



## Exemption 5

Exemption 5 of the Freedom of Information Act 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."<sup>1</sup> Courts have construed this somewhat opaque language<sup>2</sup> to "exempt those documents, and only those documents that are normally privileged in the civil discovery context."<sup>3</sup>

When administering the FOIA, it is important to first note that the President and Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."<sup>4</sup> (For a discussion of these memoranda, see Procedural Requirements, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, above.)

Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"<sup>5</sup> 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

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<sup>1</sup> 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>2</sup> See, e.g., DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting and commenting on a point not reached by majority) (discussing "most natural reading" of threshold and "problem[s]" inherent in reading it in that way).

<sup>3</sup> 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 F.2d 1181, 1184 (D.C. Cir. 1987).

<sup>4</sup> Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

<sup>5</sup> Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

mentioned in its legislative history.<sup>6</sup> 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]."<sup>7</sup> The D.C. Circuit has also declared that in order to "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."<sup>8</sup>

It is important to bear in mind a difference between the application of privileges in civil discovery and in the FOIA context. In the former, the use of qualified privileges may be overcome by a showing of relevance or need by an opposing party.<sup>9</sup> In the FOIA context, however, the Supreme Court has held that the standard to be employed is whether the documents would "routinely be disclosed" in civil litigation.<sup>10</sup> By definition, documents for which a party would have to make a showing of need are not routinely disclosed and thus do not fall into this category.<sup>11</sup> As a result, in the FOIA context there is no difference between qualified and absolute privileges, and courts do not take into account a party's need for the documents in ruling on a privilege's applicability.<sup>12</sup> This approach prevents the FOIA from

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<sup>6</sup> See U.S. v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); see also Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (noting that FOIA "incorporates . . . generally recognized civil discovery protections").

<sup>7</sup> 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.").

<sup>8</sup> Burka, 87 F.3d at 517.

<sup>9</sup> See, e.g., Grolier, 462 U.S. at 27 (discussing circumstances under which attorney work-product privilege may be overcome in civil discovery).

<sup>10</sup> Weber Aircraft, 465 U.S. at 799; see Grolier, 462 U.S. at 26.

<sup>11</sup> See Grolier, 462 U.S. at 28 ("It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the normally privileged.").

<sup>12</sup> 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 6, 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."), aff'd on other grounds, 240 F. App'x 751, 754 (9th Cir. 2007); 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 per curiam, 20 F. App'x 597 (8th Cir. 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 court must balance "relative interests of the parties" in determining applicability of deliberative

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being used to circumvent civil discovery rules.<sup>13</sup>

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 as "executive privilege"<sup>14</sup>), the attorney work-product privilege, and the attorney-client privilege.<sup>15</sup> First, however, Exemption 5's threshold requirement must be considered.

"Inter-Agency or Intra-Agency" Threshold Requirement

The initial consideration under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums."<sup>16</sup> Though the "most natural reading" of this language would seem to encompass only records generated by and internal to executive branch agencies,<sup>17</sup> federal courts have long given a more expansive reading to this portion of the text. This is because courts quickly recognized that federal agencies frequently have "a special need for the opinions and recommendations of temporary consultants,"<sup>18</sup> and that such expert advice can "play[] an integral function in the government's decision[making]."<sup>19</sup> Consistent with this analysis, courts have allowed agencies to protect

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<sup>12</sup>(...continued)  
process privilege under Exemption 5).

<sup>13</sup> See Weber Aircraft, 465 U.S. at 801 ("[R]espondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA."); see also Martin, 819 F.2d at 1186 ("[Plaintiff] was unable to obtain these documents using normal civil discovery methods, and FOIA should not be read to alter that result.").

<sup>14</sup> 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).

<sup>15</sup> See Sears, 421 U.S. at 149.

<sup>16</sup> 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>17</sup> See DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988); see also, e.g., Maydak v. DOJ, 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. DOJ, 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).

<sup>18</sup> Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

<sup>19</sup> Hoover v. U.S. Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[F]ederal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities."); Ryan v. DOJ, 617 F.2d 781,

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advice generated by a wide range of outside experts, regardless of whether these experts provided their assistance pursuant to a contract,<sup>20</sup> on a volunteer basis,<sup>21</sup> or in some other capacity,<sup>22</sup> creating what courts frequently refer to as the "consultant corollary" to the

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<sup>19</sup>(...continued)

790 (D.C. Cir. 1980) ("Congress apparently did not intend 'inter-agency or intra-agency' to be rigidly exclusive terms."); Burt A. Braverman & Francis J. Chetwynd, Information Law: Freedom of Information, Privacy, Open Meetings, and Other Access Laws § 9-3.1 (1985 & Supp. 1990).

<sup>20</sup> See, e.g., Hanson v. AID, 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); 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 to material supplied by outside contractors); Gov't Land Bank v. GSA, 671 F.2d 663, 665 (1st Cir. 1982) (protecting appraiser's report solicited by agency); Hoover, 611 F.2d at 1138 (same); 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); Miller v. DOJ, 562 F. Supp. 2d 82, 113 (D.D.C. 2008) (protecting formal opinion prepared by English barrister consulted for his expertise on English law); Info. Network for Responsible Mining (INFORM) v. DOE, No. 06-02271, 2008 WL 762248, at \*7 (D. Colo. March 18, 2008) (ruling that advisory documents from contractor to agency concerning agency program qualified as intra-agency); Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, No. 05-2039, 2007 U.S. Dist. LEXIS 19774, at \*18 (E.D. Mo. Mar. 20, 2007) (noting that documents prepared for agency by group of paid outside experts created by agency in order to provide advice qualified as intra- or inter-agency); Citizens for Responsibility & Ethics in Wash. v. DHS, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (protecting documents prepared by contractors for FEMA); 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); 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 Bureau of Indian Affairs).

<sup>21</sup> See, e.g., Nat'l Inst. of Military Justice v. DOD, 512 F.3d 677, 681 (D.C. Cir. 2008) (protecting advice provided by individuals whose advice Army had solicited concerning regulations for terrorist trial commissions); Wu v. Nat'l Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (protecting recommendations of volunteer consultants).

<sup>22</sup> See, e.g., Tigue v. DOJ, 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"); Durns v. BOP, 804 F.2d 701, 704 & n.5 (D.C. Cir. 1986) (applying Exemption 5 to presentence report prepared by probation officer for sentencing judge, with copies provided to Parole Commission and BOP), vacated on other grounds & remanded, 486 U.S. 1029 (1988); Miller, 562 F. Supp. 2d at 113 (protecting discussions between U.S. government and government of St. Kitts and Nevis concerning possible prosecution of plaintiff); Lardner v. DOJ, No. 03-0180, 2005 WL 758267, at \*14-15 (D.D.C. Mar. 31, 2005) (protecting documents written by judges and special prosecutors whose opinions were solicited by agency).

Exemption 5 threshold.<sup>23</sup> In these cases, courts have emphasized that the agencies sought this outside advice,<sup>24</sup> and that in providing their expertise, the consultants effectively functioned as agency employees,<sup>25</sup> providing the agencies with advice similar to what it might have received from an employee (though it should be noted that there is no requirement that an agency not have its own employee with relevant expertise before seeking the assistance of an outside consultant).<sup>26</sup>

In 2001, the Supreme Court had its first opportunity to interpret the Exemption 5 threshold in Department of the Interior v. Klamath Water Users Protective Ass'n.<sup>27</sup> Its ruling implicitly accepted (but did not directly rule on) the concept of the consultant corollary,<sup>28</sup> while placing important limitations on its use. In its 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 expressing their views to the Department on certain matters of administrative decisionmaking, not only had "their own, albeit entirely legitimate, interests in mind,"<sup>29</sup> but also were "seeking a Government benefit at the expense of other applicants."<sup>30</sup> 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.<sup>31</sup>

In cases decided subsequent to Klamath, lower federal courts have differed in how

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<sup>23</sup> See, e.g., Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001); Nat'l Inst. of Military Justice, 512 F.3d at 682.

<sup>24</sup> See, e.g., Nat'l Inst. of Military Justice, 512 F.3d at 680 (discussing importance of outside advice having been solicited by agency).

<sup>25</sup> See Klamath, 532 U.S. at 10 (discussing prior consultant cases, and noting that the documents provided by outside consultants "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done").

<sup>26</sup> 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"), aff'd, 512 F.3d 677 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 775 (2008).

<sup>27</sup> 532 U.S. 1; see also FOIA Post, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (discussing meaning, contours, and implications of Klamath decision).

<sup>28</sup> See Klamath, 532 U.S. at 10-11, 12 n.4 (discussing prior cases upholding use of consultant corollary and noting that two such cases, Pub. Citizen, Inc. v. DOJ, 111 F.3d 168, 170-72 (D.C. Cir. 1997) (protecting records involving former Presidents who were consulted by NARA and DOJ concerning treatment of their records), and Ryan, 617 F.2d at 790 (protecting records involving members of Senate who DOJ consulted with on judicial nominations), "arguably extend beyond" the "typical examples").

<sup>29</sup> Id. at 12.

<sup>30</sup> Id. at 12 n.4.

<sup>31</sup> Id. at 16.

strictly they have adhered to the two-part test elucidated by the Supreme Court. For example, in Physicians Committee for Responsible Medicine v. NIH,<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> This reading of Klamath was echoed by the District Court for the District of Columbia in Lardner v. DOJ,<sup>35</sup> 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."<sup>36</sup>

Conversely, in Merit Energy Co. v. United States Department of the Interior,<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

Similarly, in Center for International Environmental Law v. Office of the United States Trade Representative,<sup>40</sup> 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.<sup>41</sup> The court ruled 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

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<sup>32</sup> 326 F. Supp. 2d 19 (D.D.C. 2004).

<sup>33</sup> See id. at 29-30.

<sup>34</sup> See id.

<sup>35</sup> No. 03-0180, 2005 WL 758267 (D.D.C. Mar. 31, 2005).

<sup>36</sup> Id. at \*15 (citing Klamath, 532 U.S. at 12 n.4 (emphasis added by district court)).

<sup>37</sup> 180 F. Supp. 2d 1184 (D. Colo. 2001).

<sup>38</sup> See id. at 1191.

<sup>39</sup> 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).

<sup>40</sup> 237 F. Supp. 2d 17 (D.D.C. 2002).

<sup>41</sup> See id. at 25-27.

interest in providing neutral advice<sup>42</sup> -- and did not address the second component of the two-part test announced in Klamath.<sup>43</sup>

In line with those two district courts, in 2007 the District Court for the Central District of California relied only on the first part of the Klamath test in denying a threshold claim by an agency.<sup>44</sup> The court held that the threshold test was not met where the agency could not show that its consultant was operating solely on the agency's behalf and not in any way advancing his own interests when the plaintiff had presented evidence that the consultant was acting in his capacity as representative of an organization with which he was affiliated.<sup>45</sup> This was enough to defeat the agency's consultant claim, and the court did not even consider whether the consultant had been in competition with other parties.<sup>46</sup> Finally, in another ruling in 2007 from the District Court for the District of Columbia, the court, in dicta, commented that it did "not agree that Klamath stands for the proposition that communications must definitely meet [both parts of the Supreme Court's test] to fall outside of Exemption 5's shield from disclosure."<sup>47</sup>

In the most recent significant decision on the consultant corollary principle, in a case where only the first part of the Klamath test was at issue, the Court of Appeals for the Tenth Circuit rejected a claim that a paid consultant should be disqualified from serving as a consultant solely on the basis of his "deep-seated views" on the subject in question.<sup>48</sup> Instead, the court noted that the consultant was not seeking a government benefit (beyond the intellectual satisfaction of having his advice followed) and that he was functioning "akin to an agency employee."<sup>49</sup> Furthermore, as the court pointed out, it would be "unusual" if agencies restricted themselves to seeking expert advice from those with no published record of their views on their areas of expertise.<sup>50</sup>

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<sup>42</sup> Id. at 27.

<sup>43</sup> 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.").

<sup>44</sup> See Natural Res. Def. Council v. DOD, No. 04-2062, slip op. at 9 (C.D. Cal. Aug. 13, 2007).

<sup>45</sup> See id.

<sup>46</sup> See id. (rejecting use of Exemption 5 because defendants could not establish that consultant had not acted with his own interests in mind when advising them).

<sup>47</sup> People for the Am. Way Found. v. U.S. Dep't of Education, 516 F. Supp. 2d 28, 37 (D.D.C. 2007); see also Judicial Watch v. Dep't of the Army, 435 F. Supp. 2d 81, 92 n.6 (D.D.C. 2006) (criticizing, in dicta, DOJ's explanation of Klamath's two-part test in favor of decision in Center for International Environmental Law).

