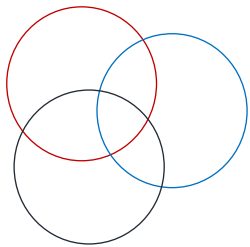


American Society of Access Professionals
National Training Conference 2023

Exemption 5

Greg Bridges, Federal Emergency Management Agency
Ryan Mulvey, Americans for Prosperity Foundation

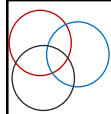
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Agenda

- Initial Threshold
- Common Privileges
- Ex 5 Tips
- Foreseeable Harm
- Discussion and Q&A
- Conclusion

2



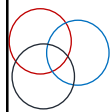
Initial Threshold

Official Language

“[I]nter-agency or intra-agency¹ memorandums or letters² which would not be available by law to a party other than an agency in litigation with the agency[.]³”

1. Can include anything created by and internal to the government, as well as materials created by external consultants and experts hired by the government.
2. “Memorandums or letters” can include all written communications.
3. “[N]ot available by law to a party in litigation” means information routinely protected in civil discovery by federally recognized privileges.

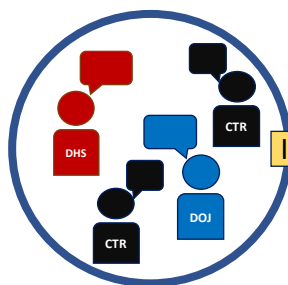
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Initial Threshold

Inter-agency or Intra-agency Threshold

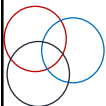
Under Normal Consideration



Information Being Shared

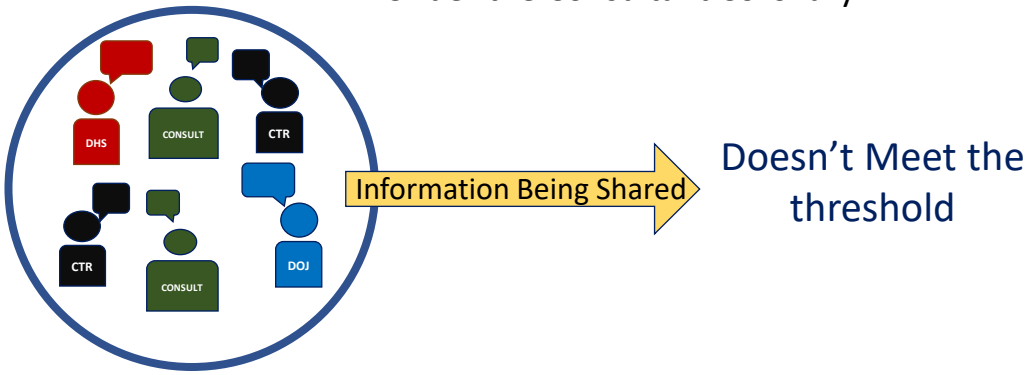
Doesn't Meet the
threshold

4

 Initial Threshold

Inter-agency or Intra-agency Threshold

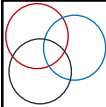
Under the Consultant Corollary^{1,2,3}



Information Being Shared → Doesn't Meet the threshold

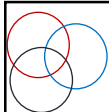
1. Under the “consultant corollary,” the initial threshold is satisfied when records are received from an outside party whose input in an agency decision is needed (consultant). Consultants effectively function as if they were agency employees.
2. The “consultant” can be paid or volunteer; a contractual relationship is not required. There can be no direct interest in the agency’s decision. (*Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001))
3. With limited exceptions, advice from a consultant must be coming into the agency and not from the agency.

5

 Common Exemption 5 Privileges

Privilege	What it is	Why it Exist	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.	<ol style="list-style-type: none"> 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.	<ol style="list-style-type: none"> 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.	<ol style="list-style-type: none"> 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. 	<ol style="list-style-type: none"> 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. 2. <u>Deliberative</u>: Makes recommendations or expresses opinions on legal or policy matters; does not generally include factual materials. 3. “Sunset Provision”: Records must be less than 25 years old

6



Tips on Exemption 5

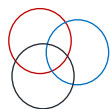
Agencies

- When you cannot provide details on the decision-making, provide details on the basis for the final decision.
- If (b)(6) could be justified on the individuals involved, the harm to their opinions and recommendations could be reduced.
- Provide records that respond to the reason the requester submitted the request and not necessarily what they wrote.

Requesters

- Be transparent about what you are seeking to verify/confirm when submitting email searches.
- Do not use catch-all phrases (i.e. any and all) for request about decision-making.
- Be prepared to submit multiple requests for all information on an agency decision.

7



Foreseeable Harm Standard

- An analysis of whether it is reasonable to foresee harm in disclosure to an interest protected by an exemption.
- It has been a requirement since the FOIA Improvement Act of 2016, 5 U.S.C. § 552(a)(8).

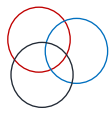
Important Court Decisions

- “[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))

8

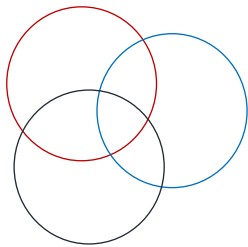


Foreseeable Harm Standard

Foreseeable Harm – Practical Tips

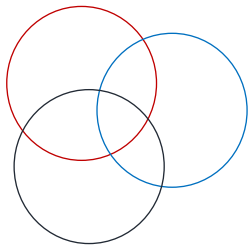
- The required analysis should focus, at least for deliberative process privilege withholdings, on the harm in the agency decision making process.
- The harm analysis must not be incorporated into the threshold requirement—it builds on technical requirements for invocation of a statutory exemption.
- What **not** to do:
 - Use boilerplate
 - 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
 - Provide a concrete demonstration of 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.
- 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?

9



Discussion Q&A

10



Conclusion