The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise-exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute "a serious abuse of agency discretion" redressable through a reverse FOIA suit.[581] Thus, in the absence of a statute or properly promulgated regulation giving the agency authority to release the information -- which would remove the disclosure prohibition of the Trade Secrets Act -- a determination by an agency that information falls within Exemption 4 is "tantamount" to a decision that it cannot be released.[582]

EXEMPTION 5

Exemption 5 of the FOIA 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."[1] The courts have construed this somewhat opaque language, with its sometimes confusing threshold requirement,[2] to "exempt those documents, and only those documents that are normally privileged in the civil discovery context."[3]

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[580](...continued)
limited practical significance"); Frazee v. U.S. Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996) (holding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act") (reverse FOIA suit).

[581] Nat'l Org. for Women v. Soc. Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord McDonnell Douglas, 57 F.3d at 1164 (holding that the Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as 'contrary to law' within the meaning of the Administrative Procedure Act"); Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (reverse FOIA suit); see also FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4") (advising that the Trade Secrets Act is "a potent barrier to the disclosure of any information that falls within the protection of Exemption 4").

[582] CNA, 830 F.2d at 1144.

[1] 5 U.S.C. § 552(b)(5) (2000 & Supp. IV 2004).

[2] See, e.g., U.S. Dep't of Justice v. Julian, 486 U.S. 1, 19 n.1 (Scalia, J., dissenting on a point not reached by the majority) (discussing the "most natural reading" of the threshold and the "problem[s]" inherent in reading it in that way).

[3] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819
(continued...)

EXEMPTION 5

Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"[4] the Supreme Court subsequently made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history.[5] Accordingly, the Court of Appeals for the District of Columbia Circuit has stated that the statutory language "unequivocally" incorporates "all civil discovery rules into FOIA [Exemption 5]."[6] However, this incorporation of discovery privileges requires that a privilege be applied in the FOIA context exactly as it exists in the discovery context.[7] Thus, the precise contours of a privilege, with regard to applicable parties or the types of information that are protectible, are also incorporated into the FOIA.[8]

Additionally, it is not the "hypothetical litigation" between particular parties (in which relevance or need are appropriate factors) that governs Exemption 5's applicability;[9] rather, it is the circumstances in civil litigation in which memoranda would "routinely be disclosed."[10] Therefore, whether

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[3](...continued)
F.2d 1181, 1184 (D.C. Cir. 1987); see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (highlighting importance of protecting privileged information).

[4] Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

[5] See U.S. v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); see also FOIA Update, Vol. V, No. 4, at 6. But see also Burka v. HHS, 87 F.3d 508, 517 (D.C. Cir. 1996) ("[T]o justify nondisclosure under Exemption 5, an agency must show that the type of material it seeks to withhold is generally protected in civil discovery for reasons similar to those asserted by the agency in the FOIA context.").

[6] Martin, 819 F.2d at 1185; see also Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("Exemption 5 requires the application of existing rules regarding discovery.").

[7] See Burka v. HHS, 87 F.3d 508, 517 (D.C. Cir. 1996); see also Julian, 486 U.S. at 13 (1988) (holding that presentence report privilege, designed to protect report subjects, cannot be invoked against them as first-party requesters).

[8] See id.

[9] Sears, 421 U.S. at 149 n.16.

[10] H.R. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418.

the privilege invoked is absolute or qualified is of no significance.[11] Accordingly, no requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which he is a party.[12] Indeed, such an approach, combined with a careful application of Exemption 5's threshold language, is the only means by which the Supreme Court's firm admonition against use of the FOIA to circumvent discovery privileges can be given full effect.[13] Nevertheless, the fact that information is not generally discoverable does not necessarily mean that it is not discoverable by a specific class of parties in civil litigation, so just as the FOIA's privacy exemptions are not used against a first-party requester,[14] a privilege that is designed to pro-

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[11] See Grolier, 462 U.S. at 27; see also FOIA Update, Vol. V, No. 4, at 6.

[12] See Grolier, 462 U.S. at 28; Sears, 421 U.S. at 149; see also, e.g., Martin, 819 F.2d at 1184 ("[T]he needs of a particular plaintiff are not relevant to the exemption's applicability."); Swisher v. Dep't of the Air Force, 660 F.2d 369, 371 (8th Cir. 1981) (observing that applicability of Exemption 5 is in no way diminished by fact that privilege may be overcome by showing of "need" in civil discovery context); MacLean v. DOD, No. 04-CV-2425, slip op. at 8-9 (S.D. Cal. June 2, 2005) ("[S]ince there is no 'need' determination under FOIA, there is no room for this Court to balance the public's interest in disclosure against defendants' interest in protecting the deliberative process."); Bilbrey v. U.S. Dep't of the Air Force, No. 00-0539, slip op. at 11 (W.D. Mo. Jan. 30, 2001) ("Once a government agency makes a prima facie showing of privilege, the analysis under FOIA Exemption 5 ceases, and does not proceed to the balancing of interests."), aff'd, No. 01-1789, 2001 WL 1222471, at *1 (8th Cir. Oct. 16, 2001) (unpublished table decision). But see In re Diet Drugs Prods. Liability Litig., No. 1203, 2000 WL 1545028, at *4 (E.D. Pa. Oct. 12, 2000) (stating that a court must balance the "relative interests of the parties" in determining the applicability of the deliberative process privilege under Exemption 5).

[13] See Weber Aircraft, 465 U.S. at 801-02 ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."); see also Martin, 819 F.2d at 1186 (Where a requester is "unable to obtain those documents using ordinary civil discovery methods, . . . FOIA should not be read to alter that result."); Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. Civ.A.04-1919, 2005 WL 913268, at *7 (D.D.C. Apr. 20, 2005) ("[T]he purpose of FOIA is not to serve as a tool for obtaining discovery for an administrative forfeiture proceeding."), reconsideration granted in part & denied in part on other grounds, 374 F. Supp. 2d 129 (D.D.C. 2005); cf. Nat'l Ass'n of Criminal Def. Lawyers, No. 97-372, slip op. at 8-10 (D.D.C. July 22, 1998) (holding that although agency made limited disclosures of report pursuant to criminal discovery rules, it was protectible because it was not "normally available by law" to party in litigation with agency).

[14] See H.R. Rep. No. 93-1380, at 13 (1974); see also FOIA Update, Vol. X,

(continued...)

tect a certain class of persons cannot be invoked against those persons as FOIA requesters.[15]

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts, somewhat imprecisely, as "executive privilege"[16]), the attorney work-product privilege, and the attorney-client privilege.[17] First, however, Exemption 5's threshold requirement must be considered.

"Inter-Agency or Intra-Agency" Threshold Requirement

The threshold issue under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums" -- a phrase which, at first glance, would seem to encompass only documents generated by an agency and not documents circulated beyond the executive branch.[18] Six years ago, the Supreme Court shed much light on this issue when it ruled on the contours of Exemption 5's "inter-agency or intra-agency" threshold requirement for the first time in De-

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[14](...continued)
No. 2, at 4.

[15] See Julian, 486 U.S. at 13 (holding that presentence report privilege, designed to protect reports' subjects, cannot be invoked against them as first-party requesters); see also United States v. Kipta, No. 97-638-1, 2001 WL 477153, at *1 (N.D. Ill. May 3, 2001) (following Julian).

[16] See, e.g., Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1305 (Fed. Cir. 2006) (noting that deliberative process privilege is one of many privileges that generally fall under rubric of "executive privilege") (non-FOIA case).

[17] See Sears, 421 U.S. at 149.

[18] See U.S. Dep't of Justice v. Julian, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting on a point not reached by the majority) (observing that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency -- as opposed to an 'inter-agency memorandum,' which would be a memorandum between employees of two different agencies"); see also, e.g., Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 322 (D.D.C. 2005) (ruling that documents exchanged between federal prisoner and prison staff do not meet threshold standard); Homick v. U.S. Dep't of Justice, No. C 98-00557, slip op. at 18 (N.D. Cal. Sept. 16, 2004) (holding that document exchanged between agency employee and private attorney does not qualify under threshold standard); Canning v. U.S. Dep't of Justice, No. 01-2215, slip op. at 16 (D.D.C. Mar. 9, 2004) (ruling that document in agency file that reflected communication between private client and attorney does not meet threshold standard).

partment of the Interior v. Klamath Water Users Protective Ass'n.[19] In a unanimous decision, the Court ruled that the threshold of Exemption 5 did not encompass communications between the Department of the Interior and several Indian tribes which, in making their views known to the Department on certain matters of administrative decisionmaking, not only had "their own, albeit entirely legitimate, interests in mind,"[20] but also were "seeking a Government benefit at the expense of other applicants."[21] Thus, records submitted to the agency by the Tribes, as "outside consultants," did not qualify for attorney work-product and deliberative process privilege protection in the case.[22]

Significantly, the Supreme Court's holding in Klamath rested on distinctly narrower grounds than did the appellate court's ruling below.[23] Before the case reached the Supreme Court, the Court of Appeals for the Ninth Circuit had held that Exemption 5's threshold could not accommodate communications between an agency and any "outside consultant" who has a "direct interest" in the subject of its "consultation" with the agency.[24] But this simplistic "direct interest" test did not survive the Supreme Court's review.[25]

Rather, while acknowledging that "consultants whose communications have typically been held exempt have not been communicating with the Government in their own interest" or on behalf of anyone else "whose interests might be affected by the Government action addressed by the consultant,"[26] the Supreme Court went one step further than the Ninth Circuit in its analysis. "While this fact alone distinguishes tribal communica-

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[19] 532 U.S. 1 (2001); see also *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (discussing meaning, contours, and implications of Klamath decision).

[20] Klamath, 532 U.S. at 12.

[21] Id. at 12 n.4.

[22] Id. at 16.

[23] See *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (analyzing differences between Supreme Court's and Ninth Circuit's decisions).

[24] Klamath Water Users Protective Ass'n v. Department of the Interior, 189 F.3d 1034, 1038 (9th Cir. 1999), aff'd, 532 U.S. 1 (2001).

[25] See *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (emphasizing that "the Supreme Court ultimately applied an Exemption 5 threshold test rooted in . . . competition . . . not the Ninth Circuit's more general test that disqualified an outside party due to the existence of a self-interest alone").

[26] Klamath, 532 U.S. at 12.

tions from the consultants' examples recognized by several Courts of Appeals," the Court reasoned, "the distinction here is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone."[27]

Indeed, by limiting its holding to only those communications in which the "outside consultant" has an interest in the outcome of the decisionmaking process and in which other existing parties have competing interests in "benefits inadequate to satisfy everyone," the Court pointedly refrained from adopting a rule any broader than the facts of the case required.[28] Rather, it limited its holding to situations involving the advocacy of competing external interests by those who might otherwise qualify as consultants for purposes of satisfying Exemption 5's threshold.[29]

During the years leading up to Klamath, in recognition of the necessities and practicalities of agency functioning, many courts had construed the scope of Exemption 5 to include various types of communications originating outside of agencies.[30] This pragmatic approach to the "inter-agency or intra-agency" threshold requirement, which in light of Klamath may be characterized as an "outside consultant" test, in the past often was characterized as a "functional test" for assessing the availability of Exemption 5 protection.[31] In Klamath, the Supreme Court assumed for purposes of its decision, and thereby implicitly strengthened, the pragmatic "outside consultant" approach to Exemption 5's threshold language.[32]

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[27] Id. (emphasis added).

[28] See id. at 12 n.4 (declining to overrule Pub. Citizen, Inc. v. U.S. Dep't of Justice, 111 F.3d 168, 170-72 (D.C. Cir. 1997), and Ryan v. Dep't of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980), both of which "arguably extend beyond" the "typical examples" of cases of consultants whose communications have been considered "intra-agency").

[29] See *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (pointing out that Public Citizen and Ryan, "and their potential progeny, stand apart from what clearly was rejected under the Court's bottom-line threshold test").

[30] See Burt A. Braverman & Francis J. Chetwynd, Information Law: Freedom of Information, Privacy, Open Meetings, and Other Access Laws § 9-3.1 (1985 & Supp. 1990).

[31] See, e.g., Durns v. Bureau of Prisons, 804 F.2d 701, 704 n.5 (D.C. Cir. 1986) (employing "a functional rather than a literal test in assessing whether memoranda are 'inter-agency or intra-agency'"), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988).

[32] See Klamath, 532 U.S. at 9-11 (discussing cases involving communications from "outside consultants"); see also *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (pointing out that such "outside con-

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Regarding records generated outside an agency but created through agency initiative, whether purchased or provided voluntarily without compensation, the Court of Appeals for the District of Columbia Circuit observed in Ryan v. Department of Justice[33] that "Congress apparently did not intend 'inter-agency or intra-agency' to be rigidly exclusive terms, but rather to include [nearly any record] that is part of the deliberative process."[34] Included in this category are such things as recommendations from Members of Congress,[35] recommendations from judges and special prosecutors,[36] recommendations from an agency to a commission established to assist another agency's policymaking,[37] and documents provided by an agency's contractor employees.[38]

Likewise, the D.C. Circuit has held that Exemption 5 applies to docu-

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[32](...continued)
sultant" decisions "still stand as sound precedents for the satisfaction of Exemption 5's threshold requirement").

[33] 617 F.2d 781 (D.C. Cir. 1980).

[34] Id. at 790; see also Hooper v. Bowen, No. 88-1030, slip op. at 18 (C.D. Cal. May 24, 1989) ("courts have regularly construed this threshold test expansively rather than hypertechnically"); FOIA Update, Vol. III, No. 3, at 10 ("FOIA Counselor: Protecting 'Outside' Advice"); cf. Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No. 97-372, slip op. at 7-8 (D.D.C. July 22, 1998) (protecting agency-generated draft report circulated to nongovernmental parties for review and comment).

[35] See Ryan, 617 F.2d at 790 (protecting recommendations on judicial nomination process made by senators to Attorney General).

[36] See Lardner v. U.S. Dep't of Justice, No. 03-0180, U.S. Dist. LEXIS 5465, at *51-52 (D.D.C. Mar. 31, 2005).

[37] See Tigue v. U.S. Dep't of Justice, 312 F.3d 70, 78-79 (2d Cir. 2002) (protecting recommendations from a United States Attorney's Office to the Webster Commission, which was established to serve "as a consultant to the IRS").

[38] See Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (upholding agency's invocation of Exemption 5 to protect documents prepared by private contractor hired to perform audit for agency); Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 292 (4th Cir. 2004) (applying privilege analysis to documents prepared by attorney hired by private company in contractual relationship with agency); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 76 n. 2 (D.D.C. 2003) (holding that "witness statements from Forest Service contractor employees may be considered 'inter-agency or intra-agency' for the purpose of Exemption 5," citing Klamath, 532 U.S. at 10-11).

ments originating with a court.[39] Under this commonsense approach, documents generated by consultants outside of an agency were typically found to qualify for Exemption 5 protection because agencies, in the exercise of their primary functions, commonly have "a special need for the opinions and recommendations of temporary consultants."[40] Indeed, it has long been recognized under the FOIA that such advice can "play[] an integral function in the government's decision[making]."[41] And though frequently these consultants are called upon because there is no one readily available in the agency with the particular expertise that the consultant has,[42] there

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[39] Durns, 804 F.2d at 704 & n.5 (applying Exemption 5 to presentence report prepared by probation officer for sentencing judge, with copies provided to Parole Commission and Bureau of Prisons); cf. Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5 -- without even discussing "inter-agency or intra-agency" threshold -- to material supplied by outside contractors).

[40] Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (recognizing importance of outside consultants in deliberative process privilege context).

[41] Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980) (protecting appraiser's report solicited by agency); see also, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979) (protecting consultant's report concerning safe levels of workplace lead exposure); Wu v. Nat'l Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (protecting recommendations of volunteer consultants); Pohlman, Inc. v. SBA, No. 4:03-01241, slip op. at 23 (E.D. Mo. Sept. 30, 2005) (protecting market valuation report prepared for agency by outside consultant); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1355 (D.N.M. 2002) (protecting recommendations provided by private company hired by BIA); cf. Rashid v. HHS, No. 98-0898, slip op. at 6-7 (D.D.C. Mar. 2, 2000) (holding correspondence sent by Assistant United States Attorney to expert witness, requesting evaluation of evidence in case, protectible under attorney work-product privilege); Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 142 (D. Mass. 1998) ("[L]etters from a federal agency to a state agency that solicit or respond to the state agency's input in an effort to coordinate and tailor joint regulatory efforts may be no less a part of the federal agency's deliberative processes than the state agency's recommendations or advice when acted upon at the federal level."); Judicial Watch, Inc. v. Comm'n on U.S.-Pac. Trade & Inv. Policy, No. 97-0099, slip op. at 9 (D.D.C. Sept. 30, 1999) (protecting recommendations from individuals outside government regarding proposed executive branch appointees); Hooper, No. 88-1030, slip op. at 17-19 (C.D. Cal. May 24, 1989) (protecting records originating with private insurance companies which acted as "fiscal intermediaries" for Health Care Financing Administration).

[42] See Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1122-23 (D.C. Cir. 1989) (noting instances in which court had allowed agency consultations with

(continued...)

is no requirement that outside consultants be engaged in providing expertise unavailable within the agency for Exemption 5 to apply.[43]

While agencies often are the recipients of expert advice, they also occasionally provide it. In Dow Jones & Co. v. Department of Justice, the D.C. Circuit held that documents conveying advice from an agency to Congress for purposes of congressional decisionmaking are not "inter-agency" records under Exemption 5 for the simple reason that Congress is not an "agency" under the FOIA -- though the court also held that agencies may protect communications outside of an agency if they are "part and parcel of the agency's deliberative process."[44]

In applying the basic rationale of the Dow Jones decision, the District Court for the District of Columbia found in 2004 that documents created by an agency to assist the decisionmaking process of a presidentially created commission, the National Energy Policy Development Group (NEPDG), could not be protected by Exemption 5.[45] The lower court ruled that just as Congress did not qualify as an "agency" for FOIA purposes, neither did the NEPDG, a White House entity likewise not subject to the FOIA.[46] However, this decision was overturned on appeal by the Court of Appeals for the District of Columbia Circuit.[47] The D.C. Circuit recognized that the NEPDG did

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[42](...continued)
outside experts to meet Exemption 5 threshold test).

[43] See Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 345 (D.D.C. 2005) (holding that there is "no requirement . . . that outside consultants possess expertise not possessed by those inside the agency").

[44] 917 F.2d 571, 574-75 (D.C. Cir. 1990); see also Texas v. ICC, 889 F.2d 59, 61 (5th Cir. 1989) (holding that a document sent from an agency to an outside party did not meet the threshold standard because it was "a mere request for information, not a consultation or a solicitation of expert advice"); Paisley v. CIA, 712 F.2d 686, 699 n.54 (D.C. Cir. 1983) (presaging Dow Jones by suggesting that agency responses to congressional requests for information may not constitute protectible "inter-agency" communications); cf. Hennessey v. U.S. Agency for Int'l Dev., No. 97-1133, 1997 WL 537998, at *3 (4th Cir. Sept. 2, 1997) (finding no "intra-agency 'deliberative process,'" as agency intended all interested parties to be involved in decision).

[45] See Judicial Watch, Inc. v. U.S. Dep't of Energy, 310 F. Supp. 2d 271, 315 (D.D.C. 2004).

[46] See id.

[47] See Judicial Watch, Inc. v. U.S. Dep't of Energy, 412 F.3d 125, 130-31 (D.C. Cir. 2005).

not qualify as an agency as defined by the FOIA,[48] yet it noted that the NEPDG was created specifically to advise the President on a policy issue and, therefore, that it would be "inconceivable" for Congress to have intended for Exemption 5 to apply to decisionmaking processes where the decisionmaker was an agency official subject to presidential oversight but not to decisionmaking processes where the decisionmaker is the President himself.[49] Underscoring the reading that the D.C. Circuit has traditionally given to the Exemption 5 threshold, the court firmly emphasized that "a document need not be created by an agency or remain in the possession of the agency in order qualify as 'intra-agency.'"[50]

In reversing this lower court decision, the D.C. Circuit acted consistently with the Supreme Court's 1973 decision in EPA v. Mink,[51] in which the Supreme Court declared that it was "beyond question that [agency documents prepared for a presidentially created committee organized to advise him on matters involving underground nuclear testing] are 'inter-agency or intra-agency' memoranda or 'letters' that were used in the decisionmaking processes of the Executive Branch."[52]

The D.C. Circuit's analysis in this case is entirely consistent with its analysis a year earlier in Judicial Watch, Inc. v. Department of Justice, in which it ruled that certain Department of Justice communications to the President or the Office of the President regarding pardons were properly protected under the presidential communications privilege.[53] The necessary implication of the D.C. Circuit's ruling was that these records were protected under Exemption 5 despite the fact that neither the President nor the Office of the President is an "agency" subject to the FOIA.[54]

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[48] See id. at 129.

[49] See id. at 130.

[50] Id. (concluding, both implicitly and pragmatically, that its Dow Jones result was one thing for Congress, as the maker of laws under the Constitution, but would be quite another if applied to a President).

[51] 410 U.S. 74 (1973).

[52] Id. at 85 (emphasis added); see also Ryan, 617 F.2d at 786-87 (rejecting argument that Attorney General is not "agency" when acting in advisory capacity to President); Berman v. CIA, 378 F. Supp. 2d 1209, 1219-20 (E.D. Cal. 2005) (rejecting argument that documents prepared for President are not "inter-agency" simply because President is not "agency").

[53] No. 03-5098, 2004 WL 980826, at *11 (D.C. Cir. May 7, 2004).

[54] See, e.g., McDonnell v. Clinton, No. 97-1535, 1997 WL 33321085, at *1 (D.D.C. July 3, 1997) (holding that the "Office of the President, including its personal staff . . . whose sole function is to advise and assist the President, does not fall within the definition of agency" (citing Kissinger v. Reporters

(continued...)

In Formaldehyde Institute v. HHS,[55] the D.C. Circuit found that Exemption 5's "inter-agency or intra-agency" threshold requirement was satisfied even where no "formal relationship" existed between HHS and an outside scientific journal engaged in the process of reviewing an article that was submitted by an HHS scientist for possible publication.[56] The D.C. Circuit stated that the deciding factor was the "role" that the evaluative comments from the journal's reviewers played in the process of agency deliberations -- that is, they were regularly relied upon by agency authors and supervisors in making the agency's decisions.[57] More recently, in Public Citizen, Inc. v. U.S. Department of Justice,[58] the D.C. Circuit likewise protected the consultative relationship between former Presidents and agencies under the Presidential Records Act,[59] going so far as to conclude that "[c]onsultations under the Presidential Records Act are precisely the type that Exemption 5 was designed to protect."[60] It should be noted, moreover, that the Supreme Court in Klamath explicitly left open the continued viability of the D.C. Circuit's precedents in both Public Citizen and Ryan, noting that these two decisions "arguably extend" beyond the "typical examples" of cases in which communications of outside consultants have been held to satisfy "inter-agency or intra-agency" threshold.[61] It still remains to be seen exactly how such pre-Klamath precedents will develop further under Kla-

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[54](...continued)
Comm. for Freedom of the Press, 445 U.S. 136, 150-55 (1980))), aff'd, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished table decision); cf. AFL-CIO v. FEC, 177 F. Supp. 2d 48, 64 (D.D.C. 2002) (suggesting that FOIA might be "unconstitutional as applied" in particular context, while not reaching issue due to "judicial preference for resolving matters on non-constitutional grounds"), aff'd on other grounds, 333 F.2d 168 (D.C. Cir. 2003); accord Mink, 410 U.S. at 85 (avoiding constitutional infirmity, albeit sub silentio, through nondisclosure result).