<sup>48</sup> Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236, 1245 (10th Cir. 2009).

<sup>49</sup> Id.

<sup>50</sup> Id.

While agencies often are the recipients of expert advice, they also occasionally provide it. In Dow Jones & Co. v. DOJ,<sup>51</sup> 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 because Congress is not itself an "agency" under the FOIA<sup>52</sup> (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"<sup>53</sup>).

This same court has found the threshold satisfied for communications exchanged with the Office of the President, even though the President and his immediate advisors are not themselves an "agency" under the FOIA.<sup>54</sup> Indeed, the presidential communications privilege, which exists to protect advisory communications made to the President and his close advisers, has been repeatedly upheld in FOIA cases,<sup>55</sup> in spite of the fact that the President is not an "agency."<sup>56</sup> (For further discussion of this privilege, see Exemption 5, Other Privileges, below.)

Similarly, in 2005 the D.C. Circuit upheld Exemption 5 protection for documents created for a presidentially created commission, the National Energy Policy Development Group (NEPDG), in spite of the fact that such commissions are not agencies subject to the FOIA.<sup>57</sup> In reversing a lower court ruling, the D.C. Circuit recognized that the NEPDG did not qualify

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<sup>51</sup> 917 F.2d 571 (D.C. Cir. 1990).

<sup>52</sup> Id. at 574-75; see also 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. AID, No. 97-1133, 1997 WL 537998, at \*3 (4th Cir. Sept. 2, 1997) (rejecting use of deliberative process privilege because agency had not intended deliberations to be internal, but rather intended to involve outside parties); Texas v. ICC, 889 F.2d 59, 61 (5th Cir. 1989) (holding that document sent from agency to outside party did not meet threshold standard because it was "a mere request for information, not a consultation or a solicitation of expert advice").

<sup>53</sup> Dow Jones, 917 F.2d at 575.

<sup>54</sup> See Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1110 n.1 (D.C. Cir. 2008) (noting that Office of the President is not an "agency").

<sup>55</sup> See, e.g., Loving v. DOD, 550 F.3d 32, 37-38 (D.C. Cir. 2008); Judicial Watch, 365 F.3d at 1113; Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 81 (D.D.C. 2008); Citizens for Responsibility & Ethics in Wash. v. DHS, No. 06-0173, 2008 WL 2872183, at \*2 (D.D.C. July 22, 2008); Citizens for Responsibility & Ethics in Wash., 514 F. Supp. 2d at 42; Berman v. CIA, 378 F. Supp. 2d 1209, 1219-20 (E.D. Cal. 2005), aff'd on other grounds, 501 F.3d 1136 (9th Cir. 2007).

<sup>56</sup> See, e.g., Berman, 378 F. Supp. 2d at 1219-20 (rejecting plaintiff's claim that Exemption 5 could not protect documents addressed to President even though President is not an "agency").

<sup>57</sup> See Judicial Watch, Inc. v. DOE, 412 F.3d 125, 130-31 (D.C. Cir. 2005).



as an agency as defined by the FOIA.<sup>58</sup> However, it noted that because the NEPDG was created specifically to advise the President on a policy issue, 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.<sup>59</sup>

This ruling is in line with the Supreme Court's 1973 decision in EPA v. Mink,<sup>60</sup> in which the 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."<sup>61</sup>

Lastly, there has been some disagreement in the cases on the issue of whether representatives of state and local governments engaged in joint regulatory operations classify as consultants to federal agencies. In one instance, the District Court for the District of Columbia held that a local government was not a consultant because it was acting as a co-regulator with a federal agency, and not in an advisory capacity.<sup>62</sup> In a different case, however, this same court held that communications from state officials working with FEMA to coordinate Hurricane Katrina evacuation plans could be protected under the Exemption 5 threshold.<sup>63</sup>

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<sup>58</sup> See id. at 129.

<sup>59</sup> Id. at 130.

<sup>60</sup> 410 U.S. 74 (1973).

<sup>61</sup> 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).

<sup>62</sup> See People for the Am. Way Found., 516 F. Supp. 2d at 39 (holding that documents submitted by District of Columbia Mayor's Office could not be protected because District and agency "share[d] ultimate decision-making authority with respect to a co-regulatory project"); see also 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 engaged in joint regulatory project).

<sup>63</sup> See Citizens for Responsibility and Ethics in Wash., 514 F. Supp. 2d at 44-45 (protecting documents obtained from emergency management officials in Mississippi and Louisiana); see also 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); 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 agency pursuant to joint state-federal operation might be protected); cf. United States v. Allsteel, Inc., No. 87-C-4638, 1988 WL 139361, at \*2 (N.D. Ill. Dec. 21, 1988) (protecting

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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."<sup>64</sup> 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 actually 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.<sup>65</sup>

Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies."<sup>66</sup> 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.<sup>67</sup>

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<sup>63</sup>(...continued)

documents exchanged between federal and state co-regulators) (non-FOIA case).

<sup>64</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

<sup>65</sup> 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. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. DOJ, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); Kidd v. DOJ, 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. DOJ, 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 misrepresentations"); 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).

<sup>66</sup> 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.").

<sup>67</sup> 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 Commc'ns 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

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Thus, even the 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 as the source of any decision."<sup>68</sup> 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.<sup>69</sup> Moreover, the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision<sup>70</sup> or even has decided not to make a final decision.<sup>71</sup> Nor is it altered by the passage of time in general,<sup>72</sup>

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<sup>67</sup>(...continued)

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, in alternative, that deliberative process privilege was inapplicable when by regulation entire decisionmaking process was open to all interested parties).

<sup>68</sup> Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

<sup>69</sup> See id. at 776; see also Missouri, 147 F.3d at 710-11 (protecting an 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 (protecting draft forest plans and preliminary draft environmental impact statements); Chem. Mfrs., 600 F. Supp. at 118 (protecting preliminary scientific data generated in connection with study of chemical).

<sup>70</sup> 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); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) ("Contrary to plaintiff's assertion that materials lose their Exemption 5 protection once a final decision is taken, it is the document's role in the agency's decision-making process that controls."); Judicial Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (rejecting as "unpersuasive" assertion that deliberative process privilege is inapplicable after deliberations have ended and relevant decision has been made).

<sup>71</sup> 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

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though agencies are encouraged to consider whether the passage of time has sufficiently reduced the risk of harm from release so that a discretionary release may be appropriate.<sup>73</sup>

Traditionally, courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.<sup>74</sup> First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy."<sup>75</sup> 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."<sup>76</sup> The burden is upon the agency to show that the information in question satisfies both requirements.<sup>77</sup> The quality of an agency's declaration and Vaughn Index have been found to be crucial to the agency's ability to meet this obligation.<sup>78</sup>

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<sup>71</sup>(...continued)

concerning now-abandoned agency program were nonetheless predecisional).

<sup>72</sup> See, e.g., Bruscino v. BOP, No. 94-1955, 1995 WL 444406, at \*5 (D.D.C. May 15, 1995) ("The predecisional character of a document is not lost simply . . . because of the passage of time."), aff'd in part, rev'd in part on other grounds & remanded, No. 95-5213, 1996 WL 393101 (D.C. Cir. June 24, 1996); 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."); cf. Nixon v. Adm'r of Gen. Servs., 443 U.S. 425, 448-49 (1977) (holding that President's constitutionally based privileges survive beyond individual President's term in office) (non-FOIA case).

<sup>73</sup> See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-martch2009.pdf>; see also FOIA Post, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

<sup>74</sup> See Mapother v. DOJ, 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))).

<sup>75</sup> Jordan, 591 F.2d at 774.

<sup>76</sup> Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

<sup>77</sup> See Coastal States, 617 F.2d at 866.

<sup>78</sup> Compare Mo. Coal. for the Env't. Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211 (8th Cir. 2008) (upholding agency's use of deliberative process privilege where it could be "fairly concluded" from Vaughn Index and declaration that release of documents could reveal deliberative process), with Rein, 553 F.3d at 368 ("Our review leads us to conclude the

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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."<sup>79</sup> On this point, the Supreme Court has been 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

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<sup>78</sup>(...continued)

Agencies' descriptions of many of the challenged documents lack the specificity and particularity required for a proper determination of whether they are exempt from disclosure."); Morley v. CIA, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (criticizing "minimal information" provided in agency submissions as being inadequate for court to determine if privilege was claimed properly); People of Cal. ex rel. Brown v. EPA, No. 07-2055, 2009 WL 273411, at \*4 (N.D. Cal. Feb. 4, 2009) (ordering in camera review where agency's Vaughn Index did not provide enough information for court to evaluate agency's use of privilege); Ctr. for Biological Diversity v. OMB, No. 07-4997, 2008 WL 5129417, at \*7 (N.D. Cal. Dec. 4, 2008) (denying summary judgment and criticizing agency submissions as containing "boilerplate explanations" for withholdings); Hall v. DOJ, 552 F. Supp. 2d 23, 29 (D.D.C. 2008) (denying summary judgment to agency because agency had not established that harm would result from release of documents); and Columbia Snake River Irrigators Ass'n v. Lohn, No. 07-1388, 2008 WL 750574, at \*5 (W.D. Wash. Mar. 19, 2008) (ordering in camera review of documents where agency's submissions had not made clear whether withheld documents were party of agency's deliberative process).

<sup>79</sup> Coastal States, 617 F.2d 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); Hall, 552 F. Supp. 2d at 29 (denying summary judgment to agency because agency had failed to tie withheld documents to "specific" decisionmaking process); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1098 (C.D. Cal. 2005) (holding that agency must identify specific decisionmaking process); Carter v. U.S. Dep't of Commerce, 186 F. Supp. 2d 1147, 1153-54 (D. Or. 2001) (holding that adjusted 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); Greenberg, 10 F. Supp. 2d at 17 (stating that "evaluation of the legal status" of case would be protected, but "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"); 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. 1999) (rejecting privilege claim because agency "utterly failed to specify the role played by each withheld document" in policy-formulation process).

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.<sup>80</sup>

Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, courts have found Exemption 5 can be applicable.<sup>81</sup> In a particularly

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<sup>80</sup> Sears, 421 U.S. at 151 n.18; see also Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 373 (4th Cir. 2009) ("Contrary to [plaintiffs] argument, the Agencies were not required to identify the specific policy judgment at issue in each document."); 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."); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 522 (D. Minn. 2008) (rejecting claim that agency was required to link withheld documents to specific agency decision); Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Labor, 478 F. Supp. 2d 77, 82 (D.D.C. 2007) (rejecting plaintiff's argument that privilege did not apply because agency had not identified "precisely what policies were under consideration"); Maydak v. DOJ, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) (protecting information concerning federal inmate that was used by BOP 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 draft audit report that was never reviewed by 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 per curiam, No. 00-5331, 2001 WL 238162, at \*1 (D.C. Cir. Feb. 23, 2001); 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) (stating that "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."); Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.D.C. 1989) (noting that court "must give considerable deference to the agency's explanation of its decisional process, due to agency's expertise"). But see Senate of P.R. v. DOJ, 823 F.2d 574, 585 (D.C. Cir. 1987) (suggesting agency must specify final "decisions to which the advice or recommendations . . . contributed").

<sup>81</sup> 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.

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instructive decision, Access Reports v. DOJ, the Court of Appeals for the District of Columbia Circuit emphasized the importance of identifying the larger process to which a document sometimes contributes.<sup>82</sup> Further, "predecisional" documents are not only those circulated within the agency, but can also be those from an agency lacking decisional authority that advises another agency possessing such authority.<sup>83</sup> They even can be "documents which the agency decisionmaker herself prepared as part of her deliberation and decisionmaking process,"<sup>84</sup> or documents that do not end up being considered by the agency decisionmaker

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<sup>81</sup>(...continued)

2d 271, 277 (D. Conn. 2001) (rejecting argument that 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 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"); 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 specific agency decision but predecisional "in relation to their impact on broader policy decisions"); 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 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).

<sup>82</sup> 926 F.2d 1192, 1196 (D.C. Cir. 1991) (upholding use of privilege where withheld documents had been shown to contribute to agency's decisionmaking process on "how to shepherd [a] bill through Congress"); see also Nielsen, 252 F.R.D. at 522 (protecting documents tied to agency deliberations on land purchase and public reaction to agency actions); Citizens for Responsibility and Ethics in Wash., 478 F. Supp. 2d at 83 (applying privilege to agency deliberations on how to respond to media report); Sierra Club, 384 F. Supp. 2d at 16 (upholding use of privilege to documents discussing agency strategies to promote legislative proposals to Congress).

<sup>83</sup> See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 188 (1975); Bureau of Nat'l Affairs, Inc. v. DOJ, 742 F.2d 1484, 1497 (D.C. Cir. 1984); Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 18-19 (D.D.C. 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).

