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."[1] Courts have construed this somewhat opaque language[2] to "exempt those documents, and only those documents that are normally privileged in the civil discovery context."[3]

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.[4] (For a discussion of these memoranda, see the chapter on President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines.)

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[1] 5 U.S.C. § 552(b)(5) (2006 & Supp. IV 2010).

[2] 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 meaning" of threshold and "problem[s]" inherent in reading it in that way).

[3] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987); Zander v. DOJ, 885 F. Supp. 2d 1, 15 (D.D.C. 2012) (holding that attorney-client privilege should be given "same meaning" in "both the discovery and FOIA contexts" to ensure that "FOIA may not be used as a supplement to civil discovery – as it could be if the attorney-client privilege were less protective under FOIA"); Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 281 (S.D.N.Y. 2009) (recognizing incorporation of various civil discovery privileges).

[4] 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, 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines]; 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).

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Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"[5] the Supreme Court subsequently made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history.[6] 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]."[7] 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."[8]

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.[9] 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.[10] 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.[11] As a result, in the FOIA context there is no difference between qualified and absolute privileges, and courts do not take into

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

[6] See United States 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").

[7] 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.").

[8] Burka, 87 F.3d at 517.

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

[10] Weber Aircraft, 465 U.S. at 799; see Grolier, 462 U.S. at 26; see also Nkihtaqmikon v. Bureau of Indian Affairs, 672 F. Supp. 2d 149, 153-54 (D. Me. 2009) (holding that "[n]o less than a private party engaged in litigation, individuals within the [agency] must be able to freely discuss their 'uninhibited opinions and recommendations'" (quoting Providence Journal Co. v. U.S. Dept. of the Army, 981 F.2d 552, 557-59 (1st Cir. 1992))).

[11] 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.").

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account a party's need for the documents in ruling on a privilege's applicability.[12] This approach prevents the FOIA from being used to circumvent civil discovery rules.[13]

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"[14]), the attorney work-product privilege, and the attorney-client privilege.[15] 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."[16] The Supreme Court has stated that the threshold of Exemption 5 requires that the

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[12] See Grolier, 462 U.S. at 28; Sears, 421 U.S. at 149; see also, e.g., Martin, 819 F.2d at 1184 ("[T]he needs of a particular plaintiff are not relevant to the exemption's applicability."); Swisher v. Dep't of the Air Force, 660 F.2d 369, 371 (8th Cir. 1981) (observing that applicability of Exemption 5 is in no way diminished by fact that privilege may be overcome by showing of need in civil discovery context); Judicial Watch Inc. v. DHS, 841 F. Supp. 2d 142, 162-63 (D.D.C. 2012) (rejecting argument that need of plaintiff may overcome deliberative process privilege); 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. Liab. 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 process