[55] 889 F.2d 1118 (D.C. Cir. 1989).

[56] Id. at 1123-24.

[57] Id. (citing CNA, 830 F.2d at 1161); see also Weinstein v. HHS, 977 F. Supp. 41, 44-45 (D.D.C. 1997) (protecting evaluations by outside scientific experts utilized in "NIH's competitive grant application process"). But see Texas, 889 F.2d at 62 (embracing old "functional test" but finding it not satisfied for documents submitted by private party not standing in any consultative or advisorial role with agency).

[58] 111 F.3d 168 (1997).

[59] 44 U.S.C. §§ 2201-07 (2000).

[60] 111 F.3d at 171.

[61] 532 U.S. at 12 n.4; see also *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01).

math in future cases involving the contours of Exemption 5's threshold.[62]

In two cases decided subsequent to Klamath, federal district courts have limited the threshold test as laid out by the Supreme Court. In Merit Energy Co. v. United States Department of the Interior,[63] the District Court for the District of Colorado held that communications between a Native American tribe and the agency did not meet the "inter or intra-agency" test, because the tribe was advocating its own interests.[64] The court did not expressly address the second part of the Klamath test -- namely, whether the tribe was advocating its interests at the expense of other parties.[65]

Similarly, in Center for International Environmental Law v. Office of the United States Trade Representative,[66] the District Court for the District of Columbia refused to allow the United States Trade Representative to protect documents exchanged by his office with the Government of Chile in the course of bilateral trade negotiations between the United States and the Chilean government.[67] The court made its ruling on the basis that the "critical factor" in the case before it was the "degree of self-interest" pursued by the outside party, "as compared to its interest in providing neutral advice"[68] -- and did not address the second component of the two-part test

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[62] See *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (observing in this regard that Public Citizen and Ryan, "and their potential progeny, stand apart from" what the Supreme Court rejected in Klamath); see also Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, No. 94-0173-B, slip op. at 5 (D. Me. Apr. 18, 1995) (presaging Klamath in holding that intra-agency threshold was not satisfied in case where party sought governmental benefit at expense of others' interests, and where agency "did not 'call upon' the [Penobscot] Nation to 'assist in internal decision-making'"; instead, "the Nation 'approached the government with their own interest in mind'" (quoting County of Madison v. U.S. Dep't of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981))).

[63] 180 F. Supp. 2d 1184 (D. Colo. 2001).

[64] See id. at 1191.

[65] See id.; see also Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1223-24 (D. Mont. 2004) (limiting discussion of Klamath's threshold test to its first component and then ordering disclosure, apparently based on understanding of waiver as result of prior disclosure).

[66] 237 F. Supp. 2d 17 (D.D.C. 2002).

[67] See id. at 25-27.

[68] Id. at 27.

announced in Klamath.[69]

Another application of the Klamath test can be found in Physicians Committee for Responsible Medicine v. National Institutes of Health.[70] In this 2004 case, the District Court for the District of Columbia ruled that Exemption 5 could not be used to protect documents submitted by an NIH grant applicant, because the applicant failed to qualify as a consultant under the test laid out in Klamath.[71] But in so ruling, the court referred to both of the aforementioned elements of the Klamath threshold test: that the applicant had submitted the grant application documents with his own interests in mind and that he was competing for a governmental benefit at the expense of other applicants, in a true multilateral situation.[72] This reading of Klamath was echoed by the District Court for the District of Columbia in Lardner v. U.S. Dep't of Justice,[73] in which the court explained that "[f]airly read, the holding of Klamath is only that a communication from an 'interested party' seeking a Government benefit 'at the expense of other applicants' is not an intra-agency record."[74]

Lastly, while state or local governments that voluntarily provide documents to federal agencies outside the contours of a formal state-federal partnership will likely not be considered consultants,[75] it still remains un-

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[69] See Klamath, 532 U.S. at 12 ("[T]he dispositive point is that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors."); see also *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (explaining both content and contours of Klamath test). But see Judicial Watch v. Dep't of the Army, 435 F. Supp. 2d 81, 92 n.6 (D.D.C. 2006) (criticizing, in dicta, Justice Department's explanation of Klamath's two-part test in favor of decision in Center for International Environmental Law).

[70] 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

[71] See id. at 30.

[72] See id.

[73] No. 03-0180, 2005 U.S. Dist. LEXIS 5465 (D.D.C. Mar. 31, 2005).

[74] Lardner, 2005 U.S. Dist. LEXIS 5465, at *51; accord *FOIA Post* "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (discussing both elements of Supreme Court's Exemption 5 threshold standard).

[75] See Citizens for Pa.'s Future v. U.S. Dep't of Interior, No. 03-4498 (3d Cir. July 30, 2004) (vacating lower court decision protecting documents exchanged between state and federal agencies); Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999) (holding that letter sent from city councilman to agency did not meet threshold test, but specifically leaving open question of whether communication from state agency to federal

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clear to what extent state or local governments acting in concert with federal agencies on joint regulatory matters will be considered consultants to the federal government for Exemption 5 purposes. Some courts have indicated a willingness to accept the idea that state governments can be consultants to the federal government under the Exemption 5 threshold.[76]

Deliberative Process Privilege

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions."[77] Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.[78]

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[75](...continued)
agency pursuant to joint state-federal operation might be).

[76] See Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002) (holding that particular documents provided by state agency to Department of Interior had not contributed to Department's deliberative process and therefore could not be protected by Exemption 5, but not disagreeing that such documents provided by state agency to federal agency could meet Exemption 5's threshold); cf. United States v. Allsteel, Inc., No. 87-C-4638, 1988 WL 139361, at *2 (N.D. Ill. Dec. 21, 1988) (protecting documents exchanged between federal and state co-regulators) (non-FOIA case).

[77] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975); see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (emphasizing importance of deliberative process privilege in protecting decisionmakers' ability to receive "confidential advice and counsel").

[78] See, e.g., Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); Kidd v. U.S. Dep't of Justice, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would "inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents") (internal quotation marks omitted); Heggestad v. U.S. Dep't of Justice, 182 F. Supp. 2d 1, 12 (D.D.C. 2000) (protecting memoranda containing recommendations based on perjured testimony, finding that they "have no probative value to the public since they are based on misrep-
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Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies."[79] In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.[80]

Indeed, in a major en banc decision, the Court of Appeals for the District of Columbia Circuit emphasized that even the mere status of an agency decision within an agency decisionmaking process may be protectible if the release of that information would have the effect of prematurely disclosing "the recommended outcome of the consultative process . . . as well

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[78](...continued)
resentations"); AFGE v. HHS, 63 F. Supp. 2d 104, 108 (D. Mass. 1999) (holding that release of predecisional documents "could cause harm by providing the public with erroneous information"), aff'd, No. 99-2208, 2000 U.S. App. LEXIS 10993, at *3 (1st Cir. May 18, 2000). But see ITT World Commc'ns, Inc. v. FCC, 699 F.2d 1219, 1237-38 (D.C. Cir. 1983) (dictum) (suggesting that otherwise exempt predecisional material "may" be ordered released so as to explain actual agency positions), rev'd on other grounds, 466 U.S. 463 (1984).

[79] Sears, 421 U.S. at 150; see also Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998) ("The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.").

[80] See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Schell v. HHS, 843 F.2d 933, 940 (6th Cir. 1988) ("Because Exemption 5 is concerned with protecting the deliberative process itself, courts now focus less on the material sought and more on the effect of the material's release."); Dudman Communications Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes -- not to protect specific materials."); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 16 n.19 (D.D.C. 1998) (concluding that Exemption 5 "is not limited to preventing embarrassment or 'chilling' of the individual authors of deliberative documents" but is designed to prevent chilling of agency deliberations); Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 117 (D.D.C. 1984) (finding that ongoing regulatory process would be subject to "delay and disrupt[ion]" if preliminary analyses were prematurely disclosed). But cf. Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, No. 94-0173-B, slip op. at 6 (D. Me. Apr. 18, 1995) (holding deliberative process privilege inapplicable when by regulation entire decisionmaking process is open to all interested parties) (alternative holding).

as the source of any decision."[81] This is particularly important to agencies involved in a regulatory process that specifically mandates public involvement in the decision process once the agency's deliberations are complete.[82] Moreover, the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision[83] or even has decided to not make a final decision.[84] Nor is it altered by the passage of time in general.[85]

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[81] Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

[82] See id. at 776; see also Missouri, 147 F.3d at 710-11 (protecting intra-agency memorandum commenting on draft environmental impact statement and finding that "[a]lthough [the National Environmental Policy Act] contemplates public participation . . . NEPA's statutory language specifically indicates that disclosure to the public is to be in accord with FOIA, which includes Exemption 5"); Nat'l Wildlife, 861 F.2d at 1120-21 (draft forest plans and preliminary draft environmental impact statements protected); Chem. Mfrs., 600 F. Supp. at 118 (preliminary scientific data generated in connection with study of chemical protected).

[83] See, e.g., Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); May v. Dep't of the Air Force, 777 F.2d 1012, 1014-15 (5th Cir. 1985); Cuccaro v. Sec'y of Labor, 770 F.2d 355, 357 (3d Cir. 1985); Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (rejecting specious assertion that deliberative process privilege "expires" after deliberations have ended and relevant decision has been made); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) (same); see also FOIA Update, Vol. XVI, No. 3, at 5 (dispelling "common misconception" about Exemption 5 on this point).

[84] See Sears, 421 U.S. at 151 n.18 (extending protection to records that are part of decisionmaking process even where process does not produce actual decision by agency); Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *21 (D.D.C. Mar. 20, 2006) (rejecting plaintiff's claim that documents relating to action ultimately not taken did not qualify as predecisional); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995) (holding that to release deliberative documents because no final decision was issued would be "exalting semantics over substance"), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); cf. Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 112 (holding that documents concerning now-abandoned agency program were nonetheless predecisional).

[85] See, e.g., AGS Computers, Inc. v. U.S. Dep't of Treasury, No. 92-2714, slip op. at 13 (D.N.J. Sept. 16, 1993) (holding that predecisional character is not lost through passage of time); Founding Church of Scientology v. Levi, 1 Gov't Disclosure Serv. (P-H) ¶ 80,155, at 80,374 (D.D.C. Aug. 12, 1980) ("There is nothing in the language of the provision to suggest that passage of time without more derogates from the exempt status of the deliberative material.").

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.[86] First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy."[87] Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[88] The burden is upon the agency to show that the information in question satisfies both requirements.[89]

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process."[90] On this point,

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[86] See Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing Petroleum Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))).

[87] Jordan, 591 F.2d at 774.

[88] Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

[89] See Coastal States, 617 F.2d at 866.

[90] Id. at 868; see also Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 559 (1st Cir. 1992) (protecting IG's recommendations even though decisionmakers were not obligated to follow them); Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123 (D.C. Cir. 1989) (protecting recommendations on suitability of article for publication, though decision on "whether and where" to publish article had not yet been made); Greenberg, 10 F. Supp. 2d at 17 (stating that "an evaluation of the legal status" of a case would be protected, but an "instruction from a senior to a junior official as to what legal action should be taken -- a final decision . . . does not merit Exemption 5 protection"); Horsehead Indus. v. EPA, No. 94-1299, slip op. at 14 (D.D.C. Oct. 1, 1996) ("In determining whether material is predecisional in nature, courts must look to see what role the material played in the decisionmaking process . . . . A statement of an opinion by an agency official or preliminary findings reported by a public affairs official do not necessarily constitute a statement of EPA policy or final opinion that has the force of law."); Knowles v. Thornburgh, No. 90-1294, slip op. at 5-6 (D.D.C. Mar. 11, 1992) (holding information generated during process preceding President's ultimate decision on application for clemency was predecisional); cf. Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 940 (D. Ariz. 2000) (rejecting as "tenuous" defendant's position that releasing information would "result in humans disturbing nesting goshawks," which in turn would alter agency's deliberative process by affecting results of scientific study), aff'd on other grounds, 314 F.3d 1060 (9th Cir. 2002); Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 299 (D.D.C.

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the Supreme Court has been very clear:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.[91]

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[90](...continued)
1999) (rejecting privilege claim because agency "utterly failed to specify the role played by each withheld document" in policy-formulation process).

[91] Sears, 421 U.S. at 151 n.18; see also Schell, 843 F.2d at 941 ("When specific advice is provided, . . . it is no less predecisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use."); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) (protecting information concerning federal inmate that was used by Bureau of Prison officials as part of continuing process of making decisions regarding inmate's status); Hamilton Sec. Group, Inc. v. HUD, 106 F. Supp. 2d 23, 30 (D.D.C. 2000) (protecting a draft audit report that was never reviewed by an agency decisionmaker; holding that "only those materials that are reviewed and approved by the District Inspector General represent the agency's final position"), aff'd, No. 00-5331, 2001 WL 238162, at *1 (D.C. Cir. Feb. 23, 2001) (per curiam); Greenberg, 10 F. Supp. 2d at 16 (rejecting argument that documents were not deliberative because not actually relied upon, observing that "[i]f the author had known that the notes discussing the proposed questions and issues would be subject to FOIA disclosure if not actually used, the author likely would have been more cautious in what he or she recommended"); Brooks v. IRS, No. CV-F-96-6284, 1997 U.S. Dist LEXIS 21075, at *23-24 (E.D. Cal. Nov. 17, 1997) ("governmental privilege does not hinge on whether or not the District Counsel relied on or accorded any weight to the information at issue in rendering its final decision"); Perdue Farms, Inc. v. NLRB, No. 2:96-CV-27-BO(1), 1997 U.S. Dist. LEXIS 14579, at *17 (E.D.N.C. Aug. 5, 1997) ("Although some [deliberative] processes do not ripen into agency decisions, this does not preclude application of the deliberative process privilege."); Hunt v. U.S. Marine Corp., 935 F. Supp. 46, 51 (D.D.C. 1996) (agency need not point specifically to final decision made); Chem. Mfrs., 600 F. Supp. at 118 ("[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take -- of the deliberative process -- by which the decision itself is made'" (quoting Vaughn, 523 F.2d at 1144)); Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.D.C. 1989) (court "must give considerable deference to the agency's explanation of its decisional process, due to agency's expertise"). But see Carter v. U.S. Dep't of Commerce, 186 F. Supp. 2d 1147, 1153-54 (D. Or. 2001) (holding that adjust-
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Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, Exemption 5 can be applicable.[92] In

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[91](...continued)
ed census data not examined by decisionmaker "cannot be said to have contributed" to decisionmaking process; and rejecting argument that data were nevertheless predecisional because agency was actively considering using them in future), aff'd, 307 F.3d 1084 (9th Cir. 2002); cf. Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1094 (9th Cir. 1997) (declaring Supreme Court pronouncement to be merely "cautionary dictum"); Am. Small Bus. League v. SBA, No. C 04-4250, slip op. at 5 (N.D. Cal. Apr. 29, 2005) (following Maricopa's ruling that a document is not predecisional if it is only "part of a continuing process of agency self-examination," despite the Supreme Court's direct pronouncement to the contrary in Sears).

[92] See, e.g., Casad v. HHS, 301 F.3d 1247, 1252 (10th Cir. 2002) (holding that deliberative process privilege protects redacted portions of "summary statements" created prior to NIH's research grant funding decisions); Sierra Club v. U.S. Dep't of Interior, 384 F. Supp. 2d 1, 16 (D.D.C. 2004) (rejecting as "simplistic" plaintiff's claim that deliberative process privilege did not apply to documents generated after presidential policy decision but which reflected deliberations on how best to advocate President's policy proposals in Congress); Gordon v. FBI, 388 F. Supp. 2d 1028, 1038 (N.D. Cal. 2005) (protecting documents concerning government's "no-fly" list even after implementation of these lists, because withheld documents discussed potential revisions to relevant regulations); Tarullo v. DOD, 170 F. Supp. 2d 271, 277 (D. Conn. 2001) (rejecting an argument that a document was not predecisional, instead finding that it was merely "a description of how the agency performed under its then-existing policy," and concluding that although the memorandum "contains some objective description of the facts providing a basis for . . . opinions, it consists primarily of specific subjective recommendations about future agency conduct and policy"); Judicial Watch, Inc. v. Reno, No. 00-0723, slip op. at 6-7 (D.D.C. Mar. 30, 2001) (protecting communications regarding "continuing and follow-up issues" resulting from decision to repatriate Cuban emigré Elian Gonzalez); Felsen v. HHS, No. 95-975, slip op. at 90 (D. Md. Sept. 30, 1998) ("agency need not identify any specific decision, but merely must establish 'what deliberative process is involved, and the role played by the documents in issue in the course of that process'" (quoting Coastal States, 617 F.2d at 868)); Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, No. C-3-95-328, slip op. at 55-56 (S.D. Ohio Sept. 12, 1996) (protecting communications that were postdecisional with respect to a specific agency decision but predecisional "in relation to their impact on broader policy decisions"); Md. Coal. for Integrated Educ. v. U.S. Dep't of Educ., No. 89-2851, slip op. at 6 (D.D.C. July 20, 1992) (finding material prepared during compliance review that goes beyond critique of reviewed program to discuss broader agency policy to be part of deliberative process), appeal dismissed voluntarily, No. 92-5346 (D.C. Cir. Dec. 13, 1993); Wash. Post Co. v. DOD, No. 84-2949, 1987 U.S. Dist LEXIS 16108, at *29 (D.D.C. Feb. 25, 1987) (holding that document generated in
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a particularly instructive decision, Access Reports v. Department of Justice,[93] the D.C. Circuit emphasized the importance of identifying the larger process to which a document sometimes contributes. Further, "predecisional" documents are not only those circulated within the agency, but can also be those from an agency lacking decisional authority which advises another agency possessing such authority.[94] They even can be "documents which the agency decisionmaker herself prepared as part of her delibera-

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[92](...continued)
continuing process of examining agency policy falls within deliberative process); Ashley v. U.S. Dep't of Labor, 589 F. Supp. 901, 908-09 (D.D.C. 1983) (holding that documents containing agency self-evaluations need not be shown to be part of clear process leading up to "assured" final decision so long as agency can demonstrate that documents were part of some deliberative process). Compare Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (holding that document must be "essential element" of deliberative process), with Schell, 843 F.2d at 939-41 (appearing to reject, at least implicitly, "essential element" test), and AFGE, 63 F. Supp. 2d at 108-09 (rejecting proposed "essential functions" test). But see Maricopa, 108 F.3d at 1094 (dictum) ("agency must identify a specific decision where document is pre-decisional"); Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (suggesting agency must specify final "decisions to which the advice or recommendations . . . contributed"); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1098 (C.D. Cal. 2005) (holding that agency must identify specific decisonmaking process); Cook v. Watt, 597 F. Supp. 545, 550-52 (D. Alaska 1983) (refusing to extend privilege to documents originating in deliberative process merely because process held in abeyance and no decision reached).

[93] 926 F.2d 1192, 1196 (D.C. Cir. 1991); see also Taylor v. Dep't of the Treasury, No. C90-1928, slip op. at 3-4 (N.D. Cal. Jan. 20, 1991) (stating that deliberative process privilege covers "communications leading to the actual enactment of a law, not merely communications preceding a decision to commence the process of amending a law").

[94] See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 188 (1975); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984); Defenders of Wildlife v. United States Dep't of the Interior, No. 03-1192, 2004 WL 842374, at *11-12 (D.D.C. Apr. 13, 2004) (protecting documents relating to ethics investigation that were prepared by Department of the Interior and given to Office of Government Ethics, which had final authority over investigation). Compare Blazar v. OMB, No. 92-2719, slip op. at 14 (D.D.C. Apr. 15, 1994) (finding recommendations made from OMB to the President to be predecisional), with Am. Soc'y of Pension Actuaries v. IRS, 746 F. Supp. 188, 192 (D.D.C. 1990) (ordering disclosure after finding that IRS's budget assumptions and calculations were "relied upon by government" in making final estimate for President's budget).

tion and decisionmaking process,"[95] or documents that do not end up being considered by the agency decisonmaker at all.[96] Lastly, it has been held that the privilege is not limited to deliberations connected solely to agency activities that are specifically authorized by Congress.[97]

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,[98] that implement an established policy of an agency,[99] or that explain actions that an agency has already taken.[100] Exemption 5 ordinarily does not apply to postdecisional documents, as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopt-

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[95] Judicial Watch, 102 F. Supp. 2d at 14 (protecting notes taken by Attorney General which she did not share with others).

[96] See Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., 376 F.3d 1270, 1279 (11th Cir. 2004) (reversing magistrate's ruling that documents that had contributed to decisionmaking process were not privileged just because they had not been considered by final decisionmaker; declaring that such ruling reflected magistrate's "too narrow" view of Exemption 5); see also Schell, 843 F.2d at 941 ("A subordinate who wishes to provide information candidly should not fear that the public will be privy to his views merely because his superiors have not yet acted on his recommendations.").

[97] See Enviro Tech Int'l, Inc. v. EPA, 371 F.3d 370, 376 (7th Cir. 2004) (protecting documents that contained EPA recommendations on workplace exposure limits to n-Propyl Bromide, despite fact that EPA lacks statutory authority to regulate such exposure limits); cf. Weissman v. CIA, 565 F.2d 692, 695-96 (D.C. Cir. 1977) (holding that CIA cannot use Exemption 7 to protect documents generated in course of law enforcement activity for which it has no statutory authorization).

[98] See, e.g., Taxation With Representation Fund v. IRS, 646 F.2d 666, 677-78 (D.C. Cir. 1981).

[99] See, e.g., Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980); Nissei Sangyo Am., Ltd. v. IRS, No. 95-1019, 1997 U.S. Dist. LEXIS 22473, at *23-24 (D.D.C. May 8, 1997) (magistrate's recommendation) (declining to apply deliberative process privilege to results of tax audit in which agency was merely "applying published tax laws to factual information regarding a taxpayer"), adopted (D.D.C. Jan. 28, 1998).

[100] See, e.g., Sears, 421 U.S. at 153-54; Judicial Watch, Inc. v. HHS, 27 F. Supp. 2d 240, 245 (D.D.C. 1998) ("deliberative process privilege does not protect documents that merely state or explain agency decisions"); cf. Horowitz v. Peace Corps, No. 00-0848, slip op. at 9-10 (D.D.C. Oct. 12, 2001) (ordering parties to submit additional evidence of whether final decision had been made at time disputed memorandum was written). But cf. Murphy v. TVA, 571 F. Supp. 502, 505 (D.D.C. 1983) (protecting two "interim" decisions, which agency retains option of changing).

ed."[101] However, if a document is postdecisional in form but predecisional in its content, it may be protectible. For example, e-mail messages generated after a relevant agency decision has been made, but which merely reiterate the agency's predecisional deliberations and the author's own recommendations, are protectible under Exemption 5.[102]

Many courts have confronted the question of whether certain documents at issue were tantamount to agency "secret law," i.e., "orders and interpretations which [the agency] actually applies to cases before it,"[103] and which are "routinely used by agency staff as guidance."[104] Such documents should be disclosed because they are not in fact predecisional, but rather "discuss established policies and decisions."[105] Only those portions of a postdecisional document that discuss predecisional recommendations not expressly adopted can be protected.[106]

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[101] Sears, 421 U.S. at 152.