<sup>84</sup> Judicial Watch, 102 F. Supp. 2d at 14 (protecting notes taken by Attorney General that  
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at all.<sup>85</sup> Lastly, it has been held that the privilege is not limited to deliberations connected solely to agency activities that are specifically authorized by Congress.<sup>86</sup>

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,<sup>87</sup> that implement an established policy of an agency,<sup>88</sup> or that explain actions that an agency has already taken.<sup>89</sup> 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

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<sup>84</sup>(...continued)  
she did not share with others).

<sup>85</sup> See, e.g., 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); 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."); Hamilton Sec. Group, Inc. v. HUD, 106 F. Supp. 2d 23, 30 (D.D.C. 2000) (protecting draft audit report that was never reviewed by 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 per curiam, No. 00-5331, 2001 WL 238162, at \*1 (D.C. Cir. Feb. 23, 2001); 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) (stating that "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").

<sup>86</sup> 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).

<sup>87</sup> See, e.g., Taxation With Representation Fund v. IRS, 646 F.2d 666, 677-78 (D.C. Cir. 1981).

<sup>88</sup> 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).

<sup>89</sup> 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) (noting that "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).



adopted."<sup>90</sup> However, it is possible for communications to be postdecisional in form and timing, but predecisional in content.<sup>91</sup>

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,"<sup>92</sup> and which are "routinely used by agency staff as guidance."<sup>93</sup> Such documents have been found not protectible because they are not in fact predecisional, but rather "discuss established policies and decisions."<sup>94</sup> Nevertheless, portions of a postdecisional document that discuss predecisional recommendations not expressly adopted have been protected.<sup>95</sup>

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<sup>90</sup> Sears, 421 U.S. at 152.

<sup>91</sup> See, e.g., 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 that "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").

<sup>92</sup> Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

<sup>93</sup> Coastal States, 617 F.2d at 869; see also Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983).

<sup>94</sup> 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 release of documents characterized as "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); 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"); 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).

<sup>95</sup> See Sears, 421 U.S. at 151 (noting that postdecisional documents may still reflect protected "prior communications and the ingredients of the decisionmaking process"); see also 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. DOJ, 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

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Several criteria have been fashioned to clarify the "often blurred" distinction between predecisional and postdecisional documents.<sup>96</sup> 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).<sup>97</sup> 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.<sup>98</sup> However, the D.C. Circuit has stated that Field Service Advice memoranda ("FSAs") issued by the IRS's Office of Chief Counsel are not predecisional documents, because they constitute "statements of an agency's legal position."<sup>99</sup> The court reached this conclusion even though

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<sup>95</sup>(...continued)  
process).

<sup>96</sup> 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 WL 134587, at \*2-3 (D.D.C. Mar. 15, 1996), aff'd, 117 F.3d 607 (D.C. Cir. 1997).

<sup>97</sup> 5 U.S.C. § 552(a)(2)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see Fed. Open Mkt. Comm., 443 U.S. at 360-61 n.23.

<sup>98</sup> Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982); cf. Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 602-03 (D.C. Cir. 2001) (concluding that report was not 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 claim that document was final opinion, because 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).

<sup>99</sup> Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997); see, e.g., Tax Analysts v. IRS, 483 F. Supp. 2d 8, 17-18 (D.D.C. 2007) (ordering release of documents reflecting agency's official position on tax code); Evans, 276 F. Supp. 2d at 39 (finding documents at issue "indistinguishable" from records at issue in Tax Analysts for purposes of Exemption 5); 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 IRS agent in conduct of examination.), adopted, (M.D. Fla. Jan. 27, 1998), appeal dismissed, No. 98-2384 (11th Cir. June 5, 1998); 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 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").

the opinions were found to be "nonbinding" on the ultimate decisionmakers.<sup>100</sup>

Second, one must consider the nature of the decisionmaking authority vested in the office or person issuing the document.<sup>101</sup> If the author lacks "legal decision authority," the document is far more likely to be predecisional.<sup>102</sup> A crucial caveat in this regard, however, is that courts often look "beneath formal lines of authority to the reality of the decisionmaking process."<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> Similarly, a distinction must be made between a document which reflects

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<sup>100</sup> Tax Analysts, 117 F.3d at 617.

<sup>101</sup> 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.").

<sup>102</sup> 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."). But see Tax Analysts, 117 F.3d at 617 (finding chief counsel's "nonbinding" FSAs to field offices not predecisional because they "constitute agency law").

<sup>103</sup> 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 DOJ's Criminal Division to Director of FBI).

<sup>104</sup> Schlefer, 702 F.2d at 238, 241; see, e.g., Badran v. DOJ, 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").

<sup>105</sup> See, e.g., Nat'l Wildlife, 861 F.2d at 1122-23 (finding that headquarters' comments on regional plans were opinions and recommendations); Heggstad, 182 F. Supp. 2d at 10 (finding that top official in DOJ's Tax Division actually had made decision to prosecute despite fact that authority to make such decisions was normally exercised by chief of Tax Division's Criminal Section).

<sup>106</sup> 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);

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a final decision (in which case it must be released)<sup>107</sup> and one which consists of advice to a higher authority, in which case it is protectible.<sup>108</sup> Thus, agency recommendations to OMB concerning the development of proposed legislation to be submitted to Congress have been found to be predecisional,<sup>109</sup> but "discussions of how agency policies and decisions are to be enforced are by nature post-decisional."<sup>110</sup>

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"<sup>111</sup> than is one that travels in the opposite direction: "[F]inal

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<sup>106</sup>(...continued)

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 rather 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 properly withhold documents evaluating prior agency decision); 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).

<sup>107</sup> See Sears, 421 U.S. at 153 n.19 (noting that final opinions, which "look[] back on and explain[] . . . a decision already reached" must be released); Judicial Watch, 27 F. Supp. 2d at 245 (commenting that privilege would not apply to documents that "explain agency decisions").

<sup>108</sup> See, e.g., AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 208 (D.C. Cir. 1990) (protecting promotion recommendations made to official with authority to accept or reject them); Bureau of Nat'l Affairs, 742 F.2d at 1497 (protecting recommendation of one agency to second agency, which had ultimate decisionmaking authority).

<sup>109</sup> See Bureau of Nat'l Affairs, 742 F.2d at 1497.

<sup>110</sup> Ford Motor Co. v. U.S. Customs & Border Prot., No. 06-13346, 2008 WL 4899402, at \*17 (E.D. Mich. Aug. 1, 2008) (magistrate's report and recommendation), adopted in part and rejected in part on other grounds, 2008 WL 4899401 (E.D. Mich. Nov. 12, 2008); see also Badhwar v. DOJ, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing predecisional about a recitation of corrective action already taken."); Dow, Lohnes & Albertson v. USIA, No. 82-2569, slip op. at 15-16 (D.D.C. June 5, 1984) (holding descriptions of "agency efforts to ensure enactment of policies already established" postdecisional), vacated in part, No. 84-5852 (D.C. Cir. Apr. 17, 1985).

<sup>111</sup> Coastal States, 617 F.2d at 868; see also Nadler v. DOJ, 955 F.2d 1479, 1491 (11th Cir. 1992) ("[A] recommendation to a supervisor on how to proceed is predecisional by nature.");

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opinions . . . typically flow from a superior with policymaking authority to a subordinate who carries out the policy.<sup>112</sup> However, under certain circumstances, recommendations can flow from the superior to the subordinate.<sup>113</sup> Indeed, even a policymaker's own predecisional notes to herself may be protectible.<sup>114</sup> In sum, perhaps the most important factor to consider is the "role, if any, that the document plays in the process of agency deliberations."<sup>115</sup>

Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decisionmaker "chooses expressly to adopt or incorporate [it] by reference."<sup>116</sup> However, one opinion of the D.C. Circuit suggested

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<sup>111</sup>(...continued)

Students Against Genocide v. Dep't of State, No. 96-667, 1998 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 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); 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).

<sup>112</sup> 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.

<sup>113</sup> 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.").

<sup>114</sup> See Judicial Watch, 102 F. Supp. 2d at 16 (protecting Attorney General's handwritten predecisional notes from meeting on campaign finance task force investigation); see also Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at \*6 (N.D. Cal. Nov. 24, 2008) (protecting author's handwritten notes on her own document that indicated what points author thought most significant for later discussion); cf. Conoco Inc. v. DOJ, 687 F.2d 724, 727 (3d Cir. 1982) (protecting "unaddressed" documents located in agency files and rejecting claim that records must "circulate[] within the agency" to be protected).

<sup>115</sup> 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.").

<sup>116</sup> Sears, 421 U.S. at 161; see, e.g., Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of "underlying memorandum" that was "expressly relied on in a final agency dispositional document"); Bhd. of Locomotive Eng'rs v.

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that "formal or informal" -- as opposed to express -- adoption might be sufficient, though the court did not elaborate on what might constitute "informal" adoption of a document.<sup>117</sup> In general, "approval" of a predecisional document does not necessarily constitute express incorporation of its underlying rationale,<sup>118</sup> and courts have not generally inferred incorporation on the agency's part.<sup>119</sup> This is consistent with the Supreme Court's ruling in

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<sup>116</sup>(...continued)

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 and therefore must be released); 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); cf. Afshar, 702 F.2d at 1140 (finding "substantial evidence" that recommendation expressly adopted in postdecisional memorandum, though remanding to district court for further findings of fact on whether adoption occurred).

<sup>117</sup> Coastal States, 617 F.2d at 866; see also Am. Soc'y of Pension Actuaries, 746 F. Supp. at 192 (ordering disclosure on basis that IRS's budget assumptions and calculations were "relied upon by the government" in making its final estimate for President's budget).

<sup>118</sup> See, e.g., Azmy v. DOD, 562 F. Supp. 2d 590, 604 (S.D.N.Y. 2008) ("His signature indicating his decision says nothing about how he arrived at the decision or what information he found compelling or persuasive in making his choice . . . . None of these assessments and recommendations can therefore be deemed incorporated by reference."); 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 approval of document author's reasoning); 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 incorporation of report's reasoning).

<sup>119</sup> See, e.g., Casad v. HHS, 301 F.3d at 1252-53 (refusing to order disclosure where there was "no indication in the record" of express incorporation of underlying rationale of recommendations); Mayer, Brown, Rowe & Maw, LLP v. IRS, 537 F. Supp. 2d 128, 134-35 (D.D.C. 2008) (refusing to rule that incorporation had taken place where there was "an absence of proof" on this question, rejecting plaintiff's claim that agency bore burden of proof on this issue); 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); Trans Union LLC v. FTC, 141 F. Supp. 2d 62, 70 (D.D.C. 2001) (following Grumman and rejecting argument that burden is on agency to prove that documents were not adopted as basis for policy); 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); 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

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Grumman Aircraft, where the Court refused to order release of a document where the "evidence utterly fail[ed] to support an inference" that the decisionmakers had incorporated the reasoning contained in recommendations prepared for them, even where they agreed with the recommendations themselves.<sup>120</sup>

In a significant decision on adoption in 2005, the Court of Appeals for the Second Circuit ordered the release of a DOJ memorandum concerning enforcement of immigration law by state and local law enforcement agencies.<sup>121</sup> In so ruling, the court noted that DOJ 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.<sup>122</sup> This evidence of adoption went beyond "mere speculation," which would have been insufficient.<sup>123</sup> Furthermore, the appeals court was careful to point out that "casual reference[s]" to an otherwise privileged document would not be enough to demonstrate adoption, nor would the privilege have been lost had DOJ merely adopted the memorandum's conclusions.<sup>124</sup> Rather, the court found, DOJ had "publicly and repeatedly depended on the Memorandum as the primary legal authority justifying and driving . . . [its policy decision] and the legal basis therefor."<sup>125</sup> The Second

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<sup>119</sup>(...continued)

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 decision-maker would eviscerate Exemption 5."); see also 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). But see Am. Soc'y of Pension Actuaries, 746 F. Supp. at 191-2 (inferring incorporation on basis of similarity between figures used in draft document and figures used in budget proposal); Martin v. MSPB, 3 Gov't Disclosure Serv. (P-H) ¶ 82,416, at 83,044 (D.D.C. Sept. 14, 1982) ("In the absence of a reasoned Board decision, the inference arises that the Board acted on the basis of the staff recommendation.").

<sup>120</sup> Grumman, 421 U.S. at 184-85; see also Afshar, 702 F.2d at 1143 n.22 ("We think it clear that at least under the circumstances of this case, only express adoption in a nonexempt memorandum explaining a final decision will serve to strip these memoranda of their predecisional character. . . . If the agency merely carried out the recommended decision without explaining its decision in writing, we could not be sure that the memoranda accurately explained the decisionmaker's thinking.") (internal citations omitted).

