of Civil Discovery Privileges (“Not be available by law to a party other than an agency in litigation with the agency”)

The “Inter-agency or Intra-agency” Threshold

Under Normal Consideration



The “Consultant Corollary”

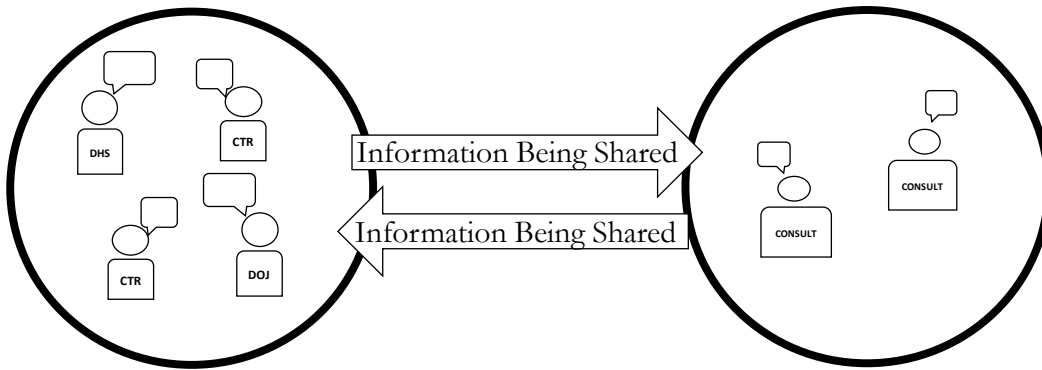
- Agencies frequently have a “special need for the opinions and recommendations of temporary consultants.” (*Soucie v. David*)
- Exemption 5’s threshold is satisfied when records are exchanged with or received from an outside party whose input in an agency is needed.
Consultants effectively function as if they were agency employees.
- The “consultant” can be paid or volunteer; a contractual relationship is not required. But the consultant cannot have a direct interest in the agency’s decision.
- With limited exceptions, advice from a “consultant” must be coming **into** the agency and not **from** the agency to another entity.

Who qualifies as a “consultant”?

- **General Rule** (*Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 552 U.S. 1 (2001)):
 - A consultant cannot be **(1)** seeking a government benefit **(2)** at the expense of another party (e.g. grant applicant)
 - A “direct interest” is disqualifying, but the degree of self-interest is what matters
 - Exemption 5’s threshold has “independent vitality”
- **Some Special Exceptions to the Rule:**
 - Former Presidents (*Pub. Citizen v. Dep’t of Justice*)
 - Senators/Congress (*Ryan v. Dep’t of Justice*)
 - But see *Dow Jones & Co v. Dep’t of Justice* (Advice to Congress) AND *Am. Oversight v. Dep’t of Transp.*
 - Presidential Commissions (*Judicial Watch v. Dep’t of Energy*)
- **Other Unusual Examples:**
 - Nominees; Foreign Governments; Judges and Special Prosecutors
 - “Common Interest”
- **Note:** The Sixth Circuit has not adopted the “consultant corollary” (*Lacaj v. Fed. Bureau of Investigation* (2017))

“Inter-agency or Intra-agency” Threshold

Under the Consultant Corollary



Under the “consultant corollary,” Exemption 5’s initial threshold is still satisfied!

Civil Discovery Privileges

- In theory, all privileges that would be available in federal civil discovery can be used with Exemption 5, including statutory, common law, and judicially created privileges.
- An agency must demonstrate the type of material it seeks to withhold is “**generally protected** for reasons similar to those asserted by the agency in the FOIA context.” Are the records “**routinely disclosed**”?
- The most common Exemption 5 privileges:
 1. Deliberative-Process Privilege
 2. Attorney-Client Privilege
 3. Attorney Work-Product Privilege