[102] See Elec. Privacy Info. Ctr. v. DHS, No. 04-1625, 2006 U.S. Dist. LEXIS 94615, at *22-24 (D.D.C. Dec. 22, 2006) (protecting e-mail message generated after agency decision made which "recanted" deliberations preceding decision); N. Dartmouth Properties, Inc. v. HUD, 984 F. Supp. 65, 69 (D. Mass. 1997) (noting that author may not have known that final decision had been reached at time he composed message because "[n]o one would waste time preparing an e-mail message in an attempt to persuade someone to reach a conclusion if he knew that the conclusion he was advocating had already been reached").

[103] Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

[104] Coastal States, 617 F.2d at 869; see also Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983).

[105] Coastal States, 617 F.2d at 868; see also Safeway, Inc. v. IRS, No. 05-3182, 2006 WL 3041079, at *9 (N.D. Cal. Oct. 24, 2006) (ordering the release of documents characterized as an "intraagency discussion of how to apply established policy and law to the particular facts of Plaintiff's audit"); Evans v. OPM, 276 F. Supp. 2d 34, 40 (D.D.C. 2003) (holding that deliberative process privilege does not protect memorandum issued by OPM's Office of General Counsel that is "clear statement" of OPM's position on adoption of governmentwide hiring policy); Hansen v. U.S. Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (ordering disclosure of draft document used by agency as final product); see also Carlton v. Dep't of Interior, No. 97-2105, slip op. at 15 n.7 (D.D.C. Sept. 3, 1998) (observing that court "need not find that the agency is withholding secret law . . . to conclude that the government has nevertheless failed to justify its withholdings under FOIA Exemption 5").

[106] See Sears, 421 U.S. at 151 (holding postdecisional documents subject to deliberative process privilege "as long as prior communications and the ingredients of the decisionmaking process are not disclosed"); see also

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Several criteria have been fashioned to clarify the "often blurred" distinction between predecisional and postdecisional documents.[107] First, an agency should determine whether the document is a "final opinion" within the meaning of one of the two "automatic" disclosure provisions of the FOIA, subsection (a)(2)(A).[108] In an extensive consideration of this point, the Court of Appeals for the Fifth Circuit held that, inasmuch as subsection (a)(2)(A) specifies "the adjudication of [a] case[]," Congress intended "final opinions" to be only those decisions resulting from proceedings (such as that in Sears) in which a party invoked (and obtained a decision concerning) a specific statutory right of "general and uniform" applicability.[109] However, the D.C. Circuit has stated that Field Service Advice memoranda ("FSAs") issued by the Internal Revenue Service's Office of Chief Counsel are not predecisional documents, because they constitute "statements of

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[106](...continued)
Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are."); Blazar, No. 92-2719, slip op. at 15 (D.D.C. Apr. 15, 1994) (deciding that President's indication of which alternative he adopted does not waive privilege for unadopted recommendations); cf. Steinberg v. U.S. Dep't of Justice, No. 91-2740, 1993 WL 385820, at *3 (D.D.C. Sept. 13, 1993) (holding that protection of exemption is not lost where decision to conduct particular type of investigation was merely intermediate step in larger process).

[107] See Schlefer, 702 F.2d at 237. See generally ITT, 699 F.2d at 1235; Arthur Andersen & Co. v. IRS, 679 F.2d 254, 258-59 (D.C. Cir. 1982); Tax Analysts v. IRS, No. 94-923, 1996 U.S. Dist. LEXIS 3259, at *4-8 (D.D.C. Mar. 15, 1996), aff'd, 117 F.3d 607 (D.C. Cir. 1997).

[108] 5 U.S.C. § 552(a)(2)(A) (2000 & Supp. IV 2004); see Fed. Open Mkt. Comm., 443 U.S. at 360-61 n.23.

[109] Skelton v. U.S. Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982); cf. Rockwell Int'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 602-03 (D.C. Cir. 2001) (concluding that a report was not a final opinion because it contained "conclusions of a voluntarily undertaken internal agency investigation, not a conclusion about agency action (or inaction) in an adversarial dispute with another party"); Common Cause v. IRS, 646 F.2d 656, 659-60 (D.C. Cir. 1981) (rejecting a claim that a document was a final opinion, because the agency's action involved "the voluntary suggestion, evaluation, and rejection of a proposed policy by an agency, not the agency's final, unappealable decision not to pursue a judicial remedy in an adversarial dispute"). But see Afshar v. Dep't of State, 702 F.2d 1125, 1142-43 (D.C. Cir. 1983) (holding that even single recommendation of no precedential value or applicability to rights of individual members of public loses protection if specifically adopted as basis for final decision).

an agency's legal position."[110] The court reached this conclusion even though the opinions were found to be "nonbinding" on the ultimate decisionmakers.[111]

Second, one must consider the nature of the decisionmaking authority vested in the office or person issuing the document.[112] If the author lacks "legal decision authority," the document is far more likely to be predecisional.[113] A crucial caveat in this regard, however, is that courts often look "beneath formal lines of authority to the reality of the decisionmaking

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[110] Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997); Evans, 276 F. Supp. 2d at 39 (finding documents at issue "indistinguishable" from records at issue in Tax Analysts for purposes of Exemption 5); cf. Tax Analysts v. IRS, 97 F. Supp. 2d 13, 17 (D.D.C. 2000) (protecting IRS Legal Memoranda, and distinguishing them from FSAs, on the basis that "[w]hereas [Legal Memoranda] flow 'upward' from staffers to reviewers, [FSAs] flow 'outward' from the Office of Chief Counsel to personnel in the field"); Ginsberg v. IRS, No. 96-2265-CIV-T-26E, 1997 WL 882913, at *4 & nn.4, 5 (M.D. Fla. Dec. 23, 1997) (magistrate's recommendation) ("Although the opinions of District Counsel may not represent final opinions or policy statements of the IRS . . . [they were] relied upon and specifically referenced" by the IRS agent in the conduct of the examination.), adopted (M.D. Fla. Jan. 27, 1998), appeal dismissed, No. 98-2384 (11th Cir. June 5, 1998).

[111] Tax Analysts, 117 F.3d at 617.

[112] See Pfeiffer, 721 F. Supp. at 340 ("What matters is that the person who issues the document has authority to speak finally and officially for the agency.").

[113] Grumman, 421 U.S. at 184-85; see also A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 147 (2d Cir. 1994) (finding staff attorney's recommendation predecisional as she had no authority to close investigation); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 24-25 (D.D.C. 2001) (protecting memoranda "written by a component office without decisionmaking authority to a different component office" that had such authority), aff'd in part, rev'd in part on other grounds & remanded, 294 F.3d 71 (D.C. Cir. 2002); Tax Analysts, 97 F. Supp. 2d at 17 ("Because the drafters lack ultimate [decisionmaking] authority, their views are necessarily predecisional."); Badhwar v. U.S. Dep't of the Air Force, 615 F. Supp. 698, 702-03 (D.D.C. 1985) (concluding that Air Force safety board does not make decisions, only recommendations), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); Am. Postal Workers Union v. Office of Special Counsel, No. 85-3691, slip op. at 6 (D.D.C. June 24, 1986) (protecting prosecutorial recommendations to special counsel which were not binding or dispositive). But see Tax Analysts, 117 F.3d at 617 (finding chief counsel's "nonbinding" FSAs to field offices to be not predecisional because they "constitute agency law").

process."[114] Hence, even an assertion by the agency that an official lacks ultimate decisionmaking authority might be "superficial" and unavailing if agency "practices" commonly accord decisionmaking authority to that official.[115] Conversely, an agency official who appears to have final authority may in fact not have such authority or may not be wielding that authority in a particular situation.[116]

Careful analysis of the decisionmaking process is sometimes required to determine whether the records reflect an earlier preliminary decision or recommendations concerning follow-up issues,[117] or whether the document

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[114] Schlefer, 702 F.2d at 238; see also Nat'l Wildlife, 861 F.2d at 1123; cf. Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *7 (D.D.C. July 29, 1999) (protecting recommendations on possible criminal investigations from head of Department of Justice's Criminal Division to Director of FBI).

[115] Schlefer, 702 F.2d at 238, 241; see, e.g., Badran v. U.S. Dep't of Justice, 652 F. Supp. 1437, 1439 (N.D. Ill. 1987) (concluding that INS decision on plaintiff's bond was final, even though it was reviewable by immigration judge, because "immigration judges are independent from the INS, and no review of plaintiff's bond occurred within the INS").

[116] See, e.g., Nat'l Wildlife, 861 F.2d at 1122-23 (finding that headquarters' comments on regional plans were opinions and recommendations); Heggestad, 182 F. Supp. 2d at 10 (finding that top official in Department of Justice's Tax Division actually had made decision to prosecute despite fact that authority to make such decisions had been delegated to chief of Tax Division's Criminal Section); Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No. 97-372, slip op. at 10-13 (D.D.C. July 22, 1998) (deciding that predecisional character of draft IG report is not affected by fact that FBI took adverse personnel action against investigated employees after reviewing it); Jowett, Inc. v. Dep't of the Navy, 729 F. Supp. 871, 874 (D.D.C. 1989) (protecting audit reports prepared by entity lacking final decisionmaking authority).

[117] See, e.g., City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1254 (4th Cir. 1993) (protecting documents discussing past decision insofar as it influences future decision); Access Reports, 926 F.2d at 1196 (finding that staff attorney memorandum on how proposed FOIA amendments would affect future cases not postdecisional working law but opinion on how to handle pending legislative process); Sierra Club, 384 F. Supp. 2d at 16 (protecting documents discussing how to promote presidential decision in Congress); Gordon, 388 F. Supp. 2d at 1038 (upholding decision to withhold documents that concerned possible revisions to "no-fly" list regulations); The Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (rejecting plaintiff's argument that mere fact that documents in question were created after relevant settlement agreement was concluded mandated holding that they were postdecisional; agency may

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sought reflects a final decision or merely advice to a higher authority.[118] Thus, agency recommendations to OMB concerning the development of proposed legislation to be submitted to Congress are predecisional,[119] but descriptions of "agency efforts to ensure enactment of policies already established" are postdecisional.[120]

Third, it is useful to examine the direction in which the document flows along the decisionmaking chain. Naturally, a document "from a subordinate to a superior official is more likely to be predecisional"[121] than is

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[117](...continued)
properly withhold documents evaluating prior agency decision); Hamrick v. Dep't of the Navy, No. 90-283, 1992 WL 739887, at *2 (D.D.C. Aug. 28, 1992) ("[D]ocuments prepared after [agency's] decision to dual source the F404 engines are not 'formal agency policy,' but, recommendations for future decisions relating to F404 procurement based upon lessons learned from the dual sourcing decisionmaking process."), appeal dismissed voluntarily, No. 92-5376 (D.C. Cir. Aug. 4, 1995); Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 574-75 (D.D.C. 1984) (holding records predecisional because, although documents discussed implementation of previous decision, issues discussed were "not mere details to be worked out but rather matters requiring further study and generating debate which culminated in the making of new policy"); cf. Wilkinson v. Chao, 292 F. Supp. 2d 288, 295 (D.N.H. 2003) (holding that agency's "final" decision was its decision not to give plaintiff overtime pay, rather than auditor's "determination" on appropriateness of decision, and that therefore documents generated after former but before latter were postdecisional).

[118] See, e.g., AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 208 (D.C. Cir. 1990); Bureau of Nat'l Affairs, 742 F.2d at 1497.

[119] See Bureau of Nat'l Affairs, 742 F.2d at 1497.

[120] Dow, Lohnes & Albertson v. USIA, No. 82-2569, slip op. at 15-16 (D.D.C. June 5, 1984), vacated in part, No. 84-5852 (D.C. Cir. Apr. 17, 1985); see also Badhwar v. United States Dep't of Justice, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing predecisional about a recitation of corrective action already taken.").

[121] Coastal States, 617 F.2d at 868; see also Nadler v. U.S. Dep't of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992) ("[A] recommendation to a supervisor on how to proceed is predecisional by nature."); Judicial Watch, No. 00-0723, slip op. at 8 (D.D.C. Mar. 30, 2001) (protecting "communications from subordinates to superiors" in Elian Gonzalez case); Students Against Genocide v. Dep't of State, No. 96-667, 1999 WL 699074, at *12 (D.D.C. Aug. 24, 1998) (magistrate's recommendation) (holding field notes of official analyzing factual information and making recommendations on U.S. foreign policy exempt), adopted (D.D.C. Sept. 29, 1998), aff'd in part & remanded in part on other grounds, 257 F.3d 828, 841 (D.C. Cir. 2001); Hayes v. Dep't of
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one that travels in the opposite direction: "[F]inal opinions . . . typically flow from a superior with policymaking authority to a subordinate who carries out the policy."[122] However, under certain circumstances, recommendations can flow from the superior to the subordinate.[123] Indeed, even a policymaker's own predecisional notes to herself may be protectible.[124] In sum, perhaps the most important factor to consider is the "'role, if any, that the document plays in the process of agency deliberations.'"[125]

Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decision-

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[121](...continued)
Labor, No. 96-1149-P-M, 1998 U.S. Dist. LEXIS 14120, at *18 (S.D. Ala. June 18, 1998) (magistrate's recommendation) ("[A] recommendation from a lower-level employee to a higher-level manager qualifies as a predecisional, deliberative document for purposes of exemption 5."), adopted (S.D. Ala. Aug. 10, 1998); Burke v. DEA, No. 96-1739, slip op. at 8 (D.D.C. Mar. 31, 1998) (protecting correspondence from postal inspector to Assistant United States Attorney who he was assisting in prosecution), appeal dismissed, No. 98-5113 (D.C. Cir. Mar. 31, 2000); Ginsberg, 1997 WL 882913, at *4-5 (holding protectible IRS agent's "request for technical assistance" and supervisor's addendum revealing "areas of concern of the two authors" during conduct of examination).

[122] Brinton, 636 F.2d at 605; see also AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1276 (D.D.C. 1986); Ashley, 589 F. Supp. at 908; cf. Shumaker, Loop & Kendrick v. Commodity Futures Trading Comm'n, No. 97-7139, slip op. at 14 (N.D. Ohio Nov. 27, 1997) (protecting an advisory document where there was "no indication that the author of the document had authority to establish agency policy").

[123] See Nat'l Wildlife, 861 F.2d at 1123 (finding comments from headquarters to regional office, under circumstances presented, to be advisory rather than directory); N. Dartmouth Properties, 984 F. Supp. at 70 (dictum) ("Conversation is, after all, a two-way street. A superior would be willing to engage a subordinate in candid debate only if he knows that his opinions will also be protected by the 'deliberative process' privilege.").

[124] See Judicial Watch, 102 F. Supp. 2d at 16 (protecting Attorney General's handwritten predecisional notes from meeting on campaign finance task force investigation); cf. Conoco Inc. v. U.S. Dep't of Justice, 687 F.2d 724, 727 (3d Cir. 1982) (rejecting the contention that only records "'circulated within the agency'" may be withheld under Exemption 5).

[125] Formaldehyde, 889 F.2d at 1122 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987)); see also Judicial Watch, Inc. v. Reno, 154 F. Supp. 2d 17, 18 (D.D.C. 2001) ("It is not enough to say that a memorandum 'expresses the author's views' on a matter [because the] role played by the document in the course of the deliberative process must also be established.").

maker "chooses expressly to adopt or incorporate [it] by reference."[126] However, a few courts have suggested a less stringent standard of "formal or informal adoption."[127] Also, although mere "approval" of a predecisional document does not necessarily constitute adoption of it,[128] an inference of

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[126] Sears, 421 U.S. at 161; see, e.g., Afshar, 702 F.2d at 1140 (finding recommendation expressly adopted in postdecisional memorandum); Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of an "underlying memorandum" that was "expressly relied on in a final agency dispositional document"); Shumaker, No. 97-7139, slip op. at 14 (N.D. Ohio June 6, 2005) (ordering disclosure of advisory document written by agency general counsel and "thereafter adopted as the official position of the agency"); Bhd. of Locomotive Eng'rs v. Surface Transp. Bd., No. 96-1153, 1997 WL 446261, at *4-5 (D.D.C. July 31, 1997) (finding that staff recommendation was adopted in both written decision and commission vote); Burkins v. United States, 865 F. Supp. 1480, 1501 (D. Colo. 1994) (holding that final report's statement that findings are same as those of underlying memorandum constituted adoption of that document); Atkin v. EEOC, No. 91-2508, slip op. at 23-24 (D.N.J. July 14, 1993) (holding recommendation to close file not protectible where it was contained in agency's actual decision to close file); cf. Tax Analysts, 117 F.3d at 617 (finding that documents "routinely used" and "relied upon by agency personnel," in a particular factual setting, were "statements of the agency's legal position" and accordingly not protectible).

[127] Coastal States, 617 F.2d at 866; see Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475, slip op. at 5-8 (E.D. Va. June 7, 1996) (finding that board of directors' action "embracing" recommendations in "substantially same language" made documents postdecisional); Pension Actuaries, 746 F. Supp. at 192 (ordering disclosure simply on the basis that the IRS's budget assumptions and calculations were "relied upon by the government" in making its final estimate for the President's budget); cf. Skelton, 678 F.2d at 39 n.5 (declining to express opinion on whether reference must be to specific portion of document for express incorporation of that portion to occur).

[128] See, e.g., Mokhiber v. U.S. Dep't of Treasury, No. 01-1974, slip op. at 13 (D.D.C. Sept. 26, 2003) (protecting portions of document explaining recommended settlement amounts; ruling that decisionmaker's initialing of document signified only adoption of actual settlement amounts, not adoption of document author's reasoning); Hawkins v. U.S. Dep't of Labor, No. 3:05CV269J32, 2005 WL 2063811, at *4 (M.D. Fla. Aug. 19, 2005) (protecting documents that were used as part of basis for final agency decision, because there was no evidence of "clear adoption or incorporation" by agency); Rockwell Int'l v. U.S. Dep't of Justice, No. 98-761, slip op. at 8-9, 15 (D.D.C. Mar. 24, 1999) (finding no adoption where public memorandum merely referred to underlying documents as evidence supporting its conclusions and observing that "the memorandum is itself a discussion and statement of reasons [that] stands alone, independent of its supporting

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incorporation or adoption has twice been found to exist where a decisionmaker accepted a staff recommendation without giving a statement of reasons.[129] Nevertheless, where it is unclear whether a recommendation provided the basis for a final decision, the recommendation should be protectible.[130] (Though express incorporation and adoption are both sufficient to cause a document to lose Exemption 5 protection, it is important to note the distinction between the two terms: The former describes a scenario in which a decisionmaker expressly cites a previously predecisional document as the rationale for an agency's decision; in the latter, a document

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[128](...continued)
documents"), aff'd on other grounds, 235 F.3d 598 (D.C. Cir. 2001); N. Dartmouth Properties, 984 F. Supp. at 69-70 (holding that fact that agency ultimately reached conclusion advocated by author of withheld document did not constitute adoption of author's reasoning); AFGE v. Dep't of the Army, 441 F. Supp. 1308, 1311 (D.D.C. 1977) (holding that decisionmaker's letter setting forth reasons for decision, not underlying report, constituted final agency decision).

[129] See Am. Soc'y of Pension Actuaries, 746 F. Supp. at 191; Martin v. MSPB, 3 Gov't Disclosure Serv. (P-H) ¶ 82,416, at 83,044 (D.D.C. Sept. 14, 1982). But see Blazar, No. 92-2719, slip op. at 14-15 (D.D.C. Apr. 15, 1994) (holding that no incorporation occurred when final decisionmaker approved one of several choices but did not indicate intention to adopt remainder of document in question); Am. Postal Workers Union, No. 85-3691, slip op. at 7-9 (D.D.C. June 24, 1986) (declining to infer incorporation).

[130] See Grumman, 421 U.S. at 184-85; Afshar, 702 F.2d at 1143 n.22; see also Casad, 301 F.3d at 1252 (protecting documents that were "important consideration" for final decisionmaker but were not "dispositive"); Sec. Fin. Life Ins. Co. v. U.S. Dep't of the Treasury, No. 03-102-SBC, 2005 WL 839543, at *7 (D.D.C. Apr. 12, 2005) (protecting documents where there was no evidence of express adoption by agency); Trans Union LLC v. FTC, No. 00-2384, 2001 U.S. Dist. LEXIS 4559, at *15 (D.D.C. Apr. 9, 2001) (following Grumman and rejecting argument that burden is on agency to prove that documents were not adopted as basis for policy); Perdue Farms, 1997 U.S. Dist. LEXIS 14579, at *20-23 (holding that fact that document was created only two days before issuance of final decision was insufficient to give rise to inference of adoption); Greyson v. McKenna & Cuneo, 879 F. Supp. 1065, 1069 (D. Colo. 1995) (deciding that use of phrase "the evidence shows" not enough for inference of adoption); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (concluding that record did not suggest either "adoption" or "final opinion" of agency); Wiley Rein & Fielding v. U.S. Dep't of Commerce, No. 90-1754, slip op. at 6 (D.D.C. Nov. 27, 1990) ("Denying protection to a document simply because the document expresses the same conclusion reached by the ultimate agency decisionmaker would eviscerate Exemption 5."); Ahearn v. U.S. Army Materials & Mechs. Research Ctr., 580 F. Supp. 1405, 1407 (D. Mass. 1984) (holding that fact that general officer reached same conclusion as report of investigation did not constitute adoption of report's reasoning).

comes to be used by the agency as an embodiment of the agency's policy.)[131]

In a significant decision on adoption during this past year, the Second Circuit Court of Appeals ordered the release of a Department of Justice memorandum concerning enforcement of immigration law by state and local law enforcement agencies.[132] While the court ordered the release of the memorandum, it was clear that this was ordered only because it was beyond reasonable dispute that the Justice Department had relied on the memorandum as a statement of agency policy, making repeated public references to the document in justifying its position on the matter in question.[133] This evidence of adoption went beyond "mere speculation," which certainly would have been insufficient.[134] Furthermore, the appeals court was careful to point out that mere "casual reference[s]" to an otherwise privileged document would not be enough to demonstrate incorporation, nor would the privilege have been lost had the Justice Department merely adopted the memorandum's conclusions.[135] Rather, the court found, the Justice Department had "publicly and repeatedly depended on the Memorandum as the primary legal authority justifying and driving . . . [its policy decision] and the legal basis therefor."[136] The Second Circuit noted that this distinguished the case from Grumman Aircraft,[137] where the Supreme Court ruled that there was no adoption because the "evidence [had] utterly fail[ed] to support the conclusion that the reasoning in the reports [had

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[131] Compare Niemeier, 565 F.2d at 973 (ordering release of document that was "expressly relied on" in final agency decision document and thus "incorporated"), with Coastal States, 617 F.2d at 860 (upholding disclosure order for document that was in fact "regularly and consistently followed" by agency and thus was "adopted").

[132] Nat'l Council of La Raza v. U.S. Dep't of Justice, 411 F.3d 350, 361 (2d Cir. 2005).

[133] See id. at 358 (noting statements by agency official relying on document in question as sole means of explaining agency position on matter in question).

[134] See id. at 359 (comparing substantial evidence of adoption of memorandum in present case, as compared to other cases where such evidence was lacking).

[135] See id. at 358 ("Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis[.]").

[136] Id.; see also Bronx Defenders v. DHS, No. 04 CV 8576, 2005 WL 3462725, at *4-5 (S.D.N.Y. Dec. 19, 2005) (ordering release of memorandum because government had cited it in multiple public documents as basis for government policy).

