It’s a Privilege!

Understanding Exemption 5 and the Civil Discovery Privileges

American Society of Access Professionals
2016 FOIA – Privacy Act Workshop
Chicago, Illinois

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Our Starting Point: Understanding the Journey

US!

The Civil Discovery Privileges in History

Executive Branch Policy on Release

FOIA Improvement Act 2016

The Exemption 5 Threshold Test & Limitations Today

"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, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.”
Threshold & Limitations….

- What part is the threshold?
- Why limit to “inter-agency” and “intra-agency”?
- Who can say “memorandums” a hundred times?
- Why did Congress add limitations to the Deliberative Process Privilege?
- Don’t forget Part Two….

More on the Exemption 5 Threshold

- “Inter-agency or intra-agency memorandums or letters.”

- This means any internal government document (including e-mail), whether it has been circulated among multiple agencies, or has remained wholly within the confines of a single agency.

The Consultant Corollary: Everyone Needs a Little Help Sometimes!

- The Exemption 5 threshold has been expanded to cover situations in which an agency receives documents from an outside party.

- Why? Courts recognize that agencies frequently have “a special need for the opinions and recommendations of temporary consultants.” (Soucie v. David.)
The Consultant Corollary (Continued) –

- Interpreted to cover situations where outsiders are functioning as though they were agency employees.
- Familiar legal relationship with consultants.
- The duty a consultant owes to the client.
- When in doubt, look at the business relationship we have with the consultant.
- Consultants can be those who have a formal, contractual, paid relationship with an agency (Hoover v. Dep’t of the Interior) as well as those consulted by the agency on an unpaid volunteer basis. (Wu v. NEH, NIM v. DOD)

Limitation on the “Consultant Corollary” – the Klamath Decision

- In Klamath, the Department of the Interior had consulted local Native American tribes on assignment of water rights. Significantly, the tribes were among many applicants for the water rights.
- The 9th Circuit Court of Appeals ruled that the tribes could not be consultants to the agency because they had a direct interest in the agency’s decision.

The Klamath Decision at the Supreme Court –

- On appeal, the United States Supreme Court ruled that an outsider cannot be a consultant when the outsider is:
  a) seeking a government benefit
  b) at the expense of another party.
- Subsequent courts have focused only on the degree of self-interest pursued by the outside party.
The Aftermath of the Klamath Decision & Klamath Today -

The Supreme Court left intact two decisions from the D.C. Circuit Court of Appeals in which “interested” consultants were held to have met the threshold standard.

The consultants were former Presidents consulting with the National Archives (Public Citizen v. DOJ), and members of the Senate advising the Justice Department. (Ryan v. DOJ.)

Related Threshold Issues -

Advice from a consultant must be coming into the agency, not from the agency.

Thus, while an agency can protect advice it receives from Congress, it cannot protect advice it provides to Congress. (Dow Jones v. DOJ.)

Related Threshold Issues (continued) -

An agency may protect advice it provides to a Presidentially-created commission.

It would be “inconceivable” to extend Exemption 5 coverage to situations where the decisionmaker is an agency official, but not where the decisionmaker is the President himself. (Judicial Watch v. DOE.)
Enough with the Preliminary Stuff, Let’s Talk About the Privileges!

- The Big Three Privileges –
  - Deliberative Process Privilege
  - Attorney Work-Product Privilege
  - Attorney-Client Privilege
- All civil discovery privileges that exist in litigation, could be applied.
  - But, it is unlikely that you would ever see them in the FOIA context. Why?
- Examples of Other Privileges
  - Doctor-Patient Privilege
  - Religious Confessional Privilege
  - Marital Privilege

The Deliberative Process Privilege -

- The deliberative process privilege allows agencies to withhold documents which reflect deliberative, predecisional communications. History?
- Three purposes underlying the privilege:
  - To encourage open, frank discussion.
  - To protect against premature disclosure of proposed policies before they are adopted.
  - To guard against public confusion from release of reasons and rationales that were not ultimately the basis for agency decisions.