Common Exemption 5 Privileges

Privilege	What is it?	Why does it exist?	Technical Requirements
Attorney Work-Product Privilege	A judicially created doctrine that protects materials prepared in anticipation of litigation.	To prevent opposing parties from receiving unfair advantages in litigation by keeping secret an advocate's preparation.	1. Prepared by or at the direction of an attorney. 2. Created in reasonable anticipation of litigation.
Attorney-Client Privilege	A common-law privilege that protects confidential communication between the client and attorney.	To allow the open and candid discussion needed to provide sound legal advice.	1. Communication must be between attorney and client. 2. Communication must be "confidential."
Deliberative-Process Privilege	A common-law privilege that protects the internal processes of agency decision making.	1. To assure agency employees that they can express uninhibited opinions without fear of public scrutiny (<i>i.e.</i> , to encourage open and frank discussion). 2. To prevent premature disclosure of proposed policies. 3. To protect against public confusion from the release of deliberations and proposed decisions that were not ultimately adopted.	1. <u>Pre-decisional</u> : Made BEFORE the adoption of a policy or opinion. It must have assisted in decision making—even if a proposal "dies on the vine" —rather than justified a decision already made. NOTE: "Incorporation" and "Adoption" 2. <u>Deliberative</u> : Makes recommendations or expresses opinions on legal or policy matters; does not generally include factual materials. 3. 25-year "Sunset" Provision

Deliberative-Process Privilege:

- Information that has been incorporated or adopted loses the predecisional status
 - **Incorporation** = The decisionmaker expressly cites a previously predecisional document as the rationale for an agency's decision
 - **Adoption** = A previously predecisional document comes to be used by the agency as the embodiment of agency policy

Foreseeable Harm Standard

- Codified by the FOIA Improvement Act of 2016. *See* 5 U.S.C. § 552(a)(8). Previously applied as a matter of policy.
- **Does the agency (1) reasonably foresee that disclosure would harm an interest protected by an exemption, or (2) is disclosure prohibited by law?**
- Analysis must be **context specific** – not generalized or speculative.
- Requires 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.
- Disclosure **would** result in harm – not just **could** result in harm.
- In accordance with the Attorney General's 2022 FOIA Guidelines, agencies should confirm in their administrative response letters that they have applied the foreseeable harm standard when considering disclosure determinations.

Key Court Decisions

- “[T]he 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[.]’”
- ***Rosenberg v. Dep’t of Def.*, 342 F. Supp. 3d 62 (D.D.C. 2018)**
- “[G]eneralized assertions’ are not sufficient, nor are ‘mere speculative or abstract fears, or fear of embarrassment.’ . . . [W]hat 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.”
- ***Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 3 F.4th 350 (D.C. Cir. 2021)**

Relevant OIP Guidance

- March 2022 Garland Memo on FOIA
- “Applying a Presumption of Openness and the Foreseeable Harm Standard” (March 2023)
- “Applying the ‘Foreseeable Harm’ Standard Under Exemption 5” (FOIA Update,

vol. XV, No. 2 (1994))

Foreseeable Harm Standard

INSUFFICIENT	SUFFICIENT
Perfunctory statements that disclosure would/could be harmful (e.g. impede free exchange of information)	Describe how disclosure of the specific category or substance of information would be harmful
Generally assert disclosure would/could be harmful	Describe how specific disclosure would be harmful because of concrete reason
Speculate about harms	Identify actual harms to occur
Embarrassment to the agency	

Foreseeable Harm – Practical Tips

- Analysis for Exemption 5 purposes:
 - Step 1: Is the threshold met? → YES
 - Step 2: Does a privilege apply? → YES
 - Step 3: Would disclosure of the information result in a foreseeable harm?
 - If YES → withhold
 - If NO → release
- What **not** to do:
 - Use boilerplate language
 - Rely on generalized harms
 - Treat the standard as mere codification of existing practice (“business as usual”)
- Best Practices:
 - Categorical approaches are fine, but don’t make categories overly broad
 - Concretely show why disclosure of a particular record (or type of material) **will**, in the context of the agency action implicated by the record, impede the same kind of deliberations/communications going forward
 - Consider the sensitivity of a document’s content; the age of a record; the status of the underlying decision; status of involved parties, *etc.*

Foreseeable Harm – Open Questions

- Does the foreseeable harm standard apply to all exemptions? What does “prohibited by law” mean?
- How do we identify the “interest” protected by an exemption?
- How does the analysis change for each exemption—or, with Exemption 5, between different privileges?