[137] 421 U.S. 168, 184 (1975).

been] adopted."[138]

A second primary limitation on the scope of the deliberative process privilege is that of course it applies only to "deliberative" documents and it ordinarily is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda.[139] Not only would factual material "generally be available for discovery,"[140] but its release usually would not threaten consultative agency functions.[141] This seemingly straightforward

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[138] Id. at 184; see Robert v. HHS, No. 05-4660, 2007 U.S. App. LEXIS 3646, at *6 (2d Cir. Feb. 15, 2007) (rejecting plaintiff's claim of adoption or incorporation where there was "no evidence in the record" of either); La Raza, 411 F.3d at 359. But see Sussman v. U.S. Dep't of Justice, No. 03-3618, 2006 WL 2850608, at *18 (E.D.N.Y. Sept. 30, 2006) (denying summary judgment where government had "not addressed" whether predecisional, deliberative documents were adopted); Judicial Watch v. USPS, 297 F. Supp. 2d 252, 261 (D.D.C. 2004) (ruling oddly that agency had affirmative obligation to explicitly deny that draft documents had been adopted as agency policy); Wilderness Soc'y, 344 F. Supp. 2d at 14 (citing Judicial Watch, 297 F. Supp. 2d at 261, for same proposition).

[139] See, e.g., EPA v. Mink, 410 U.S. 73, 91 (1973) (refusing to extend deliberative process privilege protection to "factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy, or opinion"); Coastal States, 617 F.2d at 867 (citing Mink, 410 U.S. at 93); Bilbrey v. U.S. Dep't of the Air Force, No. 00-0539, slip op. at 10-11 (W.D. Mo. Jan. 30, 2001) (holding privilege inapplicable to factual statements underlying predecisional recommendations), aff'd, No. 01-1789, 2001 WL 1222471, at *1 (8th Cir. Oct. 16, 2001) (unpublished table decision); Sw. Ctr. for Biological Diversity, 170 F. Supp. 2d at 941 (concluding that release of "raw research data" would not expose agency's deliberative process, on grounds that such data were not recommendations, not subject to alteration upon further agency review, and not "selective" in character).

[140] 410 U.S. at 87-88 (1973).

[141] See Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974); see also Dean v. FDIC, 389 F. Supp. 2d 780, 794 (E.D. Ky. 2005) (distinguishing between portions of documents containing opinions of inspector general investigators and sections that merely discuss substance of investigations); Rashid v. HHS, No. 98-0898, slip op. at 11-12 (D.D.C. Mar. 2, 2000) (declining to extend the privilege to agency requests for outside experts' evaluations on the basis that although "[t]he requests were predecisional, . . . they were not deliberative in that they did not 'reflect the give-and-take of the consultative process'" (quoting Coastal States, 617 F.2d at 866)); D.C. Technical Assistance Org. v. HUD, No. 98-0280, slip op. at 4-5 (D.D.C. July 29, 1999) (ordering release of factual portion of an otherwise deliberative record because it "does not evaluate the actions taken, but

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distinction between deliberative and factual materials can blur, however, where the facts themselves reflect the agency's deliberative process[142] -- which has prompted the D.C. Circuit to observe that "the use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases."[143]

In fact, the full D.C. Circuit has firmly declared that factual information should be examined "in light of the policies and goals that underlie" the privilege and in "the context in which the materials are used."[144] Following this approach, for example, the District Court for the District of Columbia recently allowed the Air Force to withhold "vote sheets" that were used in the process of determining retirement benefits.[145] Even though these vote sheets were factual in nature, the court found that they were used by agency personnel in developing recommendations to an agency decisionmaker and thus were "precisely the type of pre-decisional documents intended to fall under Exemption 5."[146]

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts generally allow agencies to withhold factual material in an otherwise "deliberative" document under two general types of circum-

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[141](...continued)
only describes them"); Horsehead, No. 94-1299, slip op. at 16 (D.D.C. Oct. 1, 1996) ("EPA has not demonstrated how the disclosure of either the testing processes . . . or the data from that testing involves [sic] its deliberative process.").

[142] See, e.g., Nat'l Wildlife, 861 F.2d at 1118 (rejecting simplistic fact/opinion distinction, and instead focusing on whether documents in question play role in agency's deliberative process); Skelton, 678 F.2d at 38-39 (explaining that focus should be on whether release of documents would reveal agency's evaluative process).

[143] Dudman, 815 F.2d at 1568.

[144] Wolfe, 839 F.2d at 774; see also Nat'l Wildlife, 861 F.2d at 1119 ("ultimate objective" of Exemption 5 is to safeguard agency's deliberative process); Sakomoto v. EPA, 443 F. Supp. 2d 1182, 1192 (N.D. Cal. 2006) (holding that facts may be withheld when they are "directly tied to the deliberative process").

[145] See Brannum v. Dominguez, 377 F. Supp. 2d 75, 83 (D.D.C. 2005).

[146] Id.; see also Bloomberg, L.P. v. SEC, No. 02-1582, 2004 U.S. Dist LEXIS 15111, at *34 (D.D.C. July 28, 2004) (protecting notes taken by SEC officials at meeting with companies subject to SEC oversight; finding that, though factual in form, notes would, if released, "severely undermine" SEC's ability to gather information from its regulatees and in turn undermine SEC's ability to deliberate on best means to address policymaking concerns in such areas).

stances.[147] The first circumstance occurs when the author of a document selects specific facts out of a larger group of facts and this very act is deliberative in nature. In Montrose Chemical Corp. v. Train, for example, the summary of a large volume of public testimony compiled to facilitate the EPA Administrator's decision on a particular matter was held to be part of the agency's internal deliberative process.[148] The D.C. Circuit held that the very act of distilling the testimony, of separating the significant facts from the insignificant facts, constitutes an exercise of judgment by agency personnel.[149] Such "selective" facts are therefore entitled to the same protection as that afforded to purely deliberative materials, as their release would "permit indirect inquiry into the mental processes,"[150] and so "expose" pre-

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[147] See FOIA Update, Vol. VII, No. 3, at 6.

[148] 491 F.2d at 71.

[149] Id. at 68; see, e.g., Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *3 (10th Cir. Oct. 14, 1999) (protecting factual "distillation" which revealed significance that examiner attributed to various aspects of case); The Edmonds Inst. v. U.S. Dep't of Interior, No. 04-1560, 2006 WL 3059889, at *6 (D.D.C. Oct. 30, 2006) (protecting factual material considered for, but not utilized, in final report); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 585 (N.D. W. Va. 2005) (protecting notes of agency investigator who previously had been briefed on investigation and had geared his queries accordingly, thereby making his notes selectively recorded information); Hamilton Sec. Group, 106 F. Supp. 2d at 33 (protecting facts in a draft audit report on the grounds that "any factual information that could be [released] would reveal decisions made by the auditor" and thereby chill future agency deliberations); Heggestad, 182 F. Supp. 2d at 12 n.10 (protecting facts "selected by authors from a larger body of factual material," because disclosure would reveal authors' deliberative processes); Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210, 1999 U.S. Dist. LEXIS 17537, at *12 (D.D.C. Nov. 3, 1999) (affirming agency denial of "fact summaries that show the investigators' deliberation in determining [plaintiff's] suitability" for federal appointment); Mace, 37 F. Supp. 2d at 1150 (protecting factual "distillation" in otherwise deliberative EEOC report), aff'd, 197 F.3d 329 (8th Cir. 1999); Means v. Segal, No. 97-1301, slip op. at 10-11 (D.D.C. Mar. 18, 1998) (magistrate's recommendation) (holding that factual material "could not be released as segregable from the remainder, as the facts discussed in the investigative report reflect the value placed on each in forming the recommendation"), adopted (D.D.C. Apr. 15, 1998), aff'd per curiam, No. 98-5170 (D.C. Cir. Oct. 6, 1998); Atkin, No. 91-2508, slip op. at 21 (D.N.J. July 14, 1993) (holding exempt staff selection of certain factual documents to be used for report preparation); Bentson Contracting Co. v. NLRB, No. 90-451, slip op. at 3 (D. Ariz. Dec. 28, 1990) (finding that agency properly withheld document characterizing issues most important to parties and discussing how facts were analyzed in decisional process).

[150] Williams v. U.S. Dep't of Justice, 556 F. Supp. 63, 65 (D.D.C. 1982).

decisional agency deliberations.[151] Thus, to protect the factual materials, an agency must identify a process which "could reasonably be construed as predecisional and deliberative."[152]

A D.C. Circuit opinion concerning a report consisting of factual materials prepared for an Attorney General decision on whether to allow former U.N. Secretary General Kurt Waldheim to enter the United States provides an illustration of this factual/deliberative distinction and of the breadth of deliberative process privilege coverage under prevailing case law.[153] The D.C. Circuit found that "the majority of [the report's] factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action," and that it therefore fell within the delibera-

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[151] Mead Data, 566 F.2d at 256; see also Providence Journal, 981 F.2d at 562 (revealing IG's factual findings would divulge substance of related recommendations); Lead Indus., 610 F.2d at 85 (disclosing factual segments of summaries would reveal deliberative process by "demonstrating which facts in the massive rule-making record were considered significant to the decisionmaker"); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 01-639, 2006 WL 2038513, at *7 (D.D.C. July 19, 2006) (quoting favorably from the government's declaration explanation that the "very act of selecting those facts which are significant from those that are not, is itself a deliberative process"); Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1373 (E.D.N.C. 1986) (holding that list of farmworker camps was "selective fact" and thus protectible).

[152] City of Va. Beach, 995 F.2d at 1255; see also Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002) (holding that documents listing locations of endangered species were not deliberative, despite fact that they were prepared partly to assist agency in making determinations under Endangered Species Act, 16 U.S.C. § 1653 (2000)); ITT, 699 F.2d at 1239 (holding that notes must be more than "straightforward factual narrations" to be protected); Playboy Enters. v. Dep't of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982) (concluding that factual materials must be generated in course of agency's decisionmaking process to be protectible); Bryce v. OPIC, No. A-96-CA-595, slip op. at 17 (W.D. Tex. Sept. 28, 1998) (finding set of photographs to be "factual in nature" and rejecting argument that photographs are deliberative in that they embody agency consultant's "determination of those aspects of [a mining site] that it determined were of sufficient significance to bring to OPIC's attention"), appeal dismissed voluntarily, No. 99-50893 (5th Cir. Oct. 14, 1999); Lacy v. U.S. Dep't of the Navy, 593 F. Supp. 71, 78 (D. Md. 1984) (holding that photographs attached to deliberative report "do not become part of the deliberative process merely because some photographs were selected and others were not").

[153] Mapother, 3 F.3d at 1538-40.

tive process privilege.[154] By contrast, it also held that a chronology of Waldheim's military career was not deliberative, as it was "neither more nor less than a comprehensive collection of the essential facts" and "reflect[ed] no point of view."[155]

The second such circumstance is when factual information is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. If revealing factual information is tantamount to revealing the agency's deliberations, then the facts may be withheld.[156] For example, the D.C. Circuit has held

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[154] Id. at 1539 (distinguishing and confining Playboy as involving report designed only to inform Attorney General of facts he would make available to Member of Congress, rather than one involving any decision he would have to make); see also City of Va. Beach, 995 F.2d at 1255 (observing similarly that in Playboy "[the] agency identified no decision in relation to the withheld investigative report"); Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 71 (D.D.C. 2006) (protecting factual information considered, but not utilized in agency's final report, because release of such information "would reveal the editorial judgment" of agency employees); Phillips v. Immigration & Customs Enforcement, 385 F. Supp. 2d 296, 303 (S.D.N.Y. 2005) (citing Mapother and protecting notes taken in an interview that "reflect[ed] a selective recording of information"); Envtl. Prot. Servs., 364 F. Supp. 2d at 585 (protecting selectively assembled facts, on basis that such information could not be "severed from its context" (quoting Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 483 (2d Cir. 1999))).

[155] Mapother, 3 F.3d at 1539-40; see also D.C. Technical Assistance Org., No. 98-0280, slip op. at 5 (D.D.C. July 29, 1999) ("The order in which the [factual portions] are listed is apparently random, so that disclosing them reveals nothing of the decision making process or of the subjective assessment that follows.").

[156] See, e.g., Horowitz v. Peace Corps, 428 F.3d 271, 277 (D.C. Cir. 2005) (protecting a requested document where the decisonmaker's "thought processes are woven into the document to such an extent" that any attempt at segregating out information would reveal agency deliberations); Wolfe, 839 F.2d at 774-76 (protecting mere "fact" of status of proposal in deliberative process); Pohlman, Inc. v. SBA, No. 4:03-01241, slip op. at 25-26 (E.D. Mo. Sept. 30, 2005) (holding that to extent that portions of document could be considered factual, such information was inextricably intertwined with deliberative material and therefore were not subject to disclosure); Hawkins, 2005 WL 2063811, at *3 (protecting factual portions of a deliberative document that could not be "segregated in a meaningful way" from deliberative sections); Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 384 F. Supp. 2d 138, 151-52 (D.D.C. 2005) (finding that factual portions of records were inextricably intertwined with deliberative portions and therefore were not releaseable); Tarullo, 170 F. Supp. 2d at 278 ("Although the document does summarize relevant facts, that summary is so

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that the deliberative process privilege covers construction cost estimates, which the court characterized as "elastic facts," finding that their disclosure would reveal the agency's deliberations.[157]

Similarly, when factual or statistical information is actually an expression of deliberative communications, it may be withheld on the basis that to reveal that information would reveal the agency's deliberations.[158] Ex-

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[156](...continued)
intertwined with . . . recommendations and opinions . . . that production of a redacted version would be incomprehensible, and the very selection of facts could also reveal the nature of those recommendations and opinions."); Brownstein Zeidman & Schomer v. Dep't of the Air Force, 781 F. Supp. 31, 36 (D.D.C. 1991) (holding that the release of summaries of negotiations would inhibit the free flow of information, as "summaries are not simply the facts themselves"); Jowett, 729 F. Supp. at 877 (determining that disclosing manner of selecting and presenting even most factual segments of audit reports would reveal process by which agency's final decision is made); Wash. Post Co. v. DOD, No. 84-2403, slip op. at 5 (D.D.C. Apr. 15, 1988) (finding factual assertions in briefing documents "thoroughly intertwined" with opinions and impressions); Wash. Post, 1987 U.S. Dist. LEXIS 16108, at *33 (holding that summaries and lists of materials relied upon in drafting report are "inextricably intertwined with the policymaking process"). But see Vaughn, 523 F.2d at 1145 (stating that survey results cannot be protected where they merely "provide the raw data upon which decisions can be made[and] are not themselves a part of the decisional process"); Army Times Publ'g Co. v. Dep't of the Air Force, No. 90-1383, slip op. at 6-7 (D.D.C. Feb. 28, 1995) (citing Vaughn).

[157] Quarles v. Dep't of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990); see also Pohlman, No. 4:03-01241, slip op. at 24-25 (E.D. Mo. Sept. 30, 2005) (protecting "hold values" through which SBA estimated worth of assets); cf. Russell, 682 F.2d at 1048-49 (protecting documents prepared by Air Force group charged with developing agency's official report on herbicide use during Vietnam War). But see Natural Res. Def. Council v. Nat'l Marine Fisheries Serv., 409 F. Supp. 2d 379, 384-85 (S.D.N.Y. 2006) (deciding that "preliminary findings as to objective facts" are not protectible).

[158] See, e.g., Kennecott Utah Copper Corp. v. EPA, No. 94-162, slip op. at 4 (D.D.C. Sept. 11, 1995) (holding material relating to preparation of Hazard Ranking Scores part of deliberative process); SMS Data Prods. Group, Inc. v. U.S. Dep't of the Air Force, No. 88-481, 1989 WL 201031, at *1-2 (D.D.C. Mar. 31, 1989) (holding technical scores and technical rankings of competing contract bidders predecisional and deliberative); Nat'l Wildlife Fed'n v. U.S. Forest Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (protecting variables reflected in computer program's mathematical equation); Am. Whitewater Affiliation v. FERC, No. 86-1917, 1986 U.S. Dist. LEXIS 17067, at *10 (D.D.C. Dec. 2, 1986) ("[T]he cost and energy comparisons involved in this case are deliberative."); Brinderson Constructors, Inc. v. U.S. Army
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emption 5 thus covers scientific reports that constitute the interpretation of technical data, insofar as "the opinion of an expert reflects the deliberative process of decision or policy making."[159] It has even been extended to cover successive reformulations of computer programs that were used to analyze scientific data.[160]

Indeed, the government interest in withholding technical data is even heightened if such material is requested at a time when disclosure of a scientist's "nascent thoughts . . . would discourage the intellectual risk-taking so essential to technical progress."[161] The Court of Appeals for the Ninth Circuit strongly echoed this view in National Wildlife Federation v. United States Forest Service, explaining as follows:

> Opinions on facts and [the] consequences of those facts form the grist for the policymaker's mill. Each opinion as to which of the great constellation of facts are relevant and important and each assessment of the implications of those facts suggests a different course of action by the agency. Before arriving at a final decision, the policymaker may alter his or her opinion regarding which facts are relevant or the likely consequences of these facts, or both. Tentative policies may undergo massive revisions based on a reassessment of these variables, during

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[158](...continued)
Corps of Eng'rs, No. 85-905, 1986 WL 293230, at *5 (D.D.C. June 11, 1986) (holding that computations made in order to evaluate a claim for compensation "are certainly part of the deliberative process"); Prof'l Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (observing that scores used to rate procurement proposals may be "numerical expressions of opinion rather than 'facts'"). But see Warren v. Soc. Sec. Admin., No. 98-CV-0116E, 2000 WL 1209383, at *3 (W.D.N.Y. Aug. 22, 2000) (holding that the privilege does not protect the ordered ranking of job applicants, and reasoning that such a ranking "is not pre-decisional . . . as [it is] the result of the panel's decisions" rather than an intermediate step in a multi-layered decisionmaking process), aff'd on other grounds, 10 F. App'x 20 (2d Cir. 2001).

[159] Parke, Davis, 623 F.2d at 6; see also Quarles, 893 F.2d at 392-93 (protecting cost estimates as "elastic facts"); Horsehead, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (finding that agency scientists' "open discussion of the effectiveness of . . . testing results and frank exchanges of view regarding the interpretation of those results reside near the core of an agency's deliberative process"). But see Ethyl Corp. v. EPA, 478 F.2d 47, 50 (4th Cir. 1973) (characterizing such material as "technological data of a purely factual nature").

[160] See Cleary, Gottlieb, Steen & Hamilton v. HHS, 884 F. Supp. 770, 782-83 (D.D.C. 1993).

[161] Chem. Mfrs., 600 F. Supp. at 118.

> which the agency may decide that certain initial projections are not reasonable or that the likely consequences of a given course of action have been over- or underestimated. Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent.[162]

Likewise, it is noteworthy that the D.C. Circuit has stated that the "results of . . . factual investigations" may be within the protective scope of Exemption 5.[163] However, the D.C. Circuit also has emphasized that agencies bear the burden of demonstrating that disclosure of such information "would actually inhibit candor in the decision-making process."[164]

There are several categories of documents that routinely are protected by the deliberative process privilege. Among them are "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[165] They are

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[162] 861 F.2d at 1115, 1120 (protecting, e.g., "working drafts" of forest plan and "working drafts of environmental impact statements").

[163] Paisley v. CIA, 712 F.2d 686, 698 n.53 (D.C. Cir. 1983) (dictum); see also Brannum, 377 F. Supp. 2d at 82-83 (protecting factual "vote sheets" used as basis for recommendation to agency policymaker). But see Rashid, No. 98-0898, slip op. at 13-14 (D.D.C. Mar. 2, 2000) (opining without authority that "[t]he results of research are factual and not deliberative information").

[164] Army Times Publ'g Co. v. Dep't of the Air Force, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (holding that agencies must show how process would be harmed where some factual material was released and similar factual material was withheld); see also Am. Petroleum Inst. v. EPA, 846 F. Supp. 83, 90-91 (D.D.C. 1994) (ordering agency to show how factual information could reveal deliberative process).

[165] Sears, 421 U.S. at 150; Humbarger v. EEOC, No. C 03-05818, 2005 U.S. Dist LEXIS 1707, at *5 (N.D. Cal. Jan. 28, 2005) (protecting investigative memoranda because they were predecisional and related to process of policy formation); Judicial Watch, Inc. v. Dep't of Justice, 306 F. Supp. 2d 58, 70 (D.D.C. 2004) (protecting "handwritten notes" on an invitation to the Attorney General, because disclosure "'would reveal what the staff member who wrote the notes considered to be important . . . and how the decision to attend the event may have been reached'" (quoting agency declaration)); Dorsett v. Dep't of the Treasury, 307 F. Supp. 2d. 28, 37-38 (D.D.C. 2004) (protecting Secret Service document evaluating threats presented by plaintiff and others to Secret Service protectees); Warren, 2000 WL 1209383, at *2 (protecting applicant scoresheets on basis that "[t]he decisions of a hiring panel to emphasize certain types of skills or how many points to award to an applicant for a particular educational experience or previous employ-

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protected because, by their very nature, their release would likely "stifle honest and frank communication within the agency."[166]

Of a similar nature are "briefing materials" -- reports or other documents that summarize issues and advise superiors, either generally or in preparation for an event such as congressional testimony.[167] Though courts have not spoken with complete unanimity on this category, the overwhelming weight of authority, including a number of recent cases, now

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[165](...continued)
ment experience are deliberative decisions in that they set the policy for the hiring process"); see also Jernigan v. Dep't of the Air Force, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998) (protecting "opinions and recommendations" of agency investigating officer); Nat'l Wildlife, 861 F.2d at 1121 ("Recommendations on how to best deal with a particular issue are themselves the essence of the deliberative process."); Canning v. Dep't of the Treasury, No. 94-2704, slip op. at 7 (D.D.C. Mar. 21, 2001) ("Allowing disclosure of the pre-decisional opinions of Secret Service Special Agents on whether particular organizations pose protective security risks could compromise the agency's ability to complete its protective mission by stifling honest and frank communication within the agency."); Judicial Watch, 102 F. Supp. 2d at 16 (protecting notes taken by Attorney General at campaign finance task force meeting, but not shared with any other person, because their release "could reveal how the [Attorney General] prioritized different facts and considerations in deliberating whether or not to appoint an independent counsel . . . [and] reveal her interpretation of public policies which she deemed relevant" to decision whether to appoint independent counsel); Fine v. U.S. Dep't of Energy, No. 88-1033, slip op. at 9 (D.N.M. June 22, 1991) (finding that notes written in margins of documents constitute deliberations of documents' recipient); Jowett, 729 F. Supp. at 875 (protecting documents that are "part of the give-and-take between government entities"); Strang v. Collyer, 710 F. Supp. 9, 12 (D.D.C. 1989) (approving withholding of meeting notes that reflect the exchange of opinions between agency personnel or divisions of agency), aff'd sub nom. Strang v. DeSio, 899 F.2d 1268 (D.C. Cir. 1990) (unpublished table decision).

[166] Coastal States, 617 F.2d at 866; see also Missouri, 147 F.3d at 711 ("Perhaps a fuller description [of the record] and why it is exempt might have avoided this litigation, but it was not improper for the [agency] to conclude that open and frank intra-agency discussion would be 'chilled' by public disclosure."); Schell, 843 F.2d at 942 ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect."); Fortson v. Harvey, 407 F. Supp. 2d 13, 16-17 (D.D.C. 2005) (rejecting plaintiff's argument that subordinate's report did not qualify as deliberative simply because it would be either accepted or rejected, and not debated, by superior).