Deliberative Process Privilege -

- The privilege exists to protect the integrity of agencies’ decision-making processes.
- Thus, it may be invoked to protect documents where release would harm the decisional process.
- An agency’s ability to use the privilege is generally not affected by the passage of time up to 25 years.
- New amendments to the statute place a time limitation on the assertion of the privilege.
Deliberative Process Privilege – Applying the Test

- Two requirements to withhold information under the deliberative process privilege.
- Information must be both:
  - PREDECISIONAL and
  - DELIBERATIVE.

What is a “Predecisional” Communication, Exactly?

- “Predecisional” communications are those that are antecedent to the adoption of an agency policy.
- An agency is not required to point to a final agency decision, but should be able to identify a decision-making process.
- Documents may be withheld even in situations where there has been no final agency decision.
  - Courts have recognized that agencies sometimes decide not to decide.

Predecisional Communications -

- The privilege can extend to documents created by the decision-maker as part of her own deliberative process.

- It also extends to documents that do not end up being considered by the final decision-maker at all.
  (Moye Case)
Understanding “Post-Decisional” Documents -

- Post-decisional documents are not protected by the privilege.
- These documents typically reflect an agency’s final position on an issue, or explain an agency’s actions.
- They are not protected because of the public’s right to be informed of official agency positions.
  - What is being deliberated now?
  - Angry “Note-to-File” situation.

Pre-Decisional or Post-Decisional – Deciding Decisional?

Things to consider in making determination:

- Did the author of the document possess decision-making authority?
  - Note that courts may look “beneath formal lines of authority to the reality of the decision-making process.” (Schlefer v. United States)

- In what direction does the document travel along the decision-making chain?
  - Documents that go from subordinate to superior are more likely to be predecisional.

Losing Predecisional Status: Incorporation/Adoption

- Incorporated: The decision-maker expressly cites a previously predecisional document as the rationale for an agency’s decision.

- Adopted: A previously predecisional document comes to be used by the agency as the embodiment of agency policy.
What Exactly is Deliberative?
- In addition to being predecisional, withheld information must reflect deliberative communications.
- I'm helping to further a decision
- Withheld information must be tied to some agency decision or decision-making process.
- Just because you are talking, doesn't mean you are deliberating. Who has a role to play in the process?
- The privilege does not extend to every expression of opinion
  - Your e-mail saying how much you hate your co-worker's new haircut isn't protected!

Examples of Deliberative Documents -
- Other examples of deliberative documents that are generally withholdable include:
  - **Briefing materials** – documents that summarize issues and advise superiors.
  - **Drafts** – draft documents, by their very nature, are typically predecisional and deliberative, and may be appropriate for discretionary disclosure.

Deliberative Documents – *(Yes, there's even more)*
- Agencies may withhold information where disclosure would reveal some protected aspect of the agency's deliberative process.
- Similarly, in some circumstances an agency may be able to protect the identity of the author of a deliberative document, if disclosure of this information might chill agency deliberations.
Segregating Out Factual Materials -

- The deliberative process privilege only applies to deliberative portions of documents.
- Facts, generally, don't deliberate anything.
- An agency withholding documents under this privilege has an obligation to segregate out and release factual portions.

Segregating Facts -

There are certain situations in which factual materials can be protected:

- When factual portions of a document are “inextricably intertwined” with deliberative portions.
- When the selection and inclusion of some factual material constitutes a deliberative judgment by a document's author. (Mapother v. DOJ)
- When you have “elastic facts” that are not really set in stone, such as prices in a contract bid.

The Attorney Work-Product Privilege -

- Why do we have this privilege?
- Two criteria for asserting the privilege.
- Information must have been:
  - Created by or at the direction of an attorney, and
  - Created in reasonable anticipation of litigation.
Understanding the Attorney Work-Product Privilege -

- Prepared by or at the direction of an attorney.
  - Straight forward test.

- Real test is “in anticipation of litigation.”
  - Who anticipates litigation?

More About the Attorney Work-Product Privilege -

- The privilege covers both factual and deliberative materials, so unlike with the deliberative process privilege, agencies are not required to segregate out and release factual portions of attorney work-product documents. (Judicial Watch v. DOJ.)