<sup>121</sup> Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 361 (2d Cir. 2005).

<sup>122</sup> See id. at 358 (noting statements by agency official relying on document in question as sole means of explaining agency position on matter at issue).

<sup>123</sup> See id. at 359 (comparing substantial evidence of adoption of memorandum in present case, as compared to other cases where such evidence was lacking).

<sup>124</sup> See id. at 358 ("Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis. . . .").

<sup>125</sup> Id.; see also Bronx Defenders v. DHS, No. 04 CV 8576, 2005 WL 3462725, at \*4-5 (S.D.N.Y. (continued...))

Circuit noted that this distinguished the case from Grumman Aircraft,<sup>126</sup> 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 been] adopted."<sup>127</sup>

A second primary limitation on the scope of the deliberative process privilege is that it applies only to "deliberative" documents and it ordinarily is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda, which ordinarily must be segregated out and released.<sup>128</sup> Not only would factual material "generally be available for discovery,"<sup>129</sup> but its release usually would not risk chilling agency deliberations.<sup>130</sup> This

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<sup>125</sup>(...continued)

Dec. 19, 2005) (ordering release of memorandum because government had cited it in multiple public documents as basis for government policy).

<sup>126</sup> 421 U.S. at 184.

<sup>127</sup> Id.; see Robert v. HHS, 217 F. App'x 50, 52 (2d Cir. 2007) (rejecting plaintiff's claim of adoption or incorporation where there was "no evidence in the record" of either). But see Sussman v. DOJ, 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 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).

<sup>128</sup> 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); Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1149 (9th Cir. 2008) (holding that agency had not provided enough information to determine whether it had sufficiently segregated out and released factual portions of deliberative document); Unidad Latina en Acción v. DHS, 253 F.R.D. 44, 58 (D. Conn. 2008) (ordering release of "purely factual material" needed to respond to inquiry to agency); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 44-45 (D.D.C. 2008) (denying summary judgment because agency had not demonstrated that there were not segregable factual portions of withheld documents that could be released); 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).

<sup>129</sup> Mink, 410 U.S. at 87-88.

<sup>130</sup> 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); 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 otherwise deliberative record because it "does not evaluate the actions taken, but only describes them"); Public Citizen v.

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seemingly straightforward distinction between deliberative and factual materials can become less clear, however, where the facts themselves reflect the agency's deliberative process<sup>131</sup> -- 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."<sup>132</sup> In some cases, there has simply been disagreement about whether to characterize material as "fact" or "opinion" in the first place.<sup>133</sup>

The full D.C. Circuit has 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."<sup>134</sup> Following this approach, for example, the District Court for the District of Columbia in 2005 allowed the Air Force to withhold "vote sheets" that were used in the process of determining retirement benefits.<sup>135</sup> 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."<sup>136</sup>

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts

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<sup>130</sup>(...continued)

Dep't of State, No. 91-746, 1991 WL 179116, at \*4 (D.D.C. Aug. 27, 1991) (citing Montrose Chem. and noting principle that release of "purely factual matters" generally "would not threaten agency deliberations").

<sup>131</sup> 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).

<sup>132</sup> Dudman, 815 F.2d at 1568.

<sup>133</sup> Compare Fla. House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941, 950 (11th Cir. 1992) (holding that "adjusted" 1990 census figures submitted to, but not used by, Secretary of Commerce constitute protectible "opinion"), with Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 922-23 (9th Cir. 1992) (ruling that similar materials were factual in nature and release would not reveal agency's decisionmaking process), and Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1091-92 (9th Cir. 2002) (issuing similar ruling with regard to statistical estimates created for 2000 census).

<sup>134</sup> Wolfe, 839 F.2d at 774; see also Nat'l Wildlife, 861 F.2d at 1119 (explaining that "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").

<sup>135</sup> See Brannum v. Dominguez, 377 F. Supp. 2d 75, 83 (D.D.C. 2005).

<sup>136</sup> Id.; see also Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 169 (D.D.C. 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).

generally allow agencies to withhold factual material in an otherwise "deliberative" document under a few types of circumstances. The first of these is 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,<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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<sup>137</sup> 491 F.2d 63 (D.C. Cir. 1974).

<sup>138</sup> See id. at 71.

<sup>139</sup> 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); Providence Journal, 981 F.2d at 562 (revealing IG's factual findings would divulge substance of related recommendations); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979) (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"); Columbia Snake River Irrigators Ass'n, 2008 WL 750574, at \*4 (protecting agency documents that included factual information in part because "the process of prioritizing facts and conclusions and weighing their importance and relevance is often an exercise of judgment that can affect Agency policy") (internal quotations omitted); NAACP Legal Def. & Educ. Fund, Inc. v. HUD, No. 07-3378, 2007 WL 4233008, at \*11 (S.D.N.Y. Nov. 30, 2007) (protecting portions of agency internal audit of state disaster relief procedures that relate to "ongoing audit of which the scope and focus are still in development") (internal quotations omitted); The Edmonds Inst. v. U.S. Dep't of Interior, 460 F. Supp. 2d 63, 71 (D.D.C. 2006) (protecting factual material considered for, but not utilized, in final report); Judicial Watch, Inc. v. DOJ, No. 01-639, 2006 WL 2038513, at \*7 (D.D.C. July 19, 2006) (quoting favorably from government declaration explaining that "very act of selecting those facts which are significant from those that are not, is itself a deliberative process"); Env'tl. 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 draft audit report on grounds that "any factual information that could be [released] would reveal decisions made by the auditor" and thereby chill future agency deliberations); Heggstad, 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 v. EEOC, 37 F. Supp. 2d 1144, 1150 (E.D. Mo. 1999) (protecting factual "distillation" in otherwise deliberative EEOC report), aff'd, 197 F.3d 329 (8th Cir. 1999); 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).

Similarly, in Mapother v. DOJ,<sup>140</sup> the D.C. Circuit upheld protection for portions of 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.<sup>141</sup> 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 deliberative process privilege.<sup>142</sup> In making its ruling, the court distinguished its prior holding in Playboy Enterprises v. DOJ,<sup>143</sup> in which the court had ordered release of a factual document because the document in question "was prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress,"<sup>144</sup> and did not involve any decisionmaking by the Attorney General.<sup>145</sup> By contrast, the existence of a connection to a decisionmaking process was key to the Mapother court's analysis and the different outcome it reached for certain portions of the report.<sup>146</sup> However, in Mapother the D.C. Circuit also held that the portion of the report consisting of a chronology of Waldheim's military career was not deliberative, as it was "neither more nor less than a comprehensive

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<sup>140</sup> 3 F.3d 1533 (D.C. Cir. 1993).

<sup>141</sup> See id. at 1538-40.

<sup>142</sup> Id. at 1539.

<sup>143</sup> 677 F.2d 931, 936 (D.C. Cir. 1982).

<sup>144</sup> Id.

<sup>145</sup> See id.; see also S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2485, 2008 WL 2523819, at \*8-9 (E.D. Cal. June 20, 2008) (quoting Playboy Enters. for proposition that "a report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material"); 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").

<sup>146</sup> See Mapother, 3 F.3d at 1539 (distinguishing Playboy Enters.); see also City of Va. Beach, 995 F.2d at 1255 (observing similarly that in Playboy Enters. "[the] agency identified no decision in relation to the withheld investigative report"); S. Appalachian Biodiversity Project v. U.S. Forest Serv., 500 F. Supp. 2d 764, 769 (E.D. Tenn. 2007) (holding that agency had demonstrated that release of factual materials would reveal agency's decisionmaking process, and in particular which facts decisionmaker considered most important); 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"); Env'tl. 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))); Tarullo, 170 F. Supp. 2d at 278 (holding that "the very selection of facts could . . . reveal the nature of . . . recommendations and opinions").

collection of the essential facts" and "reflect[ed] no point of view."<sup>147</sup>

In 2007, in Trentadue v. Integrity Committee,<sup>148</sup> the Court of Appeals for the Tenth Circuit discussed, but declined to follow, its understanding of the D.C. Circuit's analysis on factual selection in Mapother,<sup>149</sup> and declared that "[f]actual materials do not become privileged merely because they represent a summary of a larger body of investigation."<sup>150</sup> And, in situations where agencies have not even shown that factual studies were used selectively, the D.C. Circuit has ordered release of the documents, regardless of their connection to a decisionmaking process.<sup>151</sup>

Factual information may also be withheld as deliberative material when it is so thoroughly integrated with 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.<sup>152</sup> In other cases, courts have

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<sup>147</sup> 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.").

<sup>148</sup> 501 F.3d 1215 (10th Cir. 2007).

<sup>149</sup> See id. at 1229 (discussing Mapother).

<sup>150</sup> Id. at 1232.

<sup>151</sup> See Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 238 (D.C. Cir. 2008) (holding that agency erred in withholding studies relied upon in promulgating rule and declaring that Exemption 5 "does not authorize an agency to throw a protective blanket over all information"); 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").

<sup>152</sup> See, e.g., Rein, 553 F.3d at 375 (protecting factual portions of document because such information, when viewed as part of a larger document "would reveal the very predecisional and deliberative material Exemption 5 protects"); Horowitz v. Peace Corps, 428 F.3d 271, 277 (D.C. Cir. 2005) (protecting requested document where the decisionmaker's "thought processes are woven into 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); Goodrich Corp. v. EPA, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (protecting draft model because "evolving iterations" of model may not represent agency's "ultimate opinion," therefore "even if the data plugged into the model is itself purely factual, the selection and calibration of data is part of the deliberative process"); Reliant Energy Power Generation, Inc. v. FERC, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (protecting documents related to factual investigation because release "would allow a reader to probe too deeply into the thought processes of the drafters and would have a chilling effect on communication between agency employees"); Sakamoto, 2007 WL 1722424, at \*8 (holding factual portions of audits as non-segregable material because release would reveal "mental  
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ruled that factual material is so mixed in with deliberative material that it would not be possible to release meaningful portions of a document,<sup>153</sup> though of course the burden is on the agency to show that factual portions are so intertwined with deliberative elements.<sup>154</sup>

Courts have also recognized that under certain circumstances, "facts" themselves can be essentially deliberative. An example of this is construction cost estimates, which the D.C. Circuit characterized as "elastic facts," finding that their disclosure would reveal the agency's deliberations.<sup>155</sup>

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.<sup>156</sup> Exemption 5 thus covers scientific reports that constitute the

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<sup>152</sup>(...continued)

processes" of auditors); 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 so closely related to deliberative material that agency could protect it); Brownstein Zeidman & Schomer v. Dep't of the Air Force, 781 F. Supp. 31, 36 (D.D.C. 1991) (holding that release of summaries of negotiations would inhibit free flow of information, as "summaries are not simply the facts themselves"); Jowett, Inc. v. Dep't of the Navy, 729 F. Supp. 871, 877 (D.D.C. 1989) (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).

<sup>153</sup> See, e.g., Hawkins, 2005 WL 2063811, at \*3 (protecting factual portions of 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 too closely mixed in 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 intertwined with . . . recommendations and opinions . . . that production of a redacted version would be incomprehensible.").

<sup>154</sup> See Mead Data, 566 F.2d at 260 (holding that agency had not sufficiently justified its withholding of factual materials).

<sup>155</sup> 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 its assets); cf. Russell, 682 F.2d at 1048-49 (protecting ostensibly factual documents prepared by Air Force group in process of 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, 385 (S.D.N.Y. 2006) (ordering release of documents on basis that "preliminary findings as to objective facts" are not protectible).

<sup>156</sup> 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

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interpretation of technical data, insofar as "the opinion of an expert reflects the deliberative process of decision or policy making."<sup>157</sup> It has even been extended to cover successive reformulations of computer programs that were used to analyze scientific data.<sup>158</sup>

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."<sup>159</sup> The Court of Appeals for the Ninth Circuit 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. . . . 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. . . . Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent.<sup>160</sup>

The D.C. Circuit has found that an agency wishing to protect the results of factual inquiries bears the burden of demonstrating that disclosure of such information "would actually inhibit

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<sup>156</sup>(...continued)

Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (protecting variables reflected in computer program's mathematical equation); Brinderson Constructors, Inc. v. U.S. Army 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 claim for compensation "are certainly part of the deliberative process"). But see Warren v. SSA, No. 98-CV-0116E, 2000 WL 1209383, at \*3 (W.D.N.Y. Aug. 22, 2000) (holding that privilege does not protect ordered ranking of job applicants, and reasoning that such ranking "is not pre-decisional . . . as [it is] the result of the panel's decisions" rather than intermediate step in a multi-layered decisionmaking process), aff'd on other grounds, 10 F. App'x 20 (2d Cir. 2001).