[167] See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (protecting "talking points" and recommendations on how to answer questions).

holds that briefing materials prepared by agencies for one purpose or another are properly protected under the deliberative process privilege.[168]

A category of documents particularly likely to be found exempt under the deliberative process privilege is "drafts,"[169] although it has been observed that such a designation "does not end the inquiry."[170] It should be

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[168] See Sec. Fin. Life Ins. Co., No. 03-102-SBC, 2005 WL 839543, at *11 (D.D.C. Apr. 12, 2005) ("The undisputed evidence establishes that these [talking points] are deliberative."); Judicial Watch, Inc. v. U.S. Dep't of Energy, 310 F. Supp. 2d 271, 317 (D.D.C. 2004) (protecting briefing materials prepared for Secretary of the Interior), aff'd in part, rev'd in part on other grounds & remanded, 412 F.3d 125, 133 (D.C. Cir. 2005); Judicial Watch, 306 F. Supp. 2d at 71-72 (protecting e-mail created to prepare FERC chairman for upcoming congressional testimony); Thompson v. Dep't of the Navy, No. 95-347, 1997 WL 527344, at *4 (D.D.C. Aug. 18, 1997) (protecting materials created to brief senior officials who were preparing to respond to media inquiries, on the basis that "disclosure of materials reflecting the process by which the Navy formulates its policy concerning statements to and interactions with the press" could stifle frank communication within the agency), aff'd, No. 97-5292, 1998 WL 202253, at *1 (D.C. Cir. Mar. 11, 1998) (per curiam); Access Reports, 926 F.2d at 1196-97 (dictum); Klunzinger v. IRS, No. 5:96-CV-209, 1998 U.S. Dist. LEXIS 3226, at *31 (W.D. Mich. Mar. 3, 1998) (holding paper prepared to brief commissioner for meeting protectible); Hunt, 935 F. Supp. at 52 (holding "point papers" compiled to assist officers in formulating decision protectible); Wash. Post, 1987 U.S. Dist. LEXIS 16108, at *33 (holding summaries and lists of material compiled for general's report preparation protectible); Williams, 556 F. Supp. at 65 (holding "briefing papers prepared for the Attorney General prior to an appearance before a congressional committee" protectible); see also FOIA Update, Vol. IX, No. 4, at 5. But see Nat'l Sec. Archive v. FBI, No. 88-1507, 1993 WL 128499, at *2-3 (D.D.C. Apr. 15, 1993) (finding briefing papers to be not protectible).

[169] See, e.g., City of Va. Beach, 995 F.2d at 1253; Town of Norfolk v. U.S. Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Dudman, 815 F.2d at 1569; Russell, 682 F.2d at 1048; Lead Indus., 610 F.2d 70, 85-86 (2d Cir. 1979); Judicial Watch, 337 F. Supp. 2d at 173 (protecting draft agreement and draft of letter from Secretary of Commerce); Judicial Watch, No. 00-0723, slip op. at 9-10 (D.D.C. Mar. 30, 2001); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 36 (D.D.C. 2000); Hamilton Sec. Group, 106 F. Supp. 2d at 32; Snoddy v. Hawke, No. 99-1636, slip op. at 1-2 (D. Colo. Dec. 20, 1999), aff'd, No. 00-1384, 2001 WL 672263 (10th Cir. June 15, 2001); LaRouche, No. 91-1655, slip op. at 30 (D.D.C. May 22, 1998) (protecting draft search warrant affidavits and stating that "it is axiomatic that draft documents reflect some give and take on the part of those involved in the drafts").

[170] Arthur Andersen, 679 F.2d at 257 (citing Coastal States, 617 F.2d at

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remembered, in this regard, that the very process by which a "draft" evolves into a "final" document can itself constitute a deliberative process warranting protection.[171] As a result, Exemption 5 protection can be avail-

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[170](...continued)
866); see Heartwood, Inc. v. U.S. Forest Serv., 431 F. Supp. 2d 28, 37 (D.D.C. 2006) (ruling that draft reports prepared by Federal Advisory Committee Act committee for defendant agency could not be protected, because evidence showed that agency viewed draft reports as merely factual, not as containing "recommendations or policy judgments"); Judicial Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 261 (D.D.C. 2004) (citing Arthur Andersen for proposition that "drafts are not presumptively privileged"); see also Petroleum Info., 976 F.2d at 1436 n.8 (suggesting harm standard for "mundane," nonpolicy-oriented documents, which can include drafts); Lee v. FDIC, 923 F. Supp. 451, 458 (S.D.N.Y. 1996) (declaring that a document's draft status is not a sufficient reason "to automatically exempt" it from disclosure where it has not been shown that disclosure would "inhibit the free flow of information" between agency personnel); cf. Hansen, 817 F. Supp. at 124-25 (concluding that an unpublished internal document lost its draft status when consistently treated by the agency as a finished product over many years).

[171] See, e.g., Nat'l Wildlife, 861 F.2d at 1122 ("To the extent that [the requester] seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft[s] prepared by lower-level [agency] personnel and those actually adopted, . . . it is attempting to probe the editorial and policy judgments of the decisionmakers."); Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987) ("[E]xemption protects not only the opinions, comments and recommendations in the draft, but also the process itself."); Dudman, 815 F.2d at 1569 ("[T]he disclosure of editorial judgments -- for example, decisions to insert or delete material or to change a draft's focus or emphasis -- would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work."); Russell, 682 F.2d at 1048 ("Failure to apply the protections of Exemption (b)(5) to the . . . editorial review process would effectively make such discussion impossible."); Pies v. IRS, 668 F.2d 1350, 1353-54 (D.C. Cir. 1981) (ruling that disclosure of draft proposed regulation and draft transmittal memorandum that were ultimately not adopted as agency policy would be contrary to congressional intent in crafting Exemption 5); AFGE v. HHS, 63 F. Supp. 2d 104, 109 (D. Mass. 1999) (holding draft indoor air quality survey protectible because release would "enable a careful reader to determine the substance of HHS's proposed and adopted changes" and thereby "discourage candid discussion within the agency"), aff'd, No. 99-2208, 2000 U.S. App. LEXIS 10993 (1st Cir. May 18, 2000); Nat'l Ass'n of Criminal Def. Lawyers, No. 97-372, slip op. at 13-14 (D.D.C. July 22,1998) (holding draft inspector general report protectible because release "would uncover the [Office of the Inspector General's] deliberations regarding what should and should not have been included in the final report"); Horsehead, No. 94-1299, slip op. at 19 (D.D.C. Oct. 1, 1996) ("Comparing the draft
(continued...)

able to a draft document regardless of whether it differs from its final version.[172]

Following the 1990 census, the factual/deliberative distinction led to sharply contrasting decisions by two circuit courts of appeal, where the issue was the Commerce Department's withholding of numeric material.[173] Both the Assembly of the State of California and the Florida House of Representatives sought "adjusted" census figures for their respective states that were developed in the event that the Secretary of Commerce decided to adjust the 1990 census, a choice he opted against.[174] The Court of Appeals for the Eleventh Circuit applied a rigid "fact or opinion" test in determining whether such numerical data are protectible.[175] It viewed the census data as "opinion" that was ultimately rejected by the decisionmaker and therefore held them to be withholdable pursuant to the deliberative process privilege.[176]

Addressing the same issue, the Ninth Circuit, on the other hand, upheld a lower court's use of a "functional" test under which it found that the

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[171](...continued)
with the final version ultimately adopted by the agency would provide the requester with a picture window view into the agency's deliberations, the precise danger that Exemption 5 was crafted to avoid."); Rothschild v. CIA, No. 91-1314, slip op. at 6-7 (D.D.C. Mar. 25, 1992) (extending protection to "marginalia consisting of comments, opinions, further relevant information and associated notes" on drafts); Exxon, 585 F. Supp. at 698 (rejecting argument that agency must show how draft differs from final document, because such a requirement would "expose what occurred in the deliberative process between the draft's creation and the final document's issuance"); see also FOIA Update, Vol. VII, No. 2, at 2; FOIA Update, Vol. IV, No. 1, at 6.

[172] See Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta); Lead Indus., 610 F.2d at 86; see also Exxon, 585 F. Supp. at 698; City of West Chicago v. NRC, 547 F. Supp. 740, 751 (N.D. Ill. 1982); FOIA Update, Vol. VII, No. 2, at 2. But see Texaco, Inc. v. U.S. Dep't of Energy, 2 Gov't Disclosure Serv. (P-H) ¶ 81,296, at 81,833 (D.D.C. Oct. 13, 1981) (ruling to the contrary).

[173] Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992); Fla. House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992).

[174] Assembly of Cal., 968 F.2d at 917-18; Fla. House of Representatives, 961 F.2d at 943-44.

[175] Fla. House of Representatives, 961 F.2d at 950.

[176] Id.

data, on "the continuum of deliberation and fact . . . fell closer to fact."[177] It ordered the California data released on the basis that disclosure would not reveal any of the Department of Commerce's deliberative processes.[178] The Ninth Circuit also reached a similar conclusion ten years later in a case brought about statistical estimates compiled as part of the 2000 census.[179] As none of these cases went to the Supreme Court, this narrow conflict remains.

In a case involving purely factual data found not to fall within the deliberative process privilege, Petroleum Information Corp. v. United States Department of the Interior,[180] the D.C. Circuit concluded that such factual information should be shielded by the privilege, or not, according to whether it involves "some policy matter."[181] It focused on "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents,"[182] while at the same time suggesting that more "mundane" documents should be protected when "disclosure genuinely could be thought likely to diminish the candor of agency deliberations in the future."[183] This approach has been used by a few other courts.[184] However, in National Wildlife, the Ninth Circuit

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[177] Assembly of Cal., 968 F.2d at 922.

[178] Id. at 923; see also Carter, 186 F. Supp. 2d at 1157 (following Assembly of California and ordering disclosure of adjusted data from 2000 census).

[179] See Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1091-92 (9th Cir. 2002).

[180] 976 F.2d 1429 (D.C. Cir. 1992).

[181] Id. at 1435.

[182] Id. at 1436.

[183] Id. at 1436 n.8; accord Army Times, 998 F.2d at 1071, 1072 (concluding that "potentially harmful" factual information could be withheld if it were determined that it "would actually inhibit candor in the decision-making process if made available to the public").

[184] See Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1277-78 (S.D. Fla. 2006) (refusing to protect e-mail communications containing advice to agency director merely because these messages contained recommendations on press relations, not on matters relating to agency's "mission"); Hennessey, 1997 WL 537998, at *5 (determining that the "report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5" (citing Petroleum Info., 976 F.2d at 1437)); Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994) (concluding that the "privilege does not protect a document [that] is merely peripheral to actual policy formulation"); Legal & Safety Employer Research, Inc. v. U.S. Dep't of the Army, No. CIV. S-00-

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flatly rejected the suggestion that it impose such a requirement that documents contain "recommendations on law or policy to qualify as deliberative," and other courts have followed that approach as well[185]

Lastly, protecting the very integrity of the deliberative process can, in

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[184](...continued)
1748, 2001 WL 34098652, at *6 (E.D. Cal. May 4, 2001) (concluding that contractor performance evaluations, which were required to be considered in future government contract award determinations, were not "the type of policy decision contemplated by Exemption 5"); Chi. Tribune Co. v. HHS, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308, at *50 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (holding that scientific judgments are not protectible when they do not address agency policymaking), adopted (N.D. Ill. Mar. 28, 1997); Horsehead, No. 94-1299, slip op. at 19 (D.D.C. Oct. 1, 1996) (holding documents containing descriptions of scientific test results not protectible because they are "simply barren of any suggestion of advice or recommendations regarding policy judgments, and the factual information is easily segregated"); Larue v. IRS, No. 3-93-423, 1994 WL 315750, at *2 (E.D. Tenn. Jan. 27, 1994) (holding that privilege covers documents "actually related to the process by which policy is formed"); Md. Coal. for Integrated Educ. v. U.S. Dep't of Educ., No. 92-2178, slip op. at 2 (D.D.C. June 30, 1993) (rejecting position that deliberative process privilege applies to "all agency decisions"); see also Mapother, 3 F.3d at 1537-39 (discussing and harmonizing existing D.C. Circuit case law).

[185] 861 F.2d at 1118; see also Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1095 (9th Cir. 1997) (ignoring the issue of "policy" and protecting a letter in which an employee was "fighting to preserve his job and reputation" by offering his "candid and confidential responses . . . to the head of his agency in order to rebut the charges made against him"); Providence Journal Co., 981 F.2d at 560 (citing National Wildlife and ruling that the agency's decision to discipline personnel for alleged misconduct is no less a "deliberative task . . . than the formulation or promulgation of agency disciplinary policy"); Ctr. for Biological Diversity v. Norton, No. Civ. 01-409 TUC, 2002 WL 32136200, at *2 (D. Ariz. 2002) (holding that limiting privilege to "'policy' decisions is overly narrow" and inconsistent with Ninth Circuit law); AFGE, AFL-CIO, Local 1164 v. HHS, 63 F. Supp. 2d 104, 109 (D. Mass. 1999) (rejecting plaintiff's contentions that a document must be related to an "essential function" of the agency in order to be protected, a claim "comparable" to the "law and policy" test rejected in Nat'l Wildlife); Citizens Comm'n on Human Rights v. FDA, No. 92CV5313, 1993 WL 1610471, at *11 (C.D. Cal. May 10, 1993) (citing National Wildlife and holding that appropriate test is simply whether document in question contributes to agency's deliberative process), aff'd in pertinent part & remanded in part, 45 F.3d 1325 (9th Cir. 1995); cf. Brockway v. Dep't of the Air Force, 518 F.2d 1184, 1192 (8th Cir. 1975) (rejecting plaintiff's contentions that accident witness statements are not part of agency's deliberations and that they should be released just because they are not policy memoranda).

some contexts, be the basis for the protection of factual information.[186] Similarly under some circumstances disclosure of even the identity of the author of a deliberative document could chill the deliberative process, thus warranting protection of that identity under Exemption 5,[187] even in circumstances in which a final version of the document in question has been released to the public.[188] Indeed, one court has specifically noted that the danger of revealing the agency's deliberations by disclosing facts is particularly acute when the document withheld is "short."[189] Factual information within a deliberative document also may be withheld when it is impossible to reasonably segregate meaningful portions of that factual information from the deliberative information.[190]

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[186] See, e.g., Wolfe, 839 F.2d at 776 (revealing status of proposal in deliberative process "could chill discussions at a time when agency opinions are fluid and tentative"); Dudman, 815 F.2d at 1568 (revealing editorial judgments would stifle creative thinking).

[187] See, e.g., Brinton v. Dep't of State, 636 F.2d 600, 604 (D.C. Cir. 1980) (protecting identities of attorneys who provided legal advice to Secretary of State); Claudio, No. H-98-1911, slip op. at 8 (S.D. Tex. May 24, 2000) (accepting agency determination that release of identities of reports' authors would compromise integrity of agency decisionmaking process); Cofield v. City of LaGrange, No. 95-179, 1996 WL 32727, at *6 (D.D.C. Jan. 24, 1996) (finding internal routing notations possibly leading to identification of employees involved in decisionmaking protectible); Miscavige v. IRS, No. 91-1638, 1993 WL 389808, at *3 (N.D. Ga. June 15, 1992) (protecting handwritten signatures of agency employees involved in ongoing examination of church's claim of exempt status), aff'd on other grounds, 2 F.3d 366 (11th Cir. 1993); see also FOIA Update, Vol. VI, No. 2, at 6 (discussing circumstances under which it is appropriate to withhold name of author of requested document); cf. Wolfe, 839 F.2d at 775-76 (discussing how particularized disclosure can chill agency discussions); Greenberg, 10 F. Supp. 2d at 16 n.19 (holding that mere redaction of authors' names would not remove chilling effect on decisionmaking process).

[188] See City of W. Chi., 547 F. Supp at 750 (holding list of contributors to preliminary draft protectible even though names were in final version); Tax Reform Research Group v. IRS, 419 F. Supp. 415, 423-24 (D.D.C. 1976) (protecting identities of persons giving advice on policy matters even though substance of policy discussions had been released).

[189] Nadler, 955 F.2d at 1491 (dicta) (considering document "one and one-half pages in length").

[190] See Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (concluding that short document would be rendered "nonsensical" by segregation); see also Lead Indus., 610 F.2d at 86 ("Instead of merely combing the documents for 'purely factual' tidbits, the court should have considered the segments in the context of the whole document and

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EXEMPTION 5

Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation.[191] As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny,[192] the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.[193] The privilege is not limited to civil proceedings, but rather extends to administrative proceedings[194] and to criminal matters as

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[190](...continued)
that document's relation to the administrative process."); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *30-31 (D.D.C. Aug. 22, 1995) (holding that agency met burden in showing that in some instances factual material could not be segregated); Badhwar, 622 F. Supp. at 1375 (finding it impossible to "reasonably" segregate nondeliberative material from autopsy report); Morton-Norwich Prods., Inc. v. Mathews, 415 F. Supp. 78, 82 (D.D.C. 1976). But see Army Times, 998 F.2d at 1070 (emphasizing agency obligation to specifically address possible segregability and disclosure of factual information); accord FOIA Update, Vol. XIV, No. 3, at 10-11 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

[191] See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure).

[192] See Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc).

[193] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

[194] See, e.g., Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 586 (N.D. W. Va. 2005) (EPA administrative enforcement proceeding); McErlean v. United States Dep't of Justice, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999) (INS deportation proceeding), amended (S.D.N.Y. Oct. 29, 1999); Means v. Segal, No. 97-1301, slip op. at 11-12 (D.D.C. Mar. 18, 1998) (magistrate's recommendation) (unfair labor practice determination), adopted (D.D.C. Apr. 15, 1998), aff'd per curiam, No. 98-5170 (D.C. Cir. Oct. 6, 1998); Williams v. McCausland, No. 90-Civ-7563, 1994 WL 18510, at *10 (S.D.N.Y. Jan. 18, 1994) (MSPB proceeding); Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983) (regulatory audits and investigations); see also Judicial Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 30-31 (D.D.C. 2003) (applying privilege to memorandum written by IRS associate chief counsel that discussed private financial information concerning prospective IRS employee); cf. Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (reaching same result under Exemption (d)(5) of Privacy Act of 1974, 5 U.S.C. § 552a(d)(5) (2000)). But see MacLean v. DOD, No. 04-CV-2425, slip op. at 12-13 (S.D. Cal. June 2, 2005) (holding that privi-
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well.[195] Similarly, the privilege has also been held applicable to documents

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[194](...continued)
lege does not apply to records prepared for intra-agency review, even where such review could lead to discipline of agency employee).

[195] See, e.g., Rockwell Int'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (applying privilege in case involving prosecution of environmental crimes); Nadler v. U.S. Dep't of Justice, 955 F.2d 1479, 1491-92 (11th Cir. 1992) (applying privilege in bribery investigation); Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983) (ruling privilege applicable in bank-fraud prosecution); Butler v. U.S. Dep't of Justice, 368 F. Supp. 2d 776, 785-86 (E.D. Mich. 2005) (applying privilege to prosecution memorandum and draft indictment prepared as part of narcotics investigation); Williams v. U.S. Dep't of Justice, No. 02-2452, slip op. at 7 (D.D.C. Feb. 4, 2004) (protecting summaries of telephone conversations between Assistant United States Attorney and FBI official discussing various facets of criminal investigation); Kendrick v. Executive Office for U.S. Attorneys, No. 00-1809, slip op. at 5 (D.D.C. June 14, 2001) (holding privilege applicable to attorney notes prepared for grand jury proceedings, criminal indictment, and trial); Givner v. Executive Office for U.S. Attorneys, No. 99-3454, slip op. at 10-11 (D.D.C. Mar. 1, 2001) (approving application of privilege to "attorney notes, trial preparation materials, trial research, directives between government attorneys, witness related [sic] notes and materials, draft pleadings and draft letters" generated in criminal case); Bartolotta v. FBI, No. 99-1145, slip op. at 8 (D.D.C. July 13, 2000) (approving invocation of the privilege to protect a memorandum "prepared by an attorney of the Criminal Division that discusses and analyzes double jeopardy and collateral estoppel issues as they relate to the viability of contemplated litigation" under the RICO Act); Spannaus v. U.S. Dep't of Justice, No. 92-0372, slip op. at 4 (D.D.C. Sept. 30, 1999) (holding privilege applicable to a document prepared by an Assistant United States Attorney that discussed grand jury procedures in a criminal case, and stating that "[i]t is difficult to imagine a more direct application of the work product privilege"); Slater v. Executive Office for U.S. Attorneys, No. 98-1663, 1999 U.S. Dist. LEXIS 8399, at *9 (D.D.C. May 24, 1999) (protecting portions of letter from Assistant United States Attorney to FBI revealing investigative strategy in criminal case); Telegraph Publ'g Co. v. U.S. Dep't of Justice, No. 95-521, slip op. at 19-20 (D.N.H. Aug. 31, 1998) (holding privilege applicable to materials prepared by Assistant United States Attorney in preparation for criminal prosecution); Rzeslawski v. U.S. Dep't of Justice, No. 97-1156, slip op. at 9 (D.D.C. July 23, 1998) (affirming use of privilege for Assistant United States Attorney's handwritten notes reflecting trial preparation in criminal case), appeal dismissed, No. 00-5029 (D.C. Cir. Apr. 11, 2000); see also FOIA Update, Vol. V, No. 2, at 7 (discussing use of privilege in context of criminal law enforcement investigations). But cf. Powell v. Dep't of Justice, 584 F. Supp. 1508, 1520 (N.D. Cal. 1984) (suggesting, but not deciding, that attorney work-product materials generated in criminal case should be subject to disclosure under criminal discovery provisions).

generated in preparation of an amicus brief.[196]

This privilege sweeps very broadly in several respects.[197] First, litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable.[198] Significantly, the Court of Appeals for the District of Columbia Circuit has ruled that the privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."[199] The privilege also has been held to attach to records of law enforcement investigations, when the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer."[200]

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[196] See Strang v. Collyer, 710 F. Supp. 9, 12-13 (D.D.C. 1989), aff'd sub nom. Strang v. DeSio, 899 F.2d 1268 (D.C. Cir. 1990) (unpublished table decision).

[197] See generally FOIA Update, Vol. IV, No. 3, at 6.

[198] See Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir. 1976); see, e.g., Hertzberg v. Veneman, 273 F. Supp. 2d 67, 80 (D.D.C. 2003) (applying privilege in situation where potential claimants had discussed possibility of pursuing claims); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 19 (D.D.C. 2001) (protecting document written to assess "whether a particular case should be designated for litigation"), aff'd in part, rev'd in part on other grounds & remanded, 294 F.3d 71 (D.C. Cir. 2002); Blazy v. Tenet, 979 F. Supp. 10, 24 (D.D.C. 1997) (observing that communication between agency employee review panel and agency attorney throughout process of deciding whether to retain plaintiff "at the very least demonstrates that the [panel] was concerned about potential litigation"), summary affirmance granted, No. 97-5330 (D.C. Cir. May 12, 1998); Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, 1992 WL 281322, at *3-4 (N.D. Ill. Oct. 6, 1992) (holding that privilege applies to legal advice given for specific agency cleanup sites); Savada v. DOD, 755 F. Supp. 6, 7 (D.D.C. 1991) (finding threat of litigation by counsel for adverse party sufficient); cf. Means, No. 97-1301, slip op. at 11-12 (D.D.C. Mar. 18, 1998) (holding privilege applicable to records prepared for unfair labor practice complaint that agency later dropped).