- This privilege is not covered by the new statutory limitation.

The Attorney-Client Privilege -

- This privilege protects confidential information supplied from client to attorney, as well as the attorney’s advice based upon the client-supplied information.

- Unlike attorney work-product, the attorney-client privilege is not limited to situations involving litigation.

- As with work-product, the attorney-client privilege applies to both factual and deliberative materials.
Exercises – Let’s See it in Practice! The E-Mail Chain.

From: thomas.eugene.ogc@federalagency.gov
To: joan.shields.ogc@federalagency.gov
Date: October 2, 2005
Subject: Draft Declaration
Joan: Please review the attached draft declaration and let me know if you have any questions. This declaration is due on October 5.
Tom

From: joan.shields.ogc@federalagency.gov;
To: thomas.eugene.ogc@federalagency.gov
Date: October 5, 2005
Subject: Draft Declaration
Tom: I have made some revisions to Section A of the declaration. The revised version is attached. Please review and let’s discuss.
Joan

Exercises (cont.) -

From: jane.flannery@federalagency.gov
To: wilma.willow.ogc@federalagency.gov; tim.nealon@federalagency.gov
Cc: tim.nealon@federalagency.gov
Date: May 3, 2005
Subject: Environmental Impact Act of 2007
Wilma: Can you give me some details on the reporting requirements that are placed on the government under Section 234 of the new law? My program people and I are trying to develop guidelines for implementation of new requirements, but we are not clear on how we are to deal with the additional reporting requirements when we are already into the second quarter of the fiscal year.
Thanks,
Jane

Exercises (cont.)

From: wilma.willow.ogc@federalagency.gov; carol.hogan.ogc@federalagency.gov
To: jane.flannery@federalagency.gov; tim.nealon@federalagency.gov
Date: May 4, 2005
Subject: Environmental Impact Act of 2007
Wilma: We are currently in the process of reviewing the new reporting requirements, but we have not yet developed final guidance on this task for the second quarter. The best way forward is for the new reporting requirements to apply only in the next two quarters of the fiscal year, but our intention is to revisit this decision as we move closer to the end of the fiscal year. We appreciate your interest in this issue. It would probably be a good idea to discuss. Let me know when you are available.

Wilma

From: tim.nealon@federalagency.gov
To: wilma.willow.ogc@federalagency.gov; carol.hogan.ogc@federalagency.gov; jane.flannery@federalagency.gov
Date: May 4, 2005
I like that approach.
Yes
Exemption 5 Conclusion: The Rule of 2

- To summarize, always remember that Exemption 5 has 2 parts (threshold and privileges).

- Each of the three main privileges has 2 parts:
  - Deliberative process – predecisional and deliberative
  - Attorney work-product – prepared by or at the direction of an attorney in reasonable anticipation of litigation
  - Attorney-client – protects confidential facts and advice given based on this confidential information.

The FOIA Improvement Act of 2016 – Recent Legislation and Exemption 5

The amendments to the statute impact Exemption 5 in two significant ways:

- The “Foreseeable Harm” standard is now part of the statute.
  - It’s not only Executive Branch policy and Presidential direction anymore.
- We now have a 25 year time limit on the assertion of the Deliberative Process Privilege.

The Attorney General’s FOIA Memorandum -

- The Attorney General strongly encourages agencies to make discretionary disclosures

- Presumption of disclosure applies to all FOIA decisions

- Agencies need to work “proactively” to post information online in advance of FOIA requests
**The Attorney General’s FOIA Memorandum (continued)**

- Discretionary releases are possible with a number of FOIA exemptions, including Exemptions 2, 5 and 7, but will be most applicable under Exemption 5.

- “Foreseeable Harm Standard” should be applied in making discretionary disclosures.

**One Last Note on the “Foreseeable Harm Standard”**

- Discretionary disclosures serve an important purpose.

**Universal Factors to Consider:**

- The sensitivity of the document's content
- The age of the document
- Consult with author of document or program office to determine harm