Applicability to Exemptions:

- Exemption 3 → Doesn't apply because information is exempt by statute
- Withholdings under the following exemptions ordinarily require that disclosure would result in a foreseeable harm
 - Exemption 1 (properly classified information)
 - Exemption 4 (trade secrets and confidential commercial or financial information)
 - Exemption 6 (clearly unwarranted invasion of personal privacy)
 - Exemption 7 (information compiled for law enforcement purposes where certain predicates of likely harm are satisfied)

Example 1

From: joan.shields.ogc@federalagency.gov
To: thomas.eugene.ogc@federalagency.gov
Date: July 5, 2023
Subject: RE: Draft Declaration

Tom: I have made some revisions to Section A of the declaration. A revised version with my redlines is attached. I think we need to do more to emphasize our authority to intervene given the factual circumstances of the case. Please review and let's discuss when you have a chance.
-Joan

From: thomas.eugene.ogc@federalagency.gov
To: joan.shields.ogc@federalagency.gov
Date: July 2, 2023
Subject: Draft Declaration

Joan: Please review the attached draft declaration and let me know if you have any questions. This declaration is due on July 7th.
-Tom

Example 2

From: jane.flannery@federalagency.gov

To: wilma.willow.ogc@federalagency.gov

Cc: tim.ncalon@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

Example 3

From: tim.nealon@federalagency.gov

To: wilma.willow.ogc@federalagency.gov; jane.flannery@federalagency.gov; carol.hogan.ogc@federalagency.gov;

Date: May 5, 2021

Subject: RE: Government Contracting Accountability Act of 2020

I like that approach.

- Tim

From: wilma.willow.ogc@federalagency.gov

To: jane.flannery@federalagency.gov; tim.nealon@federal agency.gov; carol.hogan.ogc@federalagency.gov

Date: May 4, 2021

Subject: RE: Government Contracting Accountability Act of 2020

Jane: We are currently in the process of reviewing the new reporting provisions, and 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

Example 4

Internal Memorandum

To: John McGuffrie, Program Office Director

From: Evan Klinefeld, Office of the Secretary

Subject: Status of Responses to Regulatory Comments

Date: July 1, 1998

John,

I just spoke with Sec1. He is planning on speaking with a stakeholder from an important industry group next week, and he would like to have a sense of where we stand with preparing responses to reg comments received on the latest NPRM. Also, what is the expected timeframe on finalizing the rule? We should talk about looping in our comms team soon.

It was also a pleasure to meet your wife and kids last week at the meet-up at the WH.

Be well,

Evan

Example 5

From: Tracy Smith (tsmith@agency.gov)

To: Gary Lee (glee@agency.gov)

CC: Rebecca Eccles – CONTRACTOR (reccles@foiafirm.com)

Date: February 12, 2021

Subject: FOIA Coordination Committee

Gary,

Could we please make sure that, going forward, any FOIA requests that could even remotely be considered politically sensitive are elevated for discussion with the coordination committee? We need to make sure any response is given an extra layer of review. Thanks.

Tracy

PS: Adding Becky, so she can keep our contracted processors in the loop, too.

Example 6

From: ogc@fedagency1.gov

To: stateAG@stategov.gov

CC: ogc@fedagency2.gov

Date: June 2, 2023

Subject: Did you see this news?

-CONFIDENTIAL-

Fellow Team Mates: I know we've been following the news about this group. Wanted to keep you all in the loop. Talk soon!

Best,

OGC Enforcements Intake

Q&A