[199] Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992); see also Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (holding that privilege extends to documents prepared when identity of prospective litigation opponent unknown); Hertzberg, 273 F. Supp. 2d at 79 (protecting documents generated in light of "'strong probability of tort claims'" (quoting agency declaration)); Kelly v. CIA, No. 00-2498, slip op. at 32-36 (D.D.C. Aug. 8, 2002) (applying privilege to protect documents related to CIA's obligation to notify unwitting participants in drug-testing program and to claims that such individuals might raise in court).

[200] SafeCard Servs. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991); see, e.g., (continued...)

However, the mere fact that it is conceivable that litigation might occur at some unspecified time in the future will not necessarily be sufficient to protect attorney-generated documents; it has been observed that "the policies of the FOIA would be largely defeated" if agencies were to withhold any documents created by attorneys "simply because litigation might someday occur."[201] But when litigation is reasonably regarded as inevitable under the circumstances, a specific claim need not yet have arisen,[202]

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[200](...continued)
Winterstein v. U.S. Dep't of Justice, 89 F. Supp. 2d 79, 81 (D.D.C. 2000) (protecting prosecution memorandum "prepared for the purpose of pursuing a specific claim -- namely, the contemplated prosecution of Arthur Rudolph"); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *14 (S.D.N.Y. Nov. 9, 1999) (protecting correspondence between United States Attorney's Office and Postal Inspection Service regarding criminal investigative and prosecutive strategy), appeal dismissed for failure to prosecute, No. 00-6041 (2d Cir. Sept. 12, 2000); Pentagen Techs. Int'l v. United States, No. 98-4831, 1999 WL 378345, at *3 (S.D.N.Y. June 9, 1999) (upholding application of privilege to attorney notes regarding qui tam suit in which government ultimately declined to intervene); LaRouche v. U.S. Dep't of the Treasury, No. 91-1655, slip op. at 24-26 (D.D.C. May 22, 1998) (holding that privilege covers letter from Assistant United States Attorney to IRS official requesting IRS's participation in ongoing grand jury investigation of plaintiff); Rosenberg v. Freeh, No. 97-0476, slip op. at 7-8 (D.D.C. May 13, 1998) (protecting documents generated by United States Attorney's Office during course of considering prosecutive action against subjects of undercover operation); Sousa v. U.S. Dep't of Justice, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at *20 (D.D.C. June 19, 1997) (holding that documents were described sufficiently to show that murder investigation, leading to potential prosecution, was underway); Feshbach v. SEC, 5 F. Supp. 2d 774, 783 (N.D. Cal. 1997) (protecting documents pertaining to preliminary examination "based upon a suspicion of specific wrongdoing and represent[ing] an effort to obtain evidence and to build a case against the suspected wrongdoer").

[201] Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987) (emphasis added) (citing Coastal States, 617 F.2d at 865).

[202] See In re Sealed Case, 146 F.3d 881, 885-86 (D.C. Cir. 1998) (protecting document that provided legal advice intended to protect client from future litigation over particular transaction, even though no claim had yet arisen) (non-FOIA case); Schiller, 964 F.2d at 1208 (holding documents that provide tips and instructions for handling future litigation protectible); Delaney, 826 F.2d at 127 (holding memoranda that "advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency and the likely outcome" protectible); Hertzberg, 273 F. Supp. 2d at 78 (protecting documents from investigation where agency has determined that claims were likely to arise); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1289 (D. Kan. 2001) (protecting documents containing guidance for agency at-
(continued...)

and agencies can obtain necessary protection through the attorney work-product privilege.[203]

Further, it has been held that a document that was prepared for two disparate purposes was compiled in anticipation of litigation if "litigation was a major factor" in the decision to create it.[204] However, documents pre-

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[202](...continued)
torneys on litigation of environmental law cases); Bhd. of Locomotive Eng'rs v. Surface Transp. Bd., No. 96-1153, 1997 WL 446261, at *6 (D.D.C. July 31, 1997) (finding future litigation "probable" when agency is aware that its legal interpretation will be contested in court); Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at *2 (D.D.C. Aug. 21, 1995) (holding that articulable claim arose when agency became aware that its position was not accepted by taxpayers); Lacefield v. United States, No. 92-N-1680, 1993 WL 268392, at *8 (D. Colo. Mar. 10, 1993) (holding that agency's knowledge that adversary plans to challenge agency position constitutes sufficient anticipation of articulable claim); Silber v. U.S. Dep't of Justice, No. 91-876, transcript at 23-24 (D.D.C. Aug. 13, 1992) (bench order) (deciding that privilege covers monograph written to assist attorneys in prosecuting cases); Anderson v. U.S. Parole Comm'n, 3 Gov't Disclosure Serv. (P-H) ¶ 83,055, at 83,557 (D.D.C. Jan. 6, 1983) (deciding that privilege covers case digest of legal theories and defenses frequently used in litigation).

[203] See, e.g., Delaney, 826 F.2d at 127 (protecting "agency's attorneys' assessments of [a] program's legal vulnerabilities" crafted before specific litigation arose); Heggestad v. U.S. Dep't of Justice, 182 F. Supp. 2d 1, 8 (D.D.C. 2000) (noting that the privilege applies "even without a case already docketed or where the agency is unable to identify the specific claim to which the document relates"); see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (emphasizing important role of attorney work-product privilege in ensuring that "lawyers' deliberations and communications are kept private").

[204] Wilson v. Dep't of Energy, No. 84-3163, slip op. at 7 n.1 (D.D.C. Jan. 28, 1985); see also Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002) (amended opinion) (concluding that court's earlier opinion, which had required that litigation be primary factor in creation of documents for which attorney work-product privilege was claimed, was in error); Wood v. FBI, No. 3:02cv2058, 2004 U.S. Dist LEXIS 5525, at *13 (D. Conn. Mar. 31, 2004) (noting that the work-product privilege applies if the """document can fairly be said to have been prepared or obtained because of the prospect of litigation""" (quoting United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (quoting in turn Charles A. Wright, Arthur Miller, and Richard L. Marcus, 8 Federal Practice and Procedure 343 (1994)))); Hertzberg, 273 F. Supp. 2d at 80 (D.D.C. 2003) (rejecting "primary purpose" test); Maine v.
(continued...)

pared in an agency's ordinary course of business, not under circumstances sufficiently related to litigation, may not be accorded protection.[205]

The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation.[206] Logically, it can also protect the recommendation to close a litigation or prelitigation matter,[207] and even the final agency decision to terminate litigation.[208] But doc-

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[204](...continued)
Norton, 208 F. Supp. 2d 63, 67 (D. Me. 2002) (applying privilege in civil discovery context to documents created in ordinary course of agency business, so long as agency could show that they were prepared in light of possible litigation); Brotherhood, 1997 WL 446261, at *6 (holding that privilege applies where document was created "in part" for litigation). But see United States v. Gulf Oil Corp., 760 F.2d 292, 296-97 (Temp. Emer. Ct. App. 1985) (holding, in non-FOIA case, that anticipation of litigation must be "the primary motivating purpose behind the creation of the document"); Pub. Citizen Inc. v. Dep't of State, 100 F. Supp. 2d 10, 30 (D.D.C. 2000) (requiring that litigation be "primary motivating purpose" in document's creation).

[205] See Hennessey v. U.S. Agency for Int'l Dev., No. 97-1113, 1997 WL 537998, at *6 (4th Cir. Sept. 2, 1997) (deciding that a report commissioned to complete a project was not prepared "because of the prospect of litigation," despite the threat of suit); Hill Tower, Inc. v. Dep't of the Navy, 718 F. Supp. 562, 567 (N.D. Tex. 1988) (concluding that aircraft accident investigation information in JAG Manual report was not created in anticipation of litigation).

[206] United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040, 1044-45 (8th Cir. 1992) (holding that it is "beyond doubt that draft consent decrees prepared by a federal government agency involved in litigation" are covered by Exemption 5, but remanding to determine if the privilege was waived); see also Tax Analysts, 152 F. Supp. 2d at 19 (protecting recommendations concerning settlement of case); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984) ("attorney's notes or working papers which relate to . . . possible settlement discussions . . . are protected under the attorney work-product privilege"), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (unpublished table decision); Church of Scientology v. IRS, No. 90-11069, slip op. at 20 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (holding that fact that parties were contemplating settlement does not foreclose application of attorney work-product privilege); cf. Carey-Canada, Inc. v. Aetna Cas. & Sur. Co., 118 F.R.D. 250, 251-52 (D.D.C. 1987) (upholding use of privilege, in non-FOIA case, for documents related to possible settlement of claims).

[207] See, e.g., A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 146-47 (2d Cir. 1994) (concluding that exemption still was applicable even if staff attorney was considering or recommending closing investigation); Heggestad, 182 F. Supp. 2d at 10-11 (holding privilege applicable to prosecution-declina-
(continued...)

uments prepared subsequent to the closing of a case are presumed, absent some specific basis for concluding otherwise, not to have been prepared in anticipation of litigation.[209] Moreover, documents not originally prepared in anticipation of litigation cannot assume the protection of the work-product privilege merely through their later placement in a litigation-related document.[210]

Second, Rule 26(b)(3) of the Federal Rules of Civil Procedure allows the privilege to be used to protect documents prepared "by or for another party or by or for that other party's representative." Not only do documents prepared by agency attorneys who are responsible for the litigation of a case which is being defended or prosecuted by the Department of Justice qualify for the privilege,[211] but also documents prepared by an attorney "not employed as a litigator,"[212] or even documents prepared by someone not

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[207](...continued)
tion memoranda); cf. Tax Analysts v. IRS, No. 94-923, slip op. at 6 (D.D.C. Sept. 3, 1999) (protecting record containing "mental impressions" of agency attorney as to whether agency should continue to contest certain matters in litigation, or cease litigating case altogether); Grecco v. Dep't of Justice, No. 97-0419, slip op. at 12 (D.D.C. Apr. 1, 1999) (holding exemption applicable to records concerning determination whether to appeal lower court decision).

[208] See FOIA Update, Vol. VI, No. 3, at 5 (analyzing bases for privilege).

[209] See Senate of P.R., 823 F.2d at 586; Rashid v. U.S. Dep't of Justice, No. 99-2461, slip op. at 10-11 (D.D.C. June 12, 2001) (holding privilege inapplicable to documents drafted after case was settled); Canning v. Dep't of the Treasury, No. 94-2704, slip op. at 12 (D.D.C. May 7, 1998) (holding prosecutor's letter setting forth reasons relied upon in declining to prosecute case and "written after the conclusion of the investigation and after the decision to forgo litigation was made," not covered by privilege); Grine v. Coombs, No. 95-342, 1997 U.S. Dist. LEXIS 19578, at *10 (W.D. Pa. Oct. 10, 1997) (finding privilege inapplicable where no further agency enforcement action was contemplated at time of document's creation). But see Senate of P.R. v. U.S. Dep't of Justice, No. 84-1829, 1992 WL 119127, at *8 (D.D.C. May 13, 1992) (finding reasonable anticipation of litigation still existed after case was formally closed, because agency was carefully reevaluating it in light of new evidence).

[210] See Dow Jones & Co. v. Dep't of Justice, 724 F. Supp. 985, 989 (D.D.C. 1989), aff'd on other grounds, 917 F.2d 571 (D.C. Cir. 1990); MacLean, No. 04-2425, slip op. at 13 n.13 (S.D. Cal. June 2, 2005).

[211] See, e.g., Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983).

[212] Ill. State Bd. of Educ. v. Bell, No. 84-337, slip op. at 9-10 (D.D.C. May 31, 1985).

employed primarily as an attorney.[213] Courts have also accorded work product protection to materials prepared by nonattorneys who are supervised by attorneys.[214] The premise in such cases is that work-product protection

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[213] See, e.g., Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 293 (4th Cir. 2004) (upholding privilege even though attorney in question testified that he had been hired as engineer, not as attorney; finding that it was clear that despite being hired as engineer, attorney had exercised legal judgment in undertaking his analysis).

[214] See, e.g., United States v. Nobles, 422 U.S. 225, 238-39 (1975) (concluding, in a non-FOIA case, that "the realities of litigation" require that the privilege extend to material prepared by an attorney's agents); Diversified Indus. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) ("While the 'work product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer.") (non-FOIA case); Shacket v. United States, 339 F. Supp. 2d 1092, 1096 (S.D. Cal. 2004) (holding it "irrelevant" that report withheld pursuant to work-product privilege was prepared by IRS Special Agent, not attorney; observing that the privilege extends to an attorney "or other representative of a party"); Hertzberg, 273 F. Supp. 2d at 76 (rejecting claim that privilege is limited to materials prepared by attorney, and citing Federal Rule of Civil Procedure 26(b)(3) for proposition that privilege extends to documents created at direction of attorney); Davis v. FTC, No. 96-CIV-9324, 1997 WL 73671, at *2 (S.D.N.Y. Feb. 20, 1997) (protecting material prepared by economists for administrative hearing); Creel v. U.S. Dep't of State, No. 6:92CV 559, 1993 U.S. Dist. LEXIS 21187, at *27 (E.D. Tex. Sept. 29, 1993) (magistrate's recommendation) (protecting special agent's notes made while assisting attorney in investigation), adopted (E.D. Tex. Dec. 30, 1993), aff'd, 42 F.3d 641 (5th Cir. 1995) (unpublished table decision); Durham v. U.S. Dep't of Justice, 829 F. Supp. 428, 432-33 (D.D.C. 1993) (protecting material prepared by government personnel under prosecuting attorney's direction), appeal dismissed for failure to timely file, No. 93-5354 (D.C. Cir. Nov. 29, 1994); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 17 (D. Colo. Mar. 22, 1993) (holding that privilege covers telephone interview conducted by examiner at request of attorney); Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 9-10 (D. Mont. Sept. 9, 1988) (protecting water studies produced by contract companies); Nishnic v. U.S. Dep't of Justice, 671 F. Supp. 771, 772-73 (D.D.C. 1987) (holding historian's research and interviews privileged); Wilson, No. 84-3163, slip op. at 8 (D.D.C. Jan. 28, 1995) (holding consultant's report privileged); Exxon Corp. v. FTC, 466 F. Supp. 1088, 1099 (D.D.C. 1978) (protecting economist's report), aff'd, 663 F.2d 120 (D.C. Cir. 1980). But see Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *8-9 (rejecting attorney work-product applicability where documents were prepared by nonattorney who merely "may" have been acting at direction of attorney); cf. Richman v. U.S. Dep't of Justice, No. 90-C-19-C, slip op. at 3 (W.D. Wis. Mar. 2, 1994) (holding that information not prepared "by a lawyer in preparation for litigation" was not entitled to any protection under Exemption 5 whatsoever); Brittany Dyeing

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is appropriate when the nonattorney acts as the agent of the attorney; when that is not the case, the work-product privilege as incorporated by the FOIA has not been extended to protect the material prepared by the nonattorney.[215]

Third, the work-product privilege has been held to remain applicable when the information has been shared with a party holding a common interest with the agency.[216] The privilege remains applicable also when the document has become the basis for a final agency decision.[217]

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[214](...continued)
& Printing Corp. v. EPA, No. 91-2711, slip op. at 7-8 (D.D.C. Mar. 12, 1993) (holding that witness statements taken by investigator at behest of counsel cannot be protected because they would "not expose agency decision-making process").

[215] See Hall v. Dep't of Justice, No. 87-474, 1989 WL 24542, at *7-8 (D.D.C. Mar. 8, 1989) (magistrate's recommendation) (concluding that agency's affidavit failed to show that prosecutorial report of investigation was prepared by Marshals Service personnel under direction of attorney), adopted (D.D.C. July 31, 1989); Nishnic, 671 F. Supp. at 810-11 (holding that summaries of witness statements taken by USSR officials for United States Department of Justice are not protectible).

[216] See, e.g., Gulf Oil, 760 F.2d at 295-96 (protecting documents shared between two companies contemplating merger); Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982); Nishnic, 671 F. Supp. at 775 (protecting documents shared with foreign nation); cf. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 15-16 (2001) (declining to extend Exemption 5 threshold to protect communications between agency and Indian tribes, despite fiduciary obligation of agency acting as trustee to protect confidentiality of such communications); Rashid, No. 99-2461, slip op. at 10 (D.D.C. June 12, 2001) (holding privilege inapplicable because agency failed to demonstrate common interest with third parties to whom it disclosed documents).

[217] See Wood v. FBI, 312 F. Supp. 2d 328, 344 (D. Conn. 2004) (noting prior rulings that incorporation or adoption do not vitiate work-product protection), aff'd in part, rev'd in part on other grounds & remanded, 432 F.3d 78 (2d Cir. 2005); Uribe v. Executive Office for U.S. Attorneys, No. 87-1836, 1989 U.S. Dist. LEXIS 5691, at *6-7 (D.D.C. May 23, 1989) (protecting criminal prosecution declination memorandum); Iglesias v. CIA, 525 F. Supp. 547, 559 (D.D.C. 1981) ("[A]ny argument to the effect that the attorney's opinions in question may have become the basis for final agency action is irrelevant [to the applicability of] the work-product privilege."); FOIA Update, Vol. VI, No. 3, at 5; see also Fed. Open Mkt. Comm. v. Merrill, 434 U.S. 340, 360 n.23 (1979) (protecting final determination under commercial privilege); cf. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (holding that memoranda reflecting an agency decision to prosecute do not consti-
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In NLRB v. Sears, Roebuck & Co.,[218] the Supreme Court allowed the withholding of a final agency decision on the basis that it was shielded by the work-product privilege,[219] but it also stated that Exemption 5 can never apply to final decisions and it expressed reluctance to "construe Exemption 5 to apply to documents described in FOIA subsection (a)(2),"[220] the "reading room" provision of the Act.[221] This result inevitably led to no small amount of confusion,[222] which was cleared up by the Supreme Court in Federal Open Market Committee v. Merrill.[223] In Merrill, the Court explained its statements in Sears,[224] and plainly stated that even if a document is a final opinion, and therefore falls within subsection (a)(2)'s mandatory disclosure requirements, it still may be withheld if it falls within the work-product privilege.[225] (For a discussion of the automatic disclosure require-

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[217](...continued)
tute a "final disposition" of the "case" within the meaning of subsection (a)(2) of the FOIA). But see Grolier, 462 U.S. at 32 n.4 (Brennan, J., concurring) ("[I]t is difficult to imagine how a final decision could be 'prepared in anticipation of litigation or for trial.'").

[218] 421 U.S. 132 (1975).

[219] Id. at 160.

[220] Id. at 153-54.

[221] See FOIA Update, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)"); see also FOIA Update, Vol. XVII, No. 4, at 1-2 (describing amendments to subsection (a)(2)).

[222] See, e.g., Bristol-Meyers Co. v. FTC, 598 F.2d 18, 24 n.11, 29 (D.C. Cir. 1978) (citing Sears for earlier proposition that document will lose work product protection if it is expressly adopted as agency policy or is incorporated into agency's "final opinion").

[223] 443 U.S. 340 (1979).

[224] Id. at 360 n.23 (clarifying that Sears observations were made in relation to privilege for predecisional communications only).

[225] Id. ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."); see also Tax Analysts, 152 F. Supp. 2d at 29 (citing Merrill for the proposition that "agency working law contained in a privileged attorney work product is exempt material in and of itself" and, therefore, "need not be segregated and disclosed"). But see SafeCard, 926 F.2d at 1203-05, 1206 (mistakenly applying Bristol-Meyers, a pre-Merrill decision, in requiring the release of work product that memorializes a final decision); Richman v. U.S. Dep't of
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ments of subsection (a)(2), see FOIA Reading Rooms and Web Sites, FOIA Reading Rooms, above.)

Fourth, the Supreme Court's decisions in United States v. Weber Aircraft Corp.[226] and FTC v. Grolier Inc.,[227] viewed in light of the traditional contours of the attorney work-product doctrine, afford sweeping attorney work-product protection to factual materials. Because factual work product enjoys qualified immunity from civil discovery, such materials are discoverable "only upon a showing that the party seeking discovery has substantial need" of materials which cannot be obtained elsewhere without "undue hardship."[228] In Grolier, the Supreme Court held that the "test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance."[229] Because the rules of civil discovery require a showing of "substantial need" and "undue hardship" in order for a party to obtain any factual work-product,[230] such materials are not "routinely" or "normally" discoverable. This "routinely or normally discoverable" test was unanimously reaffirmed by the Supreme Court in Weber Aircraft.[231]

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[225](...continued)
Justice, No. 90-C-19-C, slip op. at 9 (W.D. Wis. Feb. 2, 1994) (mistakenly concluding that work-product privilege applies only when information is predecisional).

[226] 465 U.S. 792 (1984).

[227] 462 U.S. 19 (1983).

[228] Fed. R. Civ. P. 26(b)(3).

[229] 462 U.S. at 26; see also Sears, 421 U.S. at 149 & n.16.

[230] Fed. R. Civ. P. 26(b)(3); see, e.g., Maine v. Norton, 208 F. Supp. 2d at 66-67 (holding, in civil discovery context, that civil litigants seeking discovery can show "particularized need" for documents withheld under deliberative process privilege, and "substantial need and undue hardship" for documents withheld under attorney work-product privilege, in order to overcome opponent's assertion of privilege).

[231] 465 U.S. at 799; see also Wood, 2004 U.S. Dist LEXIS, at *14 (noting that because in civil discovery context work-product privilege can be overcome only upon showing of substantial need, such documents are never "routinely disclosed" and hence are always protected in FOIA context); cf. In re England, 375 F.3d 1169, 1178-79 (D.C. Cir. 2004) (rejecting, in non-FOIA case, plaintiff's claim that statutory exemption from discovery rule could be overcome by bare assertion that protected documents would reveal agency wrongdoing); MacLean, No. 04-2425, slip op. at 7-9 (S.D. Cal. June 2, 2005) (refusing to accept plaintiff's contention that deliberative process privilege "disappears altogether" whenever there is "any reason" to believe that government engaged in misconduct). But see Martin v. U.S.
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Although several pre-Weber Aircraft circuit court decisions limited attorney work-product protection to "deliberative" material,[232] no distinction between factual and deliberative work product should be applied.[233] During the past two years two lower federal courts held that agencies had an obligation to segregate out and disclose factual portions of work-product material.[234] However, in ruling on an appeal of one of these cases, the D.C. Circuit has explicitly repudiated any such holding, in a strong opinion clearly stating that the attorney work-product privilege does not distinguish between factual and deliberative materials.[235] This opinion firmly follows earlier precedents of that court, as well as those of numerous other federal courts,[236] and now should put any such question to rest.[237] It al-

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[231](...continued)
Dep't of Justice, No. 96-2886, slip op. at 6-7 (D.D.C. Mar. 28, 2005) (reasoning that factual work-product documents are protected merely because of fact that plaintiff had made no showing of special need for documents, rather than fundamentally because work-product documents are not routinely discoverable and therefore never disclosable under FOIA in light of Weber Aircraft, 465 U.S. at 799, and Grolier, 462 U.S. at 26).