<sup>157</sup> Parke, Davis, 623 F.2d at 6; see also Reliant, 520 F. Supp. 2d at 205-6 (protecting the "spreadsheets and tables that 'analyze raw data,' because even though materials "are not themselves deliberative, their use by agency employees in writing the Staff Report renders them part of the deliberative process") (internal citation omitted); Horsehead Indus. v. EPA, 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 scientific material as "technological data of a purely factual nature").

<sup>158</sup> See Cleary, Gottlieb, Steen & Hamilton v. HHS, 884 F. Supp. 770, 782-83 (D.D.C. 1993).

<sup>159</sup> Chem. Mfrs., 600 F. Supp. at 118.

<sup>160</sup> 861 F.2d at 1115, 1120 (protecting "working drafts" of forest plan and "working drafts of environmental impact statements").

candor in the decision-making process."<sup>161</sup>

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."<sup>162</sup> They are protected because, by their very nature, their release would likely "stifle honest and frank communication within the agency."<sup>163</sup> Materials of this nature go to

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<sup>161</sup> 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).

<sup>162</sup> Sears, 421 U.S. at 150; see, e.g., AIDS Healthcare Found. v. Leavitt, 256 F. App'x 954, 956 (9th Cir. 2007) (protecting deliberations concerning grant applications); 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."); Asian Law Caucus, 2008 WL 5047839, at \*6 (N.D. Cal. Nov. 24, 2008) (protecting e-mail exchanges reflecting deliberations on whether to create new agency procedure); Ctr. for Medicare Advocacy v. HHS, 577 F. Supp. 2d 221, 236 (D.D.C. 2008) (protecting documents containing "advice, recommendations, and suggestions"); Reilly v. DOE, No. 07-995, 2007 WL 4548300, at \*4-5 (N.D. Ill. Dec. 18, 2007) (protecting document containing recommendations for decisionmaker) (magistrate's opinion and order); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 144 (D.D.C. 2007) (protecting handwritten meeting notes of senior FTC employee as representative of his "thoughts and impressions of the meeting") (internal quotations omitted); 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. DOJ, 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 employment experience are deliberative decisions in that they set the policy for the hiring process"); see also 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).

<sup>163</sup> Coastal States, 617 F.2d at 866; see also Missouri, 147 F.3d at 711 (holding that "it was not improper for the [agency] to conclude that open and frank intra-agency discussion would

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the very heart of the privilege, for, as the Supreme Court has stated, "[t]he deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news."<sup>164</sup>

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.<sup>165</sup> Though courts have not spoken with complete unanimity on this category, the overwhelming weight of authority, including a number of recent cases, now holds that briefing materials prepared by agencies for one purpose or another are properly protected under the deliberative process privilege.<sup>166</sup>

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<sup>163</sup>(...continued)

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."); Lewis-Bey v. DOJ, 595 F. Supp. 2d, 120, 133 (D.D.C. 2009) (protecting documents whose release "would have the effect of inhibiting the free flow of recommendations and opinions") (internal citation omitted); Reliant, 520 F. Supp. 2d at 205 ("Disclosure of internal communications . . . can hamper the candid exchange of views and the ultimate policy-making process.") (internal citation omitted); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at \*10 (D. Minn. Aug. 23, 2007) ("Premature disclosure of . . . recommendations or comments 'would discourage free ranging criticism and consideration of alternatives within an agency.'") (internal citation omitted); 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); cf. AIDS Healthcare Found., 256 F. App'x at 957 (allowing agency to withhold names of grant reviewers because release of their names would "make it impossible to have any frank discussions of . . . policy matters in writing") (internal citation omitted).

<sup>164</sup> Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001); see also Casad, 301 F.3d at 1251 (quoting Klamath); Odle v. DOJ, No. 05-2711, 2006 WL 1344813, at \*12 (N.D. Cal. May 17, 2006) (same); McCoy v. United States, No. 04-101, 2006 WL 463106, at \*8 (N.D. W. Va. Feb. 24, 2006) (same).

<sup>165</sup> 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).

<sup>166</sup> See Citizens for Responsibility & Ethics in Wash. v. DHS, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (protecting briefing materials concerning ongoing response to Hurricane Katrina, which included proposed "solutions and approaches"); Bd. of County Comm'rs v. Dep't of the Interior, No. 06-209, 2007 WL 2156613, at \*12 (D. Utah July 26, 2007) (protecting "bullet-point list discussing potential courses of action" prepared for Secretary of Interior), aff'd in part, rev'd in part on other grounds sub nom., Stewart v. U.S. Dep't of Interior, 554 F.3d 1236 (10th Cir. 2009); 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. DOE, 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

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A category of documents particularly likely to be found exempt under the deliberative process privilege is "drafts,"<sup>167</sup> although it has been observed that such a designation "does not end the inquiry,"<sup>168</sup> and some courts have denied protection.<sup>169</sup> Many courts have found

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<sup>166</sup>(...continued)

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 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, 27 F. Supp. 2d 1015, 1026 (W.D. 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). But see N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 514 (D.D.C. 2007) (ruling that agency had not established that talking points were "contemplative, deliberative, analytical documents") (internal citation omitted); Nat'l Sec. Archive v. FBI, No. 88-1507, 1993 WL 128499, at \*2-3 (D.D.C. Apr. 15, 1993) (finding briefing papers not protectible).

<sup>167</sup> See, e.g., Abdelfattah v. DHS, 488 F.3d 178, 183 (3d Cir. 2007); 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); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at \*16 (N.D. Cal. Sept. 26, 2008) (protecting draft letters); Donham v. U.S. Forest Service, No. 07-111, 2008 WL 2157167, at \*5 (S.D. Ill. May 21, 2008) (finding draft documents to be "precisely the kind of documents that Exemption 5 and the deliberative process privilege seek to protect from disclosure"); Pub. Employees for Env'tl Responsibility v. Bloch, 532 F. Supp. 2d 19, 22 (D.D.C. 2008) (protecting draft "position descriptions"); Ebersole v. United States, No. 06-2219, 2007 WL 2908725, at \*5 (D. Md. Sept. 24, 2007) (protecting draft Memorandum of Understanding, noting that draft "does not memorialize a final agency decision"); Judicial Watch, 337 F. Supp. 2d at 173 (protecting draft agreement and draft of letter from Secretary of Commerce); 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, 13 F. App'x 768, 769 (10th Cir. 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").

<sup>168</sup> Arthur Andersen, 679 F.2d at 257 (citing Coastal States, 617 F.2d at 866); see also Nevada v. DOE, 517 F. Supp. 2d 1245, 1264-65 (D. Nev. 2007) (declaring that while "the word 'draft' is not talismanic" and therefore inquiry into nature of document is required, fact that no final document was "created, approved, and released" is "crucial[]" to court's analysis).

<sup>169</sup> See, e.g., N.Y. Times, 499 F. Supp. 2d at 515 (holding that agency had not demonstrated role draft documents played in decisionmaking process); 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

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that the very process by which a "draft" evolves into a "final" document can itself constitute a deliberative process warranting protection.<sup>170</sup> As a result, some courts have noted that a draft document may be protected regardless of whether it differs from its final version.<sup>171</sup>

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<sup>169</sup>(...continued)

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 document's draft status is not 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 unpublished internal document lost its draft status when consistently treated by the agency as finished product over many years).

<sup>170</sup> 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) (noting the "exemption 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."); Sussman v. DOJ, No. 03-3618, 2008 WL 2946006, at \*4 (E.D.N.Y. July 29, 2008) (upholding agency's decision to withhold draft policy document, noting that release of it would allow public "to compare the draft and final versions of the policy"); Reliant Energy, 520 F. Supp. 2d at 204 (noting that agency not required to show how draft differed from final document because doing so would expose agency's deliberative process); Nevada, 517 F. Supp. 2d at 1264 (citing Dudman and Russell); Skull Valley Band of Goshute Indians v. Kempthorne, No. 04-339, 2007 WL 915211, at \*14 (D.D.C. Mar. 26, 2007) (citing Russell and noting that "the drafting process is itself deliberative in nature"); Parker v. USDA, No. 05-0469, 2006 WL 4109672, at \*6 (D.N.M. July 30, 2006) (finding draft document "part of the internal process by which the Forest Service generates a final version of the document"); 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). But see Nielsen, 252 F.R.D. at 528 (upholding agency's withholding of drafts, but noting, in dicta, its rejection of idea that documents can be withheld simply "because they are successive versions of a document and as such, would tend to show the internal development of an agency's decision on a policy matter").

<sup>171</sup> See Exxon, 585 F. Supp. at 698 ("[T]here is no merit to Exxon's argument that in order to establish the privileged character of a draft, DOE must show to what extent the draft differs (continued...)

As mentioned above, protecting the very integrity of the deliberative process can, in some contexts, be the basis for the protection of factual information.<sup>172</sup> 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,<sup>173</sup> even in circumstances in which a final version of the document in question has been released to the public.<sup>174</sup>

In Petroleum Information Corp. v. United States Department of the Interior,<sup>175</sup> the D.C. Circuit held that withheld material should be released in part because it did not involve "some

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<sup>171</sup>(...continued)

from the final document." (emphasis in original); see also Tigue v. DOJ, 312 F.3d 70, 79 (2d Cir. 2002)(citing Lead Indus.); Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta); Lead Indus., 610 F.2d at 86 (explaining that if draft does not differ from final version, draft version has in effect been released, but if it does differ, these changes reveal agency's deliberative process); People of California v. EPA, No. 07-2055, 2008 WL 5384623, at \*5 (N.D. Cal. Dec. 22, 2008) (citing Exxon); Reliant, 520 F. Supp. 2d at 204 (same); City of West Chicago v. NRC, 547 F. Supp. 740, 751 (N.D. Ill. 1982) (citing Lead Indus.). But see Texaco, Inc. v. DOE, 2 Gov't Disclosure Serv. (P-H) ¶ 81,296, at 81,833 (D.D.C. Oct. 13, 1981) (ruling to the contrary).

<sup>172</sup> 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).

<sup>173</sup> See, e.g., AIDS Healthcare Found., 256 F. App'x at 957 (holding that if names of reviewers of grant applications were released, "[i]t would be impossible to have any frank discussions of . . . policy matters in writing") (internal citation omitted); 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); 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).

<sup>174</sup> 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).

<sup>175</sup> 976 F.2d 1429 (D.C. Cir. 1992).

policy matter.<sup>176</sup> Though the materials in question in this case were factual in nature,<sup>177</sup> some courts have applied this ruling to cases involving deliberative materials.<sup>178</sup>

However, in National Wildlife, the Ninth Circuit 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.<sup>179</sup> In part, these

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<sup>176</sup> Id. at 1435.

<sup>177</sup> See id. at 1438 (discussing "technical, objective tenor" of withheld materials).

<sup>178</sup> See People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 301-02 (D.D.C. 2007) (refusing to allow agency to withhold document containing "predecisional guidance relating to upcoming events" because agency had not shown connection to "any type of governmental policy formation or decision"); 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 because these messages contained recommendations on press relations, not on matters relating to agency's "mission"), aff'd sub nom. News-Press v. DHS, 489 F.3d 1173 (11th Cir. 2007); Hennessey, 1997 WL 537998, at \*5 (determining that "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 "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-00-1748, 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").

<sup>179</sup> 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 issue of "policy" and protecting letter in which 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 agency's decision to discipline personnel for alleged misconduct is no less "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

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contrasting decisions may stem from disagreements about what constitutes "policy," with some courts holding that the term includes virtually anything that is part of an agency's deliberations, while others ruling that the category is limited to matters closer to an agency's core substantive mission.<sup>180</sup>

### 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.<sup>181</sup> As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny,<sup>182</sup> the work-product privilege ordinarily

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<sup>179</sup>(...continued)

plaintiff's contentions that document must be related to "essential function" of agency in order to be protected); 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 because they are not policy memoranda).