[232] See Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 735 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1138 (4th Cir. 1977); Title Guar. Co. v. NLRB, 534 F.2d 484, 492-93 n.15 (2d Cir. 1976).

[233] Cf. Judicial Watch, Inc. v. Dep't of Justice, 337 F. Supp. 2d 183, 186-87 (D.D.C. 2004) (holding that documents in question were properly withheld pursuant to attorney work-product privilege, but concluding that agency must still segregate unspecified portions for disclosure), rev'd, 432 F.3d 366, 372 (D.C. Cir. 2005).

[234] See Mone v. Dep't of the Navy, 353 F. Supp. 2d 193, 196 (D. Mass. 2005) (ordering in camera review of work-product document to determine if it contained segregable material); Judicial Watch, 337 F. Supp. 2d at 186-87 (claiming that circuit law on factual work-product material was "unclear").

[235] Judicial Watch, Inc. v. U.S. Dep't of Justice, 432 F.3d 366, 371 (D.C. Cir. 2005) ("[F]actual material is itself privileged when it appears within documents that are attorney work product. If a document is fully protected as work product, then segregability is not required.").

[236] See Martin, 819 F.2d at 1187 ("The work-product privilege simply does not distinguish between factual and deliberative material."); see also Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997) (holding that district court was in error to limit protection to "the mental impressions, conclusions, opinions, or legal theories of an attorney"); A. Michael's Piano, 18 F.3d at 147 ("The work product privilege draws no distinction between materials that are factual in nature and those that are deliberative."); Norwood v. FAA, 993 F.2d 570, 576 (6th Cir. 1993) (holding that work-product privilege protects documents regardless of status as factual or deliberative);
(continued...)

ways should be remembered, though, that the agency has the burden of showing that the privilege applies to all withheld information in the first place.[238]

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[236](...continued)
Nadler, 955 F.2d at 1492 ("[U]nlike the deliberative process privilege, the work-product privilege encompasses factual materials."); Raytheon, 183 F. Supp. 2d at 1292 (rejecting plaintiff's contention that agency must segregate and release factual work-product material); Allnutt v. U.S. Dep't of Justice, No. Civ. Y-98-901, 2000 WL 852455, at *9 (D. Md. Oct. 23, 2000) (recognizing that the attorney work-product privilege encompasses both deliberative materials and "all factual materials prepared in anticipation of the litigation"), aff'd, No. 01-1038, 2001 WL 468134, at *1 (4th Cir. May 3, 2001); May v. IRS, 85 F. Supp. 2d 939, 950 (W.D. Mo. 1999) (protecting both "the factual basis for [a] potential prosecution and an analysis of the applicable law"); Rugiero v. U.S. Dep't of Justice, 35 F. Supp. 2d 977, 984 (E.D. Mich. 1998) ("[T]he law is clear that . . . both factual and deliberative work product are exempt from release under FOIA."), aff'd in part & remanded in part on other grounds, 257 F.3d 534, 552-53 (6th Cir. 2001), cert. denied, 534 U.S. 1134 (2002); Manchester v. DEA, 823 F. Supp. 1259, 1269 (E.D. Pa. 1993) (deciding that segregation not required where "factual information is incidental to, and bound with, privileged" information); Manna v. U.S. Dep't of Justice, 815 F. Supp. 798, 814 (D.N.J. 1993) (following Martin), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995); United Techs. Corp. v. NLRB, 632 F. Supp. 776, 781 (D. Conn. 1985) ("[I]f a document is attorney work product the entire document is privileged."), aff'd on other grounds, 777 F.2d 90 (2d Cir. 1985); accord FOIA Update, Vol. V, No. 4, at 6. But see Nickerson v. United States, No. 95-C-7395, 1996 WL 563465, at *3 (N.D. Ill. Oct. 1, 1996) (ruling that facts must be segregated under privilege); Fine v. U.S. Dep't of Energy, 830 F. Supp. 570, 574-76 (D.N.M. 1993) (refusing to follow Martin and instead following Robbins Tire and Deering Milliken); cf. Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *3 (D.D.C. May 1, 1998) (requiring agency to disclose "agency working law, legal analysis, and conclusions, so long as the 'mental impressions, conclusions, opinions, or legal theories of an attorney' are protected" (quoting Tax Analysts, 117 F.3d at 619 (D.C. Cir. 1997)), because to allow otherwise would "eviscerate" the court of appeals' ruling that agency must release its field service advice memoranda to requester), appeal dismissed voluntarily, No. 94-00923 (D.C. Cir. Aug. 11, 1998).

[237] See Judicial Watch, 432 F.3d at 372 ("[B]ecause the e-mails at issue in this case are attorney work product, the entire contents of these documents . . . are exempt from disclosure under FOIA.").

[238] See, e.g., Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 417810, at *19, *29-30 (D.D.C. June 6, 1995) (requiring that agency specifically explain why material protected by privilege); Kronberg v. U.S. Dep't of Justice, 875 F. Supp. 861, 869 (D.D.C. 1995) (requiring agency to show how privilege applies); cf. Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, (continued...)

A collateral issue is the applicability of the attorney work-product privilege to witness statements. Within the civil discovery context, the Supreme Court has recognized at least a qualified privilege from civil discovery for such documents -- such material was held discoverable only upon a showing of necessity and justification.[239] Applying the "routinely and normally discoverable" test of Grolier and Weber Aircraft, the D.C. Circuit has firmly held that witness statements are protectible under Exemption 5.[240] Although some courts by contrast have held that witness statements are merely unprivileged factual information that must be segregated for disclosure,[241] the weight of authority supports the conclusion that the contours of Exemption 5's privilege incorporation are coextensive with the protective scope of the attorney work-product privilege.[242] Indeed, witness statements were the very records at issue in Hickman v. Taylor,[243] the seminal case in which the Supreme Court first articulated the attorney work-product privilege doctrine.[244]

Any such differences over the traditional protection accorded witness statements do not in any event affect the viability of protecting aircraft accident witness statements; such statements are protected under a distinct common law privilege that was first enunciated in Machin v. Zuckert[245] and

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[238](...continued)
No. C-3-95-328, slip op. at 60-61 (S.D. Ohio Sept. 12, 1996) (ordering defendant to make affirmative showing that information for which it claimed privilege had been safeguarded against unauthorized disclosure).

[239] See Hickman, 329 U.S. at 511.

[240] See Martin, 819 F.2d at 1187.

[241] See, e.g., Uribe, 1989 U.S. Dist. LEXIS 5691, at *7 (declaring that statements made by plaintiff during his interrogation did not "represent the attorney's conclusions, recommendations and opinions"); Wayland v. NLRB, 627 F. Supp. 1473, 1476 (M.D. Tenn. 1986) (reasoning that because the witness statements in question were not shown to be other than an objective reporting of facts, they "do not reflect the attorney's theory of the case and his litigation strategy" and therefore cannot be protected).

[242] See FOIA Update, Vol. VIII, No. 2, at 4-5 ("OIP Guidance: Broad Protection for Witness Statements") (surveying case law on protection of witness statements).

[243] 329 U.S. 495 (1947).

[244] See id. at 512-13 ("Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.").

[245] 316 F.2d 336, 338 (D.C. Cir. 1963).

then was applied under the FOIA in Weber Aircraft.[246] (See the discussion under Exemption 5, Other Privileges, below.)

As a final point, it should be noted that the Supreme Court's decision in Grolier resolved a split in the circuits by ruling that the termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work-product.[247] Thus, as a matter of law, there is no temporal limitation on work-product protection under the FOIA.[248] However, such protection may be vitiated if the withholding of attorney work-product material would also shield from disclosure the unprofessional practices of an attorney by whom or under whose direction the material was prepared.[249] Otherwise, there is no "public interest" exception to the appli-

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[246] 465 U.S. at 799; see also Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 185 (D.C. Cir. 1987) ("[T]he disclosure of 'factual' information that may have been volunteered would defeat the policy on which the Machin privilege is based.").

[247] 462 U.S. at 28; cf. Clark-Cowlitz Joint Operating Agency v. FERC, 798 F.2d 499, 502-03 (D.C. Cir. 1986) (en banc) (reaching same result under Government in the Sunshine Act, 5 U.S.C. § 552b (2000 & Supp. III 2003)).

[248] See Gutman v. U.S. Dep't of Justice, 238 F. Supp. 2d 284, 294-95 (D.D.C. 2003) (holding that attorney work-product privilege applies to documents prepared to advise Attorney General that government had appealed judge's decision to release requester on bond, even though by time of FOIA litigation requester had been convicted and was serving prison sentence); see also FOIA Update, Vol. IV, No. 3, at 1-2 (discussing Supreme Court's rejection in Grolier of any temporal limitation on attorney work-product privilege).

[249] See Moody v. IRS, 654 F.2d 795, 801 (D.C. Cir. 1981) (remanding to the district court for an evaluation of the attorney's conduct and, "if it is found [to be] in violation of professional standards, a determination of whether his breach of professional standards vitiated the work product privilege" otherwise applicable to the withheld material); see also Rashid, No. 99-2461, slip op. at 7-8 (D.D.C. June 12, 2001) ("While there are cases in which a lawyer's conduct may render inapplicable the work-product privilege . . . this is clearly not one of them."); cf. Alexander v. FBI, 198 F.R.D. 306, 311 (D.D.C. 2000) (holding, in non-FOIA case, that plaintiff could not overcome attorney-client privilege because it had not shown that defendant had sought counsel for purpose of furthering crime or fraud). But cf. NARA v. Favish, 541 U.S. 157, 174 (holding that where a FOIA requester makes an allegation of government misconduct in an effort to overcome a privacy interest under Exemption 7(C), "bare suspicion" is not enough, because "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might [actually] have occurred"), reh'g denied, 541 U.S. 1057 (2004); MacLean, No. 04-CV-2245, slip op. at 7-9 (S.D. Cal. June 6, 2005) (rejecting claim that deliberative

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cation of the work-product privilege[250] under Exemption 5.[251]

Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."[252] Unlike the attorney work-product privilege, the attorney-client privilege is not limited to the context of litigation.[253] Moreover, although it fundamentally applies to facts divulged by a client to his attorney, this privilege also encompasses any opinion given by an attorney to his client based upon, and thus reflecting, those facts,[254] as well as communications

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[249](...continued)
process privilege is rendered inoperable if there is "any reason" to believe that governmental misconduct took place).

[250] See Winterstein, 89 F. Supp. 2d at 82.

[251] See Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (emphasizing importance and viability of privileges that are applicable under Exemption 5).

[252] Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

[253] See, e.g., Mead Data, 566 F.2d at 252-53 (distinguishing attorney-client privilege from attorney work-product privilege, which is limited to litigation context); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 114 (D.D.C. 2005) (citing Mead Data and Crooker v. ATF); Crooker v. IRS, No. 94-0755, 1995 WL 430605, at *7 (D.D.C. Apr. 27, 1995) ("Unlike [with] the work product privilege, an agency may claim the attorney-client privilege for information outside the context of litigation.").

[254] See, e.g., Jernigan v. Dep't of the Air Force, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998) (holding that privilege covers agency attorney's legal review of internal "Social Action" investigation); Schlefer v. United States, 702 F.2d 233, 244 n.26 (D.C. Cir. 1983) (observing that privilege "permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts"); Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 114 (noting that privilege protects attorney's advice based upon facts provided by client); MacLean v. DOD, No. 04-2425, slip op. at 10 (S.D. Cal. June 2, 2005) (noting that privilege applies both to confidential facts supplied by client as well as to attorney's advice based on those facts); W & T Offshore, Inc. v. U.S. Dep't of Commerce, No. 03-2285, 2004 WL 2115418, at *4 (E.D. La. Sept. 21, 2004) (applying privilege to documents reflecting confidential communications between agency employees and agency counsel); Kelly v. CIA, No. 00-2498, slip op. at 21-22 (D.D.C. Aug. 8, 2002) (applying privilege to advice provided by CIA's counsel to CIA deputy director concerning CIA's budget, which is not matter of public
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between attorneys[255] that reflect client-supplied information.[256] While the privilege typically involves a single client (even where the "client" is an agency) and his, her, or its attorneys, it also applies in situations where

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[254](...continued)
record); Barmes v. IRS, 60 F. Supp. 2d 896, 901 (S.D. Ind. 1998) (protecting material "prepared by an IRS attorney in response to a request by a revenue officer to file certain liens pursuant to collection efforts against the plaintiffs"); Wishart v. Comm'r, No. 97-20614, 1998 U.S. Dist. LEXIS, at *16 (N.D. Cal. Aug. 6, 1998) (stating that privilege protects documents "created by attorneys and by the individually-named [defendant] employees for purposes of obtaining legal representation from the government"), aff'd, 1999 WL 985142 (9th Cir. Oct. 18, 1999); Cujas v. IRS, No. 1:97CV00741, 1998 U.S. Dist. LEXIS 6466, at *19 (M.D.N.C. Apr. 15, 1998) (holding that privilege encompasses "notes of a revenue officer . . . reflecting the confidential legal advice that the agency's District Counsel orally gave the officer in response to a proposed course of action"), aff'd, No. 98-1641 (4th Cir. Aug. 25, 1998); Ludsin v. SBA, No. 96-2865, slip op. at 3 (D.D.C. Apr. 24, 1997) (holding that privilege covers intra-agency memoranda containing agency attorney's "legal conclusions and reasoning"); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *32-33 (D.D.C. Aug. 22, 1995) (protecting confidential legal advice given in course of grand jury investigation); NBC v. SBA, 836 F. Supp. 121, 124-25 (S.D.N.Y. 1993) (holding that privilege covers "professional advice given by attorney that discloses" information given by client); cf. Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at *3 (D.D.C. Aug. 21, 1995) (finding privilege inapplicable to attorney's memoranda to file which were never communicated to client). But see Lee v. FDIC, 923 F. Supp. 451, 457-58 (S.D.N.Y. 1996) (declaring that documents containing only "standard legal analysis" are not covered by privilege); cf. Brinton v. Dep't of State, 636 F.2d 600, 603 (D.C. Cir. 1980) ("[I]t is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged" unless they reflect client confidences.).

[255] See Gordon v. FBI, 388 F. Supp. 2d 1028, 1039 (N.D. Cal. 2005) (holding that privilege did not extend to e-mail exchange where there was no evidence that attorney was party to it).

[256] See, e.g., Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 114; Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (applying privilege to documents written by agency attorneys to their superiors describing advice given to clients within agency); McErlean v. U.S. Dep't of Justice, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999); Buckner v. IRS, No. 1:97-CV-414, 1998 U.S. Dist. LEXIS 12449, at *19 (N.D. Ind. July 24, 1998); Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (unpublished table decision). But see Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005) (noting that privilege requires that withheld documents reflect confidential communication between agency and its attorneys, not merely that they be exchanges between agency and its attorneys).

there are multiple clients who share a common interest.[257]

The Supreme Court, in the civil discovery context, has emphasized the public policy underlying the attorney-client privilege -- "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[258] As is set out in detail in the discussion of the attorney work-product privilege above, the Supreme Court held in United States v. Weber Aircraft Corp.[259] and in FTC v. Grolier Inc.[260] that the scopes of the various privileges are coextensive in the FOIA and civil discovery contexts.[261] Thus, any FOIA decision that might purport to expand or contract the privilege's contours according to whether the privilege is presented in a civil discovery or a FOIA context[262] does not accurately reflect the state of the law on this issue.[263] Finally, just as in the discovery context, the privilege can be waived by the client, who "owns" it, but it cannot be waived unilaterally by the at-

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[257] See, e.g., Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 292 (4th Cir. 2004) (holding that privilege applies to documents created by attorney hired by private agency in contractual relationship with agency and, by agreement, then shared between contractor and agency, who had common interest in ongoing contractual dispute); Cavallaro v. United States, 284 F.3d 236, 249-50 (1st Cir. 2002) (discussing "common interest" doctrine invoked when multiple clients consult attorney on matter of mutual interest) (non-FOIA case); Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120, 124 (4th Cir. 1994) (noting that "joint defense rule" protects confidential exchanges between parties having common interest in litigation) (non-FOIA case); Coffin v. Bowater, No. 03-227, 2005 WL 1412116, at *4 (D. Me. June 14, 2005) (citing Cavallaro as basis for evaluating privilege claim for documents exchanged between multiple parties) (non-FOIA case).

[258] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also FOIA Update, Vol. VI, No. 2, at 3-4 ("OIP Guidance: The Attorney-Client Privilege"); cf. Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (addressing the privilege in the context of a criminal investigation, and observing that "there is no case authority for the proposition that the privilege applies differently [with respect to applicability after client's death] in criminal and civil cases").

[259] 465 U.S. 792 (1984).

[260] 462 U.S. 19 (1983).

[261] 465 U.S. at 799-800; 462 U.S. at 26-28; cf. In re Lindsey, 148 F.3d 1100, 1114 (D.C. Cir. 1998) (stating that, in criminal context, "government attorney-client privilege" does not shield "information related to criminal misconduct") (non-FOIA case); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997) (same) (non-FOIA case).

[262] See, e.g., Mead Data, 566 F.2d at 255 & n.28.

[263] See FOIA Update, Vol. VI, No. 2, at 3-4.

torney.[264]

The parallelism of a civil discovery privilege and Exemption 5 protection is particularly significant with respect to the concept of a "confidential communication" within the attorney-client relationship. To this end, one court has held that confidentiality may be inferred when the communications suggest that "'the government is dealing with its attorneys as would any private party seeking advice to protect personal interests.'"[265] In Upjohn Co. v. United States, the Supreme Court held that the attorney-client privilege covers attorney-client communications when the specifics of the communication are confidential, even though the underlying subject matter is known to third parties.[266] This decision effectively overruled several earlier decisions from the Court of Appeals for the District of Columbia Circuit

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[264] See Hanson, 372 F.3d at 293-94 (holding that agency attorney's unauthorized release of otherwise privileged document, though it breached document's confidentiality, did not prevent agency from invoking privilege).

[265] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980)). But see also Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 71-72 (1st Cir. 2002) (amended opinion) (holding that district court did not err in finding privilege inapplicable where defendants failed to show confidentiality of factual communications); Mead Data, 566 F.2d at 252-53 (requiring government to make affirmative showing of confidentiality for privilege to apply); Canning v. U.S. Dep't of Justice, No. 01-2215, slip op. at 16 (D.D.C. Mar. 9, 2004) (holding that, even apart from threshold concerns, privilege could not apply to document exchanged between private attorney and client but now properly held in agency files, because confidentiality had been breached); Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (holding that confidentiality must be shown in order to properly invoke Exemption 5); cf. Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (holding district court record insufficient to support claim of privilege because it contained "no finding that the communications are based on or related to confidences from the client"); Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, No. C-3-95-328, slip op. at 59 (S.D. Ohio Sept. 12, 1996) (ordering agency to make affirmative showing that information for which it claimed privilege had been safeguarded against unauthorized disclosure).

[266] 449 U.S. at 395-96; see also United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982); In re Diet Drugs Prods. Liability Litig., No. 1203, 2000 WL 1545028, at *5 (E.D. Pa. Oct. 12, 2000) ("While the underlying facts discussed in these communications may not be privileged, the communications themselves are privileged."); Judicial Watch, Inc. v. Comm'n on U.S.-Pac. Trade & Inv. Policy, No. 97-0099, slip op. at 17 (D.D.C. Sept. 30, 1999) (citing Upjohn); In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388 (D.D.C. 1978) (holding that privilege applies even where information in question was not confidential, so long as client intended that information be conveyed confidentially).

which had followed a different rule on this point.[267]

The Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-echelon employees.[268] This broad construction of the attorney-client privilege acknowledges the reality that such lower-echelon personnel often possess information relevant to an attorney's advice-rendering function.[269] However, in 1997 the D.C. Circuit held that otherwise confidential agency memoranda are not protected under the privilege if they are authoritative interpretations of agency law,[270] a holding that was recently reinforced by the Second Circuit Court of Appeals.[271]

Other Privileges

The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.[272] However, the Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from

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[267] See, e.g., Brinton, 636 F.2d at 604; Mead Data, 566 F.2d at 255. But see Tax Analysts v. IRS, 117 F.3d 607, 618-20 (D.C. Cir. 1997) (following rule contrary to Upjohn); Schlefer, 702 F.2d at 245 (same).

[268] 449 U.S. at 392-97.

[269] See id.; see also Sherlock v. United States, No. 93-0650, 1994 WL 10186, at *3 (E.D. La. Jan. 12, 1994) (holding privilege applicable to communications from collection officer to district counsel); Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (holding that circulation of information within agency to employees involved in matter for which advice sought does not breach confidentiality); LSB Indus. v. Comm'r, 556 F. Supp. 40, 43 (W.D. Okla. 1982) (protecting information provided by agency investigators and used by agency attorneys).

[270] See Tax Analysts, 117 F.3d at 619-20.

[271] See Nat'l Council of La Raza v. U.S. Dep't of Justice, 411 F.3d 350, 360-61 (2d Cir. 2005) (stating that attorney-client privilege's rationale of protecting confidential communications is inoperative for documents that reflect actual agency policy); see also Robert v. HHS, No. 01-CV-4778, 2005 WL 1861755, at *5 (E.D.N.Y. Aug. 1, 2005) (citing La Raza though at same time finding that withheld documents did not reflect agency policy).

[272] See Ass'n for Women in Sci. v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977); see also Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("To decide [whether a recognized privilege should be abandoned] in a FOIA case would be inappropriate, as Exemption 5 requires the application of existing rules regarding discovery, not their reformulation.").

mandatory disclosure under the FOIA.[273] Because Rule 501 of the Federal Rules of Evidence allows courts to create privileges as necessary,[274] there exists the potential for "new privileges" to be applied under Exemption 5.[275] However, one major caveat should be noted in the application of any discovery privilege under the FOIA: A privilege should not be used against a requester who would routinely receive such information in civil discovery.[276]

A quarter century ago, in Federal Open Market Committee v. Mer-

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[273] See United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier Inc., 462 U.S. 19, 26-27 (1983). But see Ctr. for Individual Rights v. U.S. Dep't of Justice, No. 03-1706, slip op. at 5 (D.D.C. June 29, 2004) (holding that documents protected from disclosure in another action pursuant to joint defense privilege could still be subject to disclosure under FOIA), dismissed as moot, slip op. at 11-12 (D.D.C. Sept. 21, 2004).

[274] See Trammel v. United States, 445 U.S. 40, 47 (1980); see, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003) (recognizing, in a non-FOIA case, the settlement-negotiation privilege, which "fosters a more efficient, more cost-effective, and significantly less burdened judicial system"); Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1124-25 (7th Cir. 1997) (recognizing judge-fashioned "law enforcement investigatory privilege") (non-FOIA case); Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570, 571-73 (E.D. Mo. 1991) (recognizing "ombudsman privilege" under Rule 501 of Federal Rules of Evidence) (non-FOIA case); Shabazz v. Scurr, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (same) (non-FOIA case); see also In re Sealed Case, 121 F.3d 729, 751-52 (D.C. Cir. 1997) (recognizing "presidential communications privilege" that applies to "communications made by presidential advisers in the course of preparing advice for the President . . . even when these communications are not made directly to the President") (non-FOIA case). But cf. In re Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (declining to recognize proposed "protective function privilege") (non-FOIA case).

[275] See, e.g., FOIA Update, Vol. VI, No. 4, at 3-4 (suggesting that new privilege for settlement-negotiation records should be recognized under the FOIA). But see also Burka v. HHS, 87 F.3d 508, 517 (D.C. Cir. 1996) (holding that for record to be found privileged, agency must show that it is protected in discovery for reasons similar to those used by agency in FOIA context).

[276] See, e.g., U.S. Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988) (holding that presentence report privilege, designed to protect report's subjects, cannot be invoked against them as first-party requesters); cf. Badhwar, 829 F.2d at 184 ("Exemption 5 requires application of existing rules regarding discovery, not their reformulation.").

rill,[277] the Supreme Court found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery. This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract" and expires upon the awarding of the contract or upon the withdrawal of the offer.[278] The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by endangering consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should . . . serve as relevant criteria."[279]

This harm rationale has led one court to hold that the commercial privilege may be invoked when a contractor who has submitted proposed changes to the contract requests sensitive cost estimates.[280] Based upon this underlying theory, there is nothing in Merrill to prevent it from being read more expansively to protect the government from competitive disadvantage outside of the contract setting, as the issue in Merrill was not presented strictly within such a setting.[281] However, the Court of Appeals for the District of Columbia Circuit has declined to extend this privilege to scientific research, holding that the agency failed to show that such material is "generally protected in civil discovery for reasons similar to those asserted in the FOIA context."[282]

While the breadth of this privilege is still not fully established, a realty appraisal generated by the government in the course of soliciting buyers

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[277] 443 U.S. 340 (1979).

[278] Id. at 360.

[279] Id. at 363.

[280] Taylor Woodrow Int'l v. United States, No. 88-429, 1989 WL 1095561, at *3 (W.D. Wash. Apr. 5, 1989) (concluding that disclosure would permit requester to take "unfair commercial advantage" of agency).

[281] See 443 U.S. at 360.

[282] Burka, 87 F.3d at 517; see also Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 942-43 (D. Ariz. 2000) (rejecting proposed "research data privilege" on basis that such information is routinely discoverable in civil litigation), aff'd on other grounds, 314 F.3d 1060 (9th Cir. 2002). But see Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 32-33 (D.D.C. 2003) (citing Burka and recognizing privilege for "confidential research information," but refusing to allow withholding of documents under it because agency had not satisfied its burden of demonstrating that privilege was being used in FOIA context for reasons similar to its use in civil discovery context).

for its property has been held to fall squarely within it,[283] as have documents containing communications between agency personnel, potential buyers, and real estate agents concerning a proposed sale of government-owned real estate,[284] an agency's background documents which it used to calculate its bid in a "contracting out" procedure,[285] and portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors.[286] Quite clearly, however, purely legal memoranda drafted to assist contract-award deliberations are not encompassed by this privilege.[287]

The Supreme Court in United States v. Weber Aircraft Corp.[288] held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations.[289] Broadening the holding of Merrill that a privilege "mentioned in the legis-

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[283] See Gov't Land Bank v. GSA, 671 F.2d 663, 665-66 (1st Cir. 1982) ("FOIA should not be used to allow the government's customers to pick the taxpayers' pockets.").

[284] See Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, slip op. at 3 (E.D. Va. Dec. 24, 1996).

[285] See Morrison-Knudsen Co. v. Dep't of the Army of the United States, 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision); see also *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (discussing Morrison-Knudsen and advising that agencies may invoke commercial privilege to protect "A-76 documents," which reflect government's position in commercial bargaining process).

[286] See Hack v. Dep't of Energy, 538 F. Supp. 1098, 1104 (D.D.C. 1982); see also FOIA Update, Vol. IV, No. 4, at 14-15. But see Am. Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 3-4 (D.D.C. July 22, 1983) (distinguishing Merrill). See generally Steven W. Feldman, The Government's Commercial Data Privilege Under Exemption Five of the Freedom of Information Act, 105 Mil. L. Rev. 125 (1984); Theodore T. Belazis, The Government's Commercial Information Privilege: Technical Information and the FOIA's Exemption 5, 33 Admin. L. Rev. 415 (1981).

[287] See Shermco Indus. v. Sec'y of the Air Force, 613 F.2d 1314, 1319-20 n.11 (5th Cir. 1980); see also News Group Boston, Inc. v. Nat'l R.R. Passenger Corp., 799 F. Supp. 1264, 1270 (D. Mass. 1992) (finding affidavits insufficient to show why Amtrak payroll information is covered by privilege), appeal dismissed voluntarily, No. 92-2250 (1st Cir. Dec. 4, 1992).

[288] 465 U.S. at 799.

[289] See id. at 798-99 (noting that privilege for accident investigation privilege was first recognized in Machin v. Zuckert, 316 F.2d 336, 338 (D.C. Cir. 1963), and holding that it applies in FOIA context as well).

lative history of Exemption 5 is incorporated by the exemption,"[290] the Court held in Weber Aircraft that this long-recognized civil discovery privilege, even though not specifically mentioned in that legislative history, nevertheless falls within Exemption 5.[291] The "plain statutory language"[292] and the clear congressional intent to sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations[293] support this result.[294] This privilege also has been applied to protect statements made in Inspector General investigations.[295]

Similarly, in Hoover v. Department of the Interior, the Court of Appeals for the Fifth Circuit recognized an Exemption 5 privilege based on Federal Rule of Civil Procedure 26(b)(4), which limits the discovery of reports prepared by expert witnesses.[296] The document at issue in Hoover was an appraiser's report prepared in the course of condemnation proceedings.[297] In support of its conclusions, the Fifth Circuit stressed that such a report would not have been routinely discoverable and that premature release would jeopardize the bargaining position of the government.[298]

Most recently, in Judicial Watch, Inc. v. Department of Justice, the D.C. Circuit applied the presidential communications privilege under Ex-

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[290] Weber Aircraft, 465 U.S. at 800.

[291] Id. at 804; see also FOIA Update, Vol. V, No. 2, at 12-13.

[292] 465 U.S. at 802.

[293] See id.

[294] See also Badhwar, 829 F.2d at 185 (privilege applied to contractor report).

[295] See Ahearn v. U.S. Army Materials & Mechs. Research Ctr., 583 F. Supp. 1123, 1124 (D. Mass. 1984); see also Walsh v. Dep't of the Navy, No. 91-C-7410, 1992 WL 67845, at *4 (N.D. Ill. Mar. 23, 1992); AFGE v. Dep't of the Army, 441 F. Supp. 1308, 1313 (D.D.C. 1977). But see Nickerson v. United States, No. 95-C-7395, 1996 WL 563465, at *3 (N.D. Ill. Oct. 1, 1996) (holding privilege not applicable to statements made in course of medical malpractice investigation); Wash. Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp. 602, 606-07 (D.D.C. 1985) (finding privilege inapplicable when report format provided anonymity to witnesses).

[296] 611 F.2d 1132, 1141 (5th Cir. 1980).

[297] Id. at 1135.

[298] Id. at 1142; cf. Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118-19 (D.D.C. 1984) (observing that Rule 26(b)(4) provides parallel protection in civil discovery for opinions of expert witnesses who do not testify at trial).

emption 5 of the FOIA to protect Department of Justice records regarding the President's exercise of his constitutional power to grant pardons.[299] This privilege, which protects communications among the President and his advisors, is unique among those recognized under Exemption 5 of the FOIA in that it is "'inextricably rooted in the separation of powers under the Constitution.'"[300] Although similar to the deliberative process privilege, it is broader in its coverage because it "'applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.'"[301]

In a further exploration of the contours of this privilege, the District Court for the Eastern District of California rejected a FOIA requester's dual arguments that (1) the privilege must be invoked by the President himself[302] and (2) that the privilege could be lost simply due to the passage of time.[303] As the court noted, the privilege is itself a qualified privilege, meaning that in the civil discovery context it can be overcome by a showing of need.[304] In the FOIA context, however, such a requirement would impermissibly run afoul of the Supreme Court's "routinely and normally discoverable" test as set forth in FTC v. Grolier Inc.[305] and United States v. Weber Aircraft Corp.,[306] so the court accordingly ruled that the agency's invocation of the privilege had been proper.[307] One significant issue not yet ultimately resolved, though, is whether the privilege protects all records created within an agency to assist the President in the exercise of his nondelegable constitutional duties or is limited to those records that are "solicited and received by the President or his immediate advisers in the Office

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[299] No. 03-5093, 2004 WL 980826, at *14 (D.C. Cir. May 7, 2004).

[300] 2004 WL 980826, at *4 (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

[301] Id. (quoting In re Sealed Case, 121 F.3d at 745).

[302] See Berman v. CIA, 378 F. Supp. 2d 1209, 1220-21 (E.D. Cal. 2005) (concluding that such a requirement "would expose the President to considerable burden"); cf. Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1306-07 (Fed. Cir. 2006) (holding upon thorough review of question that authority to invoke deliberative process privilege need not be limited to head of agency, but rather may be delegated to another official) (non-FOIA case).

[303] See Berman, 378 F. Supp. 2d at 1221 (protecting documents created during Administration of President Lyndon B. Johnson).

[304] See id.

[305] 462 U.S. 19, 26 (1983).

[306] 465 U.S. 792, 799 (1984).

[307] See Berman, 378 F. Supp. 2d at 1222.

of the President."[308]

Prior to the Supreme Court's decision in Department of the Interior v. Klamath Water Users Protective Association,[309] several courts had held that communications reflecting settlement negotiations between the government and an adverse party, which are of necessity exchanged between the parties, could not be protected as "intra-agency" memoranda under Exemption 5.[310] However, several of those courts also recognized the great difficulties inherent in such a harsh Exemption 5 construction, especially in light of the "logic and force of [the] policy plea"[311] that the government's indispensable settlement mechanism can be impeded by such a result.[312]

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[308] Compare Judicial Watch, 2004 WL 980826, at *14 (holding that privilege is limited to communications sent directly to the President or his immediate advisors in Office of the President), with id. at *19-22 (Randolph, J., dissenting) (urging that coverage be extended to intra-agency records that assist in the President's decisionmaking even though not sent to the President or his immediate staff).

[309] 532 U.S. 1 (2001).

[310] See County of Madison v. U.S. Dep't of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981) (concluding that although "[w]e confess to feeling a sense of indecent exposure in countenancing a third[-]party adversary obtaining confidential exchanges between the Indians' attorneys and the government . . . we cannot agree that this means that [the] Indians are 'within' the Department of Justice"); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (applying the privilege under Exemption 4 but not under Exemption 5, on the basis that Exemption 5 "does not cover papers exchanged between a government agency and an outside adverse party . . . [but] by its terms covers only 'inter' or 'intra' agency documents"); NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1145-46 (D.D.C. 1985) (deciding that adversaries in litigation with an agency cannot "be viewed as being part of a federal agency or acting in consultation with the agency"); Norwood v. FAA, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984) (citing County of Madison for proposition that settlement records are "not exempt as inter-agency or intra-agency memos") (on motion for clarification and reconsideration); Ctr. for Auto Safety v. Dep't of Justice, 576 F. Supp. 739, 747-49 (D.D.C. 1983) (holding that records "prepared by and disclosed or transmitted to" defendants in an antitrust case "are no longer 'inter-agency or intra-agency' documents and are [thus] beyond the scope" of Exemption 5).

[311] County of Madison, 641 F.2d at 1040.

[312] See id.; see also, e.g., Ctr. for Auto Safety, 576 F. Supp. at 746 n.18 (quoting County of Madison, 641 F.2d at 1040); Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (observing that public policy favoring compromise over confrontation would be "seriously undermined" if internal doc-

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Accordingly, one court has held that notes of an agency employee that reflected positions taken and issues raised in treaty negotiations had been properly withheld pursuant to Exemption 5 because their release would harm the agency's negotiation process.[313] Other courts have found the attorney work-product and deliberative process privileges to be properly invoked for documents prepared by agency personnel that reflected the substance of meetings between adverse parties and agency personnel in preparation for eventual settlement of a case.[314] Significantly, one court explicitly applied the settlement privilege to affirm the withholding of set-

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[312](...continued)
uments reflecting employees' thoughts during course of negotiations were released); President George Washington, Message to United States House of Representatives, Mar. 30, 1796 (expounding authoritatively as well as presciently on need for secrecy in negotiations because of "pernicious influence" on future negotiations that could be occasioned by any public disclosure of such negotiations' substance); cf. Mark H. Grunewald, Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act, 9 Admin. L.J. 985 (1996) (discussing the governmental preference for settlement over litigation, the use of the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-83 (2000), to promote this goal, and the need for a statute protecting documents exchanged as part of ADRA proceedings from FOIA requests -- which was included as part of the 1996 amendments to the ADRA, 5 U.S.C. § 574(j) (2000)).

[313] Fulbright & Jaworski v. Dep't of the Treasury, 545 F. Supp. 615, 620 (D.D.C. 1982).

[314] See Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege); Finkel v. HUD, No. 90-3106, 1995 WL 151790, at *3-4 (E.D.N.Y. Mar. 28, 1995) (deliberative process privilege), aff'd, No. 95-6112, 1996 U.S. App. LEXIS 2895, at *1 (2d Cir. Feb. 21, 1996); Wilson v. Dep't of Justice, No. 87-2415, slip op. at 8-11 (D.D.C. June 14, 1992) (attorney work-product privilege); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984) (attorney work-product privilege), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (unpublished table decision); see also FOIA Update, Vol. III, No. 3, at 10; cf. United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (holding draft consent decrees covered by both deliberative process and attorney work-product privileges; remanded for determination of whether privileges waived); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 17 (D.D.C. 1998) (remanding to agency for determination of whether document contained "evaluations" of settlement negotiation process covered by deliberative process privilege or merely nonprotectible "factual" descriptions). But cf. Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 257-58 (D.C. Cir. 1977) (finding that certain documents prepared by agency concerning negotiations failed to reveal any inter-agency deliberations and therefore were not withholdable).

tlement documents under Exemption 4.[315] Furthermore, Justice Brennan, noting the need for protecting attorney work-product information, specifically cited as a particular disclosure danger the ability of adverse parties to "gain insight into the agency's general strategic and tactical approach to deciding when suits are brought . . . and on what terms they may be settled."[316]

Finally, and most significantly, in 2003, the United States Court of Appeals for the Sixth Circuit was presented in Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., a non-FOIA case, with the specific question of whether to recognize a civil discovery privilege for documents exchanged between parties in the course of settlement negotiations.[317] In making this determination, this appellate court quite properly considered the Supreme Court's directive to federal courts to recognize new discovery privileges when "reason and experience" show that there is a sufficiently strong public interest to be served by doing so.[318] Following this guidance by taking cognizance of the numerous and significant problems raised by the potential availability of settlement negotiation documents and of the inherent need to protect the confidentiality of such exchanges, the Sixth Circuit explicitly recognized a discovery privilege for documents exchanged between parties engaged in settlement negotiations.[319]

It is noteworthy in this regard that while earlier cases had not gone quite so far as to squarely recognize a settlement-negotiation privilege identified as such, many had ruled that parties making discovery demands for settlement communications would be required to make heightened, or "particularized," showings of relevancy in order to obtain them in civil dis-

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[315] See M/A-COM, 656 F. Supp. at 692 (applying privilege under Exemption 4 to protect commercial information submitted to government in course of settlement negotiations).

[316] FTC v. Grolier Inc., 462 U.S. 19, 31 (1983) (Brennan, J., concurring) (emphasis added).

[317] 332 F.3d 976 (6th Cir. 2003).

[318] See Jaffee v. Redmond, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized).

[319] See 332 F.3d at 981 ("[A]ny communications made in furtherance of settlement are privileged.") (emphasis added). But see In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 207 & n.7, 212 (D.D.C. 2005) (declining to recognize settlement privilege, in spite of Goodyear Tire), aff'd on alternative ground sub nom. In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n WD Energy Servs. Inc., 439 F.3d 740, 754-55 (D.C. Cir. 2006) (holding pointedly that "the district court lacked a sufficient factual context within which" to reach such a conclusion, and leaving the Sixth Circuit's recognition of the settlement privilege "open in this circuit").

covery.[320] Because settlement communications subject to such a discovery standard would not be "routinely and normally discoverable" under the test enunciated by the Supreme Court in Grolier[321] and Weber Aircraft,[322] they would also be protectible under Exemption 5 were the agency able to satisfy the elements of the threshold requirement.[323]

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[320] See, e.g., Butta-Brinkman v. FCA Int'l, 164 F.R.D. 475, 477 (N.D. Ill. 1995) ("Absent a showing [that plaintiff] will be unable to obtain the relevant information through other discovery requests or interrogatories, we believe these settlement documents ought to retain their confidentiality."); SEC v. Thrasher, No. 92-6987, 1995 WL 552719, at *1 (S.D.N.Y. Sept. 18, 1995) (refusing to order production of settlement communications because discovering party failed to make compelling showing of need); Matsushita Elec. Corp. v. Loral Corp., No. 92-5461, 1995 WL 527640, at *4 (S.D.N.Y. Sept. 7, 1995) ("[I]t is reasonable to require that the discovering party, as the price for obtaining such potentially disruptive disclosure [of settlement communications], make a fairly compelling showing that it needs the information."); Riddell Sports, Inc. v. Brooks, No. 92-7851, 1995 WL 20260, at *1 (S.D.N.Y. Jan. 19, 1995) (holding that in absence of particularized showing that they are likely to lead to admissible evidence, documents concerning settlement are "presumed irrelevant and need not be produced"); Morse/Diesel, Inc. v. Trinity Indus., Inc., 142 F.R.D. 80, 84 (S.D.N.Y. 1992) (concluding that the "particularized showing" requirement "places the burden of establishing relevance squarely on the party seeking production" of settlement communications); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) (requiring a defendant to make "some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement"); see also FOIA Update, Vol. VI, No. 4, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations") (establishing settlement-document protection policy); M/A-COM, 656 F. Supp. at 692 (applying privilege under Exemption 4); cf. Olin Corp. v. Ins. Co. of N. Am., 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985) (affirming special master's determination that communications are protected by "settlement privilege"). But see Tribune Co. v. Purcigliotti, No. 93-7222, 1996 WL 337277, at *2 (S.D.N.Y. June 19, 1996) (concluding that "particularized showing" requirement "is neither binding on this Court nor has [it] been universally adopted in this Circuit"). See generally Richard L. Crisona & Richard A. Schwartz, For Discovery of Settlement Materials, Be Prepared to Demonstrate Relevance, 221 N.Y.L.J. 12 (1999) (criticizing "particularized showing" requirement, but noting its use by some courts).

[321] 462 U.S. 19, 26 (1983).

[322] 465 U.S. 792, 799 (1984).

[323] See FOIA Update, Vol. VI, No. 4, at 3-4 (describing judicial recognition of Exemption 5 privilege for settlement-negotiation communications); see also Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (emphasizing importance of Exemption 5 in

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Because Exemption 5 incorporates virtually all civil discovery privileges, courts also have recognized the applicability of other privileges, whether traditional or new, in the FOIA context.[324] Among those other privileges that are now recognized for purposes of the FOIA are the confidential report privilege,[325] the presentence report privilege,[326] the critical self-evaluative privilege,[327] the expert materials privilege,[328] and the federal

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[323](...continued)
ensuring that "lawyers' deliberations and communications are kept private").

[324] See Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C. Cir. 1987) (stating that Exemption 5 "unequivocally" incorporates "all civil discovery rules into FOIA"). But see also Burka v. HHS, 87 F.3d 508, 521 (D.C. Cir. 1996) (refusing to recognize the "confidential research information" privilege under the FOIA because it is not yet "established or well-settled . . . in the realm of civil discovery"); cf. Melendez-Colon v. Dep't of the Navy, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) (rejecting the argument that the FOIA "creates a separate discovery or evidentiary privilege" that would bar plaintiff from using a document at an evidentiary hearing in a particular litigation case).

[325] See Wash. Post Co. v. HHS, 603 F. Supp. 235, 238-39 (D.D.C. 1985) (applying "confidential report" privilege under Exemption 4), rev'd on other grounds, 795 F.2d 205 (D.C. Cir. 1986).

[326] See Julian, 486 U.S. at 9 (recognizing privilege, but finding it applicable to third-party requesters only); United States v. Kipta, No. 97-638-1, 2001 WL 477153, at *1 (N.D. Ill. May 3, 2001) (citing Julian for proposition that, at least in absence of compelling justification, no third party "is to be given access to another person's [presentence investigation] report").

[327] See Wash. Post Co. v. U.S. Dep't of Justice, No. 84-3581, slip op. at 18-21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation) (applying privilege under Exemption 4), adopted (D.D.C. Dec. 15, 1987), rev'd & remanded on other grounds, 863 F.2d 96 (D.C. Cir. 1988). But see Sangre de Cristo Animal Protection, Inc. v. Dep't of Energy, No. 96-1059, slip op. at 7-9 (D.N.M. Mar. 10, 1998) (declining to apply privilege to records of animal research facility, in light of Tenth Circuit's "cautious approach to expanding common law privileges"); cf. Tucker v. United States, 143 F. Supp. 2d 619, 626 (S.D. W. Va. 2001) (declining, in a non-FOIA case, to apply the privilege for medical peer review information, on the basis that "where Congress had the opportunity to create a privilege pursuant to statute, yet failed to do so, courts should be especially hesitant in recognizing a federal privilege").

[328] See Nissei Sangyo Am., Ltd. v. IRS, No. 95-1019, 1998 U.S. Dist. LEXIS 2966, at *2-3 (D.D.C. Jan. 28, 1998) (holding that because the Federal Rules of Civil Procedure "established a separate exception to discovery for expert materials . . . Exemption 5 of the FOIA . . . incorporates" it).

mediation privilege.[329]

Lastly, while it is evident that courts will continue to apply such civil discovery privileges under Exemption 5 of the FOIA, the mere fact that a particular privilege has been recognized by state law will not necessarily mean that it will be recognized by a federal court.[330]

EXEMPTION 6

Personal privacy interests are protected by two provisions of the FOIA, Exemptions 6 and 7(C). While the application of Exemption 7(C), discussed below, is limited to information compiled for law enforcement purposes, Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."[1] These exemptions are a vitally important part of the FOIA's statutory scheme,[2] but of course they cannot be invoked to withhold from a requester information pertaining only to himself.[3]

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[329] See Sheldone v. Pa. Turnpike Comm'n, 104 F. Supp. 2d 511, 515 (W.D. Pa. 2000) (recognizing, in non-FOIA case, privilege for communications arising from mediation process); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1180-81 (C.D. Cal. 1998) (holding, in non-FOIA case, that federal mediation privilege protects all communications exchanged in course of formal mediation proceeding), aff'd, 216 F.3d 1082 (9th Cir. 2000) (unpublished table decision); cf. 28 U.S.C. § 652(d) (2000) (requiring district courts to provide by local rule for confidentiality of alternative dispute resolution proceedings); 5 U.S.C. § 574(j) (2000) ("A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).").

[330] See, e.g., Sneirson v. Chem. Bank, 108 F.R.D. 159, 162 (D. Del. 1985) (non-FOIA case); Cincotta v. City of New York, No. 83-7506, 1984 WL 1210, at *1-2 (S.D.N.Y. Nov. 14, 1984) (non-FOIA case); cf. Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 931 (C.D. Ill. 2002) (declining to order release under state law of any records that would be protected under FOIA).

[1] 5 U.S.C. § 552(b)(6) (2000 & Supp. IV 2004).

[2] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (placing particular emphasis on the importance of "preserving personal privacy" among the other interests that are protected by the FOIA's exemptions).

[3] See H.R. Rep. No. 93-1380, at 13 (1974); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) (citing U.S.

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