<sup>180</sup> Compare Nielsen, 252 F.R.D. at 522 (approving use of privilege for documents involving "policy-related . . . process of how to . . . address the possible public perception that would flow from [agencies'] actions"), and ICM Registry, LLC v. U.S. Dep't of Commerce, 538 F. Supp. 2d 130, 136 (D.D.C. 2008) (holding that "deliberations regarding public relations policy are deliberations about policy, even if they involve 'massaging' the agency's public image"), and Keeper of the Mountains Found. v. DOJ, No. 06-0098, slip op. at 31 (S.D. W. Va. Aug. 28, 2007) ("[I]t appears the [withheld documents] were part of the give-and-take of the consultative process leading to the policy-oriented judgment of the agency of how to respond to the Senate inquiry and article. . . . Consequently, the deliberative prong has been satisfied."), with Habeus Corpus Resource Ctr. v. DOJ, No. 08-2649, 2008 WL 5000224, at \*2 (N.D. Cal. Nov. 21, 2008) (rejecting use of privilege for document found "peripheral to . . . substantive policy development" and document found not prepared to assist agency decisionmaker "in arriving at a substantive policy decision"), and Mayer, Brown, 537 F. Supp. 2d at 136 (ruling that agency could not withhold documents reflecting deliberations about how much information should be "conveyed" to general public because such deliberations were "too removed from an actual policy decision"), and Cowdery, Ecker & Murphy, LLC v. Dep't of the Interior, 511 F. Supp. 2d 215, 221 (D. Conn. 2007) (holding that employee's self-assessment and supervisor's recommendations concerning employee's performance do not constitute "deliberations on Department policy, personnel or otherwise").

<sup>181</sup> 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).

<sup>182</sup> See Jordan v. DOJ, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc).

does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.<sup>183</sup> The privilege is not limited to civil proceedings, but rather extends to administrative proceedings<sup>184</sup> and to criminal matters as well.<sup>185</sup> Similarly, the privilege has also been held

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<sup>183</sup> Coastal States Gas Corp. v. DOE, 617 F.2d 854, 865 (D.C. Cir. 1980).

<sup>184</sup> See, e.g., Schoenman v. FBI, 573 F. Supp. 2d 119, 143 (D.D.C. 2008) (upholding use of privilege for documents "created by an attorney in the context of an ongoing administrative proceeding that eventually resulted in litigation"); Nevada v. DOE, 517 F. Supp. 2d 1245, 1260 (D. Nev. 2007) (noting that privilege applies to administrative proceedings, as long as they are "adversarial"); Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 586 (N.D. W. Va. 2005) (EPA administrative enforcement proceeding); McErlean v. DOJ, 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. DOE, 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) (2006)). But see MacLean v. DOD, No. 04-CV-2425, slip op. at 12-13 (S.D. Cal. June 6, 2005) (holding that privilege does not apply to records prepared for intra-agency review, even where such review could lead to discipline of agency employee), aff'd on other grounds, 240 F. App'x 751, 754 (9th Cir. 2007).

<sup>185</sup> See, e.g., Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (applying privilege in case involving prosecution of environmental crimes); Nadler v. DOJ, 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); Miller v. DOJ, 562 F. Supp. 2d 82, 113 (D.D.C. 2008) (protecting documents created in considering whether to bring criminal charges against requester); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 517 (S.D.N.Y. 2007) (protecting documents that "provid[ed] guidance for responding to motions made in criminal litigation") (internal citation omitted); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 U.S. Dist. LEXIS 6367, at \*14-15 (D.D.C. Jan. 30, 2007) (upholding use of privilege to withhold criminal case history report); Butler v. DOJ, 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); Spannaus v. DOJ, No. 92-0372, slip op. at 4 (D.D.C. Sept. 30, 1999) (holding privilege applicable to document prepared by Assistant United States Attorney that discussed grand jury procedures in criminal case, and stating that "[i]t is difficult to imagine a more direct application of the work product privilege"); Slater v. EOUSA, 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). But cf. Powell v. DOJ, 584 F. Supp. 1508, 1519-20 (N.D. Cal. 1984) (suggesting, but not deciding, that requested attorney work-product materials generated in criminal case should be subject to disclosure under criminal discovery provisions).

applicable to documents generated in preparation of an amicus brief.<sup>186</sup>

This privilege sweeps very broadly in several respects.<sup>187</sup> First, litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable.<sup>188</sup> 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."<sup>189</sup> 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."<sup>190</sup>

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<sup>186</sup> 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).

<sup>187</sup> See generally FOIA Update, Vol. IV, No. 3, at 6.

<sup>188</sup> See, e.g., Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir. 1976); Citizens for Responsibility and Ethics in Wash. v. NARA, 583 F. Supp. 2d 146, 160 (D.D.C. 2008) (allowing use of privilege in situation where agency "could reasonably have anticipated litigation over" status of requested records); 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 \*5 (N.D. Ill. Oct. 6, 1992) (applying privilege to legal advice regarding specific agency cleanup sites where agency believed statutory violations occurred, although agency later declined to prosecute); 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).

<sup>189</sup> 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); James Madison Project, v. CIA, 607 F. Supp. 2d 109, 130 (D.D.C. 2009) (protecting documents concerning agency's review of factual material in fictional manuscripts to ensure nondisclosure of classified material, which agency frequently litigated, although no specific claim was contemplated when documents created); 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).

<sup>190</sup> SafeCard Servs. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991); see, e.g., Durrani v. DOJ, 607 (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."<sup>191</sup> But when litigation is reasonably regarded as inevitable under the circumstances, a specific claim need not yet have arisen before courts have found the attorney work-product privilege applicable.<sup>192</sup>

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<sup>190</sup>(...continued)

F. Supp. 2d 77, 84-85 (D.D.C. 2009) (applying privilege to materials prepared as part of criminal prosecution of requester); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at \*9 (D. Minn. Aug. 23, 2007) (upholding use of privilege to protect documents created as part of investigation into possible violations of securities laws); Winterstein v. DOJ, 89 F. Supp. 2d 79, 81 (D.D.C. 2000) (protecting prosecution memorandum "prepared for the purpose of pursuing a specific claim"); 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); Sousa v. DOJ, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at \*20 (D.D.C. June 19, 1997) (protecting documents that agency sufficiently demonstrated were prepared during murder investigation); 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").

<sup>191</sup> Senate of P.R. v. DOJ, 823 F.2d 574, 587 (D.C. Cir. 1987) (emphasis added) (citing Coastal States, 617 F.2d at 865).

<sup>192</sup> See, e.g., 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 (protecting "agency's attorneys' assessment of [a] program's legal vulnerabilities" crafted before specific litigation arose); 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 attorneys on litigation of environmental law cases); Heggstad v. DOJ, 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"); 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); 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); 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

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In a situation where a document may have been created for more than one purpose, the work-product privilege has been found to apply if the agency can show that the document was created at least in part because of the prospect of litigation.<sup>193</sup> However, documents prepared in an agency's ordinary course of business, not under circumstances sufficiently related to litigation, may not be accorded protection.<sup>194</sup>

The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation.<sup>195</sup> It has also been used to protect the recommendation

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<sup>192</sup>(...continued)

privilege covers case digest of legal theories and defenses frequently used in litigation).

<sup>193</sup> See Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 67 (1st Cir. 2002) (amended opinion) (overturning district court ruling that litigation had to be "primary motivating factor" behind document creation for privilege to apply); see also United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) (determining, in non-FOIA case, that "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of [Federal Rule 26(b)(3)]"); Hertzberg, 273 F. Supp. 2d at 80 (D.D.C. 2003) (rejecting "primary purpose" test); Maine v. 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 of Locomotive Eng'rs v. Surface Transp Bd., No. 96-1153, 1997 WL 446261, at \*6 (D.D.C. July, 31, 2007) (holding that privilege applies where document was created "in part" for litigation); Charles A. Wright, Arthur Miller, and Richard L. Marcus, 8 Federal Practice and Procedure 343 (1994) (discussing proper interpretation of work-product privilege). 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).

<sup>194</sup> See Hennessey v. AID, No. 97-1113, 1997 WL 537998, at \*6 (4th Cir. Sept. 2, 1997) (refusing to apply privilege to report commissioned to complete project and not "because of the prospect of litigation," despite threat of suit); Hill Tower, Inc. v. Dep't of the Navy, 718 F. Supp. 562, 567 (N.D. Tex. 1988) (declining to apply privilege after concluding that aircraft accident investigation information in JAG Manual report was not created in anticipation of litigation); cf. Nevada, 517 F. Supp. 2d at 1260-61 (refusing to apply privilege to license permit applications because the proceedings were not adversarial and thus not "akin to . . . litigation") (internal citation omitted).

<sup>195</sup> 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 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).

to close a litigation or prelitigation matter.<sup>196</sup> But documents 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.<sup>197</sup> 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 file.<sup>198</sup>

Second, 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,<sup>199</sup> but also documents prepared by an attorney "not employed as a litigator,"<sup>200</sup> or even documents prepared by someone not employed primarily as an attorney.<sup>201</sup> Courts have also accorded work product protection to materials prepared by non-attorneys

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<sup>196</sup> 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); Kishore v. DOJ, 575 F. Supp. 2d 243, 259 (D.D.C. 2008) (applying privilege to document explaining government's reasons for declining prosecution); Gavin, 2007 WL 2454156, at \*9 (approving use of privilege for documents recommending closing of SEC investigations); Heggstad, 182 F. Supp. 2d at 10-11 (holding privilege applicable to prosecution-declination memoranda); cf. Grecco v. DOJ, 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).

<sup>197</sup> See Senate of P.R., 823 F.2d at 586; Rashid v. U.S. DOJ, 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 \*13 (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. DOJ, 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 reevaluating it in light of new evidence).

<sup>198</sup> See Dow Jones & Co. v. DOJ, 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 6, 2005).

<sup>199</sup> See, e.g., Antonelli v. ATF, 555 F. Supp. 2d 16, 24-25 (D.D.C. 2008) (protecting memo from Assistant U.S. Attorney to BOP officials discussing litigation strategy for upcoming case); Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983).

<sup>200</sup> Ill. State Bd. of Educ. v. Bell, No. 84-337, slip op. at 9-10 (D.D.C. May 31, 1985).

<sup>201</sup> See Hanson v. AID, 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).

who are supervised by attorneys.<sup>202</sup> The premise in such cases is that work-product protection is appropriate when the non-attorney 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 non-attorney.<sup>203</sup>

Third, the work-product privilege has been held to remain applicable when the

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<sup>202</sup> See, e.g., United States v. Nobles, 422 U.S. 225, 238-39 (1975) (concluding, in non-FOIA case, that "the realities of litigation" require that privilege extend to material prepared by attorney's agents); United States v. Ary, 518 F.3d 775, 783 (10th Cir. 2008) (stating, in non-FOIA case, that attorney-work product privilege "applies to materials prepared by an attorney's agent, if that agency acts at the attorney's direction in creating the documents"); 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 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. DOJ, 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. DOJ, 671 F. Supp. 771, 772-73 (D.D.C. 1987) (holding historian's research and interviews privileged). But see Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at \*8-9 (D.D.C. Mar. 15, 2002) (rejecting attorney work-product applicability where documents were prepared by non-attorney who merely "may" have been acting at direction of attorney); cf. Richman v. DOJ, 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 & 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 decisionmaking process").

<sup>203</sup> See Hall v. DOJ, 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 DOJ are not protectible because agency failed to demonstrate that USSR officials acted as agency agents).

information has been shared with a party holding a common interest with the agency.<sup>204</sup> This situation may arise when the government shares documents with a private party with whom it is jointly prosecuting a qui tam suit.<sup>205</sup>

Fourth, the Supreme Court's decisions in United States v. Weber Aircraft Corp.<sup>206</sup> and FTC v. Grolier Inc.,<sup>207</sup> 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."<sup>208</sup> 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."<sup>209</sup> 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,<sup>210</sup> such materials are not "routinely" or "normally" discoverable and, as a result, factual material is protected under the FOIA.<sup>211</sup> This "routinely or normally discoverable" test was unanimously reaffirmed by the Supreme Court in Weber Aircraft.<sup>212</sup>

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<sup>204</sup> See, e.g., Gulf Oil, 760 F.2d at 295-96 (protecting documents shared between two companies contemplating merger); Hunton & Williams, LLP v. DOJ, No. 06-477, 2008 WL 906783, at \*7 (E.D. Va. Mar. 31, 2008) (allowing use of privilege for documents exchanged between DOJ and private party after parties developed "joint strategy" on issue of common interest); Nishnic, 671 F. Supp. at 775 (protecting documents shared with foreign nation); cf. 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). But cf. Goodrich Corp v. EPA, 593 F. Supp. 2d 184, 192-93 (D.D.C. 2009) (holding that agency waived privilege by sharing documents with state agency, which in turn shared them with plaintiff's counsel).

<sup>205</sup> Akin, Gump, Strauss, Hauer & Feld, LLP v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007).

<sup>206</sup> 465 U.S. 792 (1984).

<sup>207</sup> 462 U.S. 19 (1983).

<sup>208</sup> Fed. R. Civ. P. 26(b)(3).

<sup>209</sup> 462 U.S. at 26; see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 146 & n.16 (1975).

<sup>210</sup> Fed. R. Civ. P. 26(b)(3); see, e.g., Maine, 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).

<sup>211</sup> Grolier, 462 U.S. at 27.

<sup>212</sup> 465 U.S. at 799 (holding that the confidential statements made to air crash safety investigators were not routinely or normally discoverable, and therefore protected in their entireties by Exemption 5); see also Wood, 312 F. Supp. 2d at 338-39 (noting that because in

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Finally, the privilege also has been found applicable even when the document has become the basis for a final agency decision.<sup>213</sup> In NLRB v. Sears, Roebuck & Co.,<sup>214</sup> the Supreme Court allowed the withholding of a final agency decision on the basis that it was shielded by the work-product privilege,<sup>215</sup> 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),"<sup>216</sup> the proactive disclosure provision of the Act.<sup>217</sup> Any potential confusion caused by this opinion was cleared up by the Supreme Court in Federal Open Market Committee v. Merrill.<sup>218</sup> In Merrill, the Court explained its statements in Sears,<sup>219</sup> and 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.<sup>220</sup> (For a discussion of the proactive disclosure

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<sup>212</sup>(...continued)

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). But see Martin v. DOJ, No. 96-2886, slip op. at 6-7 (D.D.C. Mar. 28, 2005) (reasoning that factual portions of requested document are protected because plaintiff made no showing of special need for them).

<sup>213</sup> See Wood, 312 F. Supp. 2d at 344 (noting prior rulings that incorporation or adoption do not vitiate work-product protection); Uribe v. EOUSA, 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) ("It is settled that even if a document is a final opinion or is a recommendation which is eventually adopted as the basis for agency action, it retains its exempt status if it falls properly within the work-product privilege."). But see Grolier, 462 U.S. at 32 n.4 (Brennan, J., concurring and commenting on a point not reached by the majority) ("[I]t is difficult to imagine how a final decision could be 'prepared in anticipation of litigation or for trial.'").

<sup>214</sup> 421 U.S. 132 (1975).

<sup>215</sup> Id. at 160.

<sup>216</sup> Id. at 153-54.

<sup>217</sup> See FOIA Update, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

<sup>218</sup> 443 U.S. 340 (1979).

<sup>219</sup> Id. at 360 n.23 (clarifying that Sears observations were made in relation to privilege for predecisional communications only).

<sup>220</sup> 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

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requirements of subsection (a)(2), see Proactive Disclosures, Subsection (a)(2): Making Records Available for Public Inspection, above.)

The D.C. Circuit in a 2005 case squarely ruled that because the attorney work-product privilege does not distinguish between factual and deliberative materials, there is no need to segregate the factual material because those facts themselves are covered by the privilege.<sup>221</sup> This opinion follows earlier precedents of that court, as well as those of numerous other federal courts.<sup>222</sup> The agency, though, has the burden to demonstrate that

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<sup>220</sup>(...continued)

F.2d at 1203-05, 1206 (applying Bristol-Meyers Co. v. FTC, pre-Merrill decision, in requiring release of work-product that memorializes final decision); Richman v. DOJ, No. 90-C-19-C, slip op. at 9 (W.D. Wis. Feb. 2, 1994) (concluding that work-product privilege applies only when information is predecisional).

<sup>221</sup> Judicial Watch, Inc. v. DOJ, 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.").

<sup>222</sup> See Martin, 819 F.2d at 1187 ("The work-product privilege simply does not distinguish between factual and deliberative material."); see also Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008) (noting that "if a document is covered by the attorney work-product privilege, the government need not segregate and disclose its factual contents"); 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); Nadler, 955 F.2d at 1492 ("[U]nlike the deliberative process privilege, the work-product privilege encompasses factual materials."); Berger v. IRS, 487 F. Supp. 2d 482, 500 (D.N.J. 2007) (citing Martin for point that privilege applies to both factual and deliberative material), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008); Raytheon, 183 F. Supp. 2d at 1292 (rejecting plaintiff's contention that agency must segregate and release factual work-product material); Allnutt v. DOJ, No. Civ. Y-98-901, 2000 WL 852455, at \*9 (D. Md. Oct. 23, 2000) (recognizing that attorney work-product privilege encompasses both deliberative materials and "all factual materials prepared in anticipation of the litigation"), aff'd, 8 F. App'x 225, 225 (4th Cir. 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. DOJ, 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. DOJ, 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). But see Nickerson v. United States, No. 95-C-7395, 1996 WL 563465, at \*3 (N.D. Ill. Oct. 1, 1996) (continued...)

the privilege applies to all withheld information in the first place.<sup>223</sup>

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.<sup>224</sup> Applying the "routinely and normally discoverable" test of Grolier and Weber Aircraft, the D.C. Circuit has held that witness statements are protectible under Exemption 5.<sup>225</sup> Indeed, witness statements were the very records at issue in Hickman v. Taylor,<sup>226</sup> the seminal case in which the Supreme Court first articulated the attorney work-product privilege doctrine.<sup>227</sup> It should be noted that a particular category of witness statements, aircraft accident witness statements, is protected by a distinct common law privilege first announced in Machin v. Zuckert<sup>228</sup> and applied under the FOIA in Weber Aircraft.<sup>229</sup> (For further discussion on this privilege, see 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

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<sup>222</sup>(...continued)

(ruling that facts must be segregated under privilege); Fine v. U.S. DOE, 830 F. Supp. 570, 574-76 (D.N.M. 1993) (refusing to follow Martin).

<sup>223</sup> See, e.g., Shearson v. DHS, No. 06-1478, 2007 WL 764026, at \*8 (N.D. Ohio Mar. 9, 2007) (ruling that privilege did not apply where agency had failed to demonstrate that document was prepared by attorney in anticipation of litigation); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at \*19, \*29-30 (D.D.C. June 6, 1995) (requiring that agency specifically explain why material was protected by privilege); Kronberg v. DOJ, 875 F. Supp. 861, 869 (D.D.C. 1995) (requiring agency to show how privilege applies).

<sup>224</sup> See Hickman, 329 U.S. at 511.

<sup>225</sup> See Martin, 819 F.2d at 1187. But see 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 witness statements in question were not shown to be other than objective reporting of facts, they "do not reflect the attorney's theory of the case and his litigation strategy" and therefore cannot be protected).

<sup>226</sup> 329 U.S. at 497.

<sup>227</sup> 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.").

<sup>228</sup> 316 F.2d 336, 338 (D.C. Cir. 1963).

<sup>229</sup> 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.").

protection for material otherwise properly categorized as attorney work-product.<sup>230</sup> Thus, under the Supreme Court's ruling, there is no temporal limitation on work-product protection under the FOIA.<sup>231</sup> The D.C. Circuit has found that 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.<sup>232</sup> Otherwise, there is no "public interest" exception to the application of the work-product privilege<sup>233</sup> under Exemption 5.

### 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."<sup>234</sup> Unlike the attorney work-product privilege, the attorney-client privilege is not limited to the context of litigation.<sup>235</sup> Moreover, although it

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<sup>230</sup> 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 (2006)).

<sup>231</sup> See 462 U.S. at 26; see also Gutman v. DOJ, 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).

<sup>232</sup> See Moody v. IRS, 654 F.2d 795, 801 (D.C. Cir. 1981) (remanding to district court for evaluation of 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 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).

<sup>233</sup> See Winterstein, 89 F. Supp. 2d at 82.

<sup>234</sup> Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977); see also Rein v. U.S. Patent and Trademark Office, 553 F. 3d 353, 377 (4th Cir. 2009) (noting confidentiality requirement for privilege); Ctr. for Medicare Advocacy v. HHS, 577 F. Supp. 2d 221, 237 (D.D.C. 2008) (indirectly citing Mead Data for privilege requirements).

<sup>235</sup> See, e.g., Rein, 553 F. 3d at 377 (noting that privilege "extends beyond communications in contemplation of particular litigation to communications regarding 'an opinion on the law'" (internal citation omitted); 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

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fundamentally applies to facts divulged by a client to his attorney, this privilege "also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts,"<sup>236</sup> in addition to "communications between attorneys that reflect client-supplied information."<sup>237</sup> The Court of Appeals for the District of Columbia Circuit, however, has also

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<sup>235</sup>(...continued)

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.").

<sup>236</sup> Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 114; 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 agency attorney's legal review of internal agency "Social Action" investigation "falls squarely within the traditional attorney-client privilege"); 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"); MacLean v. DOD, No. 04-2425, slip op. at 10 (S.D. Cal. June 6, 2005) (noting that privilege applies both to confidential facts supplied by client as well as to attorney's advice based on those facts) aff'd on other grounds, 240 F. App'x 751, 754 (9th Cir. 2007); 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 where agency employees requested legal advice or agency counsel responded to those requests); Barnes 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 WL 667638, at \*6 (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. 97-00741, 1998 WL 419999, at \*6 (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); 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. 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); 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); 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.").

<sup>237</sup> Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 114; see also, e.g., 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 superiors describing advice given to clients within agency); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at \*7 (S.D.N.Y. Sept. 30, 1999) (protecting portions of memorandum from agency attorney to supervisor that reflect author's legal analysis based upon information supplied by agency "sources"); Buckner v. IRS, 25 F. Supp. 2d 893, 900 (N.D. Ind. 1998) (protecting "documents that are communications among attorneys" where IRS personnel and attorneys were involved in bankruptcy proceeding against  
(continued...)

noted that "it 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.<sup>238</sup> Finally, 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 there are multiple clients who share a common interest.<sup>239</sup>

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."<sup>240</sup> 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.<sup>241</sup> and in FTC v. Grolier Inc.<sup>242</sup> that the scopes of the various privileges are coextensive in the FOIA and civil discovery contexts.<sup>243</sup> 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 attorney.<sup>244</sup>

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<sup>237</sup>(...continued)

requester); cf. 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).

<sup>238</sup> Brinton, 636 F.2d at 603.

<sup>239</sup> See, e.g., Hanson v. AID, 372 F.3d 286, 292 (4th Cir. 2004) (holding that privilege applies to documents created by attorney hired by private contractor of 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); Akin, Gump Strauss, Hauer & Feld, LLP v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007) (noting that attorney-client privilege is not waived when government shares documents with private party with whom it is jointly prosecuting qui tam action); 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).

<sup>240</sup> 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").

<sup>241</sup> 465 U.S. 792 (1984).

<sup>242</sup> 462 U.S. 19 (1983).

<sup>243</sup> 465 U.S. at 799-800; 462 U.S. at 26-28.

<sup>244</sup> 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 because "an attorney may not unilaterally waive the privilege that his client enjoys").

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, the D.C. Circuit 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,"<sup>245</sup> but in other cases it, as well as other courts, have required the government to demonstrate the confidentiality of the attorney-client communications.<sup>246</sup> 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.<sup>247</sup>

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-level employees.<sup>248</sup> This broad construction of the attorney-client privilege acknowledges the reality that such lower-level personnel often possess information relevant

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<sup>245</sup> Coastal States Gas Corp. v. DOE, 617 F.2d 854, 863 (D.C. Cir. 1980)).

<sup>246</sup> See 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); 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); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005) (noting that privilege requires agency to demonstrate that withheld documents reflect confidential communication between agency and its attorneys, not merely that they be exchanges between agency and its attorneys); Brinton, 636 F.2d at 605 (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"); cf. 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).

<sup>247</sup> 449 U.S. at 395-96; see also United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) ("[W]e do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information."); 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."); 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). 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).

<sup>248</sup> 449 U.S. at 392-97.

to an attorney's advice-rendering function.<sup>249</sup> It should be noted, however, that at least one court has ruled that an agency is required to identify who its client is in order to sustain a claim of this privilege.<sup>250</sup>

The D.C. Circuit has held that otherwise confidential agency memoranda are not protected under the privilege if they are authoritative interpretations of agency law because "Exemption 5 and the attorney-client privilege may not be used to protect . . . agency law from disclosure to the public."<sup>251</sup> This holding was reinforced by the Court of Appeals for the Second Circuit, which likewise denied protection for documents adopted as, or incorporated into, an agency's policy.<sup>252</sup>

### Other Privileges

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 mandatory disclosure under the FOIA.<sup>253</sup> Rule 501 of the Federal Rules of Evidence<sup>254</sup> allows courts to create privileges as necessary,<sup>255</sup> and new privileges are recognized from

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<sup>249</sup> 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).

<sup>250</sup> See Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 80 (D.D.C. 2008) (declining to apply privilege to certain documents because agency failed to "indicate what agency or executive branch entity is the client for purposes of the attorney-client privilege").

<sup>251</sup> Tax Analysts, 117 F.3d at 619.

<sup>252</sup> See Nat'l Council of La Raza v. DOJ, 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 and therefore protecting requested documents).

<sup>253</sup> 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. DOJ, 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).

<sup>254</sup> Fed. R. Evid. 501.

<sup>255</sup> See Jaffee v. Redmond, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized).

time to time by federal courts,<sup>256</sup> thereby paving the way for their use under Exemption 5.<sup>257</sup> There is one major caveat that should be noted in the application of any discovery privilege under the FOIA: the Supreme Court has held that a privilege should not be used against a requester who would routinely receive such information in civil discovery.<sup>258</sup>

In 1979, in Federal Open Market Committee v. Merrill,<sup>259</sup> 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.<sup>260</sup> 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.<sup>261</sup> The theory underlying the privilege is that early release of such information would likely put the

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<sup>256</sup> See, e.g., Trammel v. United States, 445 U.S. 40, 47 (1980) (recognizing spousal testimonial privilege) (non-FOIA case); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003) (recognizing, in non-FOIA case, 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 Fed. R. Evid.) (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 see Performance Aftermarket Parts Group, Ltd. v. TI Group Automotive Sys., Inc., No. 05-4251, 2007 WL 1428628, at \*3 (S.D. Tex. May 11, 2007) (declining to recognize settlement negotiation privilege, further noting that Goodyear Tire "has not been widely followed") (non-FOIA case); In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 211-212 (D.D.C. 2005) (deciding against recognition of settlement privilege) (non-FOIA case), aff'd on other grounds, 439 F.3d 740, 754 (D.C. Cir. 2006); In re Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (declining to recognize proposed "protective function privilege") (non-FOIA case).

<sup>257</sup> See Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (stating that exemption 5 "incorporates . . . generally recognized civil discovery protections"); see also Ass'n for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977) ("The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.") (non-FOIA case).

<sup>258</sup> See, e.g., DOJ v. Julian, 486 U.S. 1, 9 (1988) (holding that presentence report privilege, designed to protect subject of report from third-party access, cannot be invoked against subject himself).

<sup>259</sup> 443 U.S. 340 (1979).

<sup>260</sup> Fed. R. Civ. P. 26(c)(7).

<sup>261</sup> Merrill, 443 U.S. at 360.

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."<sup>262</sup>

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.<sup>263</sup> 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."<sup>264</sup>

While the breadth of this privilege is still not fully established, a realty appraisal generated by the government in the course of soliciting buyers for its property has been held to fall squarely within it,<sup>265</sup> as have documents containing communications between agency personnel, potential buyers, and real estate agents concerning a proposed sale of government-owned real estate,<sup>266</sup> an agency's background documents which it used to calculate its bid in a "contracting out" procedure,<sup>267</sup> and portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors.<sup>268</sup> By contrast, purely legal memoranda drafted to assist

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<sup>262</sup> Id. at 363.

<sup>263</sup> See 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).

<sup>264</sup> 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).

<sup>265</sup> 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").

<sup>266</sup> 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).

<sup>267</sup> 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).

<sup>268</sup> See Hack v. DOE, 538 F. Supp. 1098, 1104 (D.D.C. 1982). But see Am. Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 4 (D.D.C. July 22, 1983) (distinguishing Merrill and ordering release of documents on basis that defendant was not "engage[d] in buying or selling").

contract-award deliberations have been found not to be encompassed by this privilege.<sup>269</sup>

The Supreme Court in United States v. Weber Aircraft Corp.<sup>270</sup> held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations.<sup>271</sup> Broadening the holding of Merrill that a privilege "mentioned in the legislative history of Exemption 5 is incorporated by the exemption,"<sup>272</sup> the Court held in Weber Aircraft that the long-recognized civil discovery privilege for aircraft accident witness statements, even though not specifically mentioned in the FOIA's legislative history, nevertheless falls within Exemption 5.<sup>273</sup> The "plain statutory language"<sup>274</sup> and the clear congressional intent to sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations<sup>275</sup> supported this result.<sup>276</sup> This privilege also has been applied to protect statements made in Inspector General investigations.<sup>277</sup>

Similarly, in Hoover v. Department of the Interior,<sup>278</sup> the Court of Appeals for the Fifth Circuit recognized under Exemption 5 a privilege based on Federal Rule of Civil Procedure

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<sup>269</sup> 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).

<sup>270</sup> 465 U.S. at 799.

<sup>271</sup> 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).

<sup>272</sup> Weber Aircraft, 465 U.S. at 800.

<sup>273</sup> Id. at 804.

<sup>274</sup> Id. at 802.

<sup>275</sup> See id.

<sup>276</sup> See id.; see also Badhwar v. U.S. Dep't of Air Force, 829 F.2d 182, 185 (D.C. Cir. 1987) (applying aircraft accident investigation privilege to contractor report).

<sup>277</sup> 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).

<sup>278</sup> 611 F.2d 1132 (5th Cir. 1980).

26(b)(4),<sup>279</sup> which limits the discovery of reports prepared by expert witnesses.<sup>280</sup> The document at issue in Hoover was an appraiser's report prepared in the course of condemnation proceedings.<sup>281</sup> 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.<sup>282</sup>

In 2004, in Judicial Watch, Inc. v. DOJ,<sup>283</sup> the D.C. Circuit applied the presidential communications privilege under Exemption 5 of the FOIA to protect Department of Justice records regarding the President's exercise of his constitutional power to grant pardons.<sup>284</sup> 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."<sup>285</sup> 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."<sup>286</sup> However, the D.C. Circuit noted that the privilege is limited to "documents 'solicited and received' by the President or his immediate White House advisers who have 'broad and significant responsibility for investigating and formulating the advice to be given to the President."<sup>287</sup>

Subsequent to this decision, several other cases have further explored the contours of this privilege. These decisions have rejected claims that (1) the privilege must be invoked

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<sup>279</sup> Fed. R. Civ. P. 26(b)(4).

<sup>280</sup> Hoover, 611 F.2d at 1141.

<sup>281</sup> Id. at 1135.

<sup>282</sup> 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).

<sup>283</sup> 365 F.3d 1108 (D.C. Cir. 2004).

<sup>284</sup> Id. at 1114.

<sup>285</sup> Id. at 1113 (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

<sup>286</sup> Id. (quoting In re Sealed Case, 121 F.3d at 745); see also Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 81 (D.D.C. 2008) (citing In re Sealed Case on greater breadth of presidential communications privilege).

<sup>287</sup> Judicial Watch, 365 F.3d at 1114 (quoting In re Sealed Case, 121 F.3d at 752); see Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at \*8 (N.D. Cal. May 5, 2009) (protecting "any document which is a draft of a presentation or memorandum for the President or his senior advisors[,] but not intra-agency communications pertaining to such documents); Elec. Privacy Info. Ctr., 584 F. Supp. 2d at 80-81 (citing In re Sealed Case and protecting documents that were either received by President or his immediate advisors).



by the President himself;<sup>288</sup> (2) that the privilege could be lost simply due to the passage of time;<sup>289</sup> (3) that the privilege only covers documents whose release would "reveal the President's mental processes;"<sup>290</sup> and (4) that the privilege does not apply documents that memorialize otherwise protected communications.<sup>291</sup> The D.C. Circuit has also held that in cases involving this privilege, the person protected by the privilege is the President himself, and not an individual discussed in the documents solicited by the President.<sup>292</sup> However, the District Court for the District of Columbia declined to extend the privilege to cover visitor logs for the White House and Vice President's residence, ruling that the privilege only covers "communications."<sup>293</sup> As the Eastern District of California has pointed out, the privilege is itself a qualified privilege, meaning that in the civil discovery context it can be overcome by a showing of need.<sup>294</sup> In the FOIA context, however, such a requirement would be contrary to the Supreme Court's "routinely and normally discoverable" test as set forth in FTC v. Grolier Inc.<sup>295</sup> and United States v. Weber Aircraft Corp.,<sup>296</sup> so the court accordingly ruled that the agency's invocation of the privilege had been proper.<sup>297</sup>

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<sup>288</sup> See Elec. Privacy Info Ctr., 584 F. Supp. 2d at 80 ("There is no indication in the text of FOIA that the decision to withhold documents pursuant to Exemption 5 must be made by the President."); Berman v. CIA, 378 F. Supp. 2d 1209, 1220-21 (E.D. Cal. 2005) (concluding that such 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).

<sup>289</sup> See Berman, 378 F. Supp. 2d at 1221 (protecting the documents created during the Administration of President Lyndon B. Johnson).

<sup>290</sup> Elec. Privacy Info Ctr., 584 F. Supp. 2d at 81.

<sup>291</sup> See Citizens for Responsibility and Ethics in Wash. v. DHS, No. 06-0173, 2008 WL 2872183, at \*2-3 (D.D.C. July 22, 2007).

<sup>292</sup> See Loving v. DOD, 550 F.3d 32, 39 (D.C. Cir. 2008) (ruling in case involving documents sent to President concerning requester's death sentence where requester argued unsuccessfully that privilege should not be invoked against him, given that he was subject of document).

<sup>293</sup> See Citizens for Responsibility and Ethics in Wash. v. DHS, 592 F. Supp. 2d 111, 118-19 (D.D.C. 2009) (Visitor logs "shed[] no light on the content of communications between the visitor and the President or his advisors, whether the communications related to presidential deliberation or decisionmaking, or whether any substantive communications even occurred.").

<sup>294</sup> See Berman, 378 F. Supp. 2d at 1221.

<sup>295</sup> 462 U.S. 19, 26 (1983).

<sup>296</sup> 465 U.S. 792, 799 (1984).

<sup>297</sup> See Berman, 378 F. Supp. 2d at 1221-22 (ruling that plaintiff had failed to show that requested documents would be "normally and routinely" disclosed in civil discovery context);  
(continued...)

In a 2003 non-FOIA case, the Court of Appeals for the Sixth Circuit recognized a civil discovery privilege for settlement negotiation documents.<sup>298</sup> Though this was the first case to explicitly recognize a discovery privilege for such documents, at least some earlier non-FOIA cases had ruled that parties wishing to obtain these documents in discovery were required to make a heightened showing of need for them.<sup>299</sup> Subsequent to the Sixth Circuit's ruling, two district court decisions in other circuits have declined to recognize this privilege in non-FOIA cases.<sup>300</sup> To date, in the FOIA context, the privilege has only been recognized once and that was under Exemption 4.<sup>301</sup> Relatedly, certain documents exchanged during

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<sup>297</sup>(...continued)

see also Loving, 550 F.3d at 39 (noting "standard Exemption 5 analysis . . . asks only whether a document is 'normally privileged'" (citing Grolier, 462 U.S. at 28).

<sup>298</sup> Goodyear Tire & Rubber Co., 332 F.3d at 981 ("[A]ny communications made in furtherance of settlement are privileged.") .

<sup>299</sup> 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.") (non-FOIA case); 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) (non-FOIA case); Matsushita Elec. Corp. v. Lorai 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.") (non-FOIA case); 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") (non-FOIA case); 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) (non-FOIA case); 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") (non-FOIA case); 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") (non-FOIA case). 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") (non-FOIA case).

<sup>300</sup> See Performance Aftermarket Parts Group, 2007 WL 1428628, at \*3 (declining to recognize settlement negotiation privilege, further noting that Goodyear Tire "has not been widely followed") (non-FOIA case); In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d at 211-212 (deciding against recognition of settlement privilege) (non-FOIA case), aff'd on other grounds, 439 F.3d 740, 754 (D.C. Cir. 2006).

<sup>301</sup> M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (applying settlement (continued...))

mediation proceedings are protected from disclosure by statute.<sup>302</sup>

Because Exemption 5 incorporates virtually all civil discovery privileges, courts also have recognized the applicability of other privileges, whether traditional or recently recognized, in the FOIA context.<sup>303</sup> Among those other privileges that have been recognized for purposes of the FOIA are the presentence report privilege,<sup>304</sup> the expert materials privilege,<sup>305</sup> the confidential report privilege,<sup>306</sup> and the critical self-evaluative privilege,<sup>307</sup>

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<sup>301</sup>(...continued)

privilege under Exemption 4).

<sup>302</sup> See 28 U.S.C. § 652(d) (2006) (requiring district courts to provide by local rule for confidentiality of alternative dispute resolution proceedings); see also 5 U.S.C. § 574(j) (2006) ("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).") cf. 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).

<sup>303</sup> 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 Burka, 87 F.3d at 521 (refusing to recognize "confidential research information" privilege under the FOIA because it is not yet "established or well-settled . . . in the realm of civil discovery").

<sup>304</sup> 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").

<sup>305</sup> 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).

<sup>306</sup> 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).

<sup>307</sup> See Wash. Post Co. v. DOJ, 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. DOE, 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 non-FOIA case, to apply privilege for medical peer review information, on 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

(continued...)

though it should be noted that the last two of these have been recognized under Exemption 4, not Exemption 5.

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<sup>307</sup>(...continued)  
recognizing a federal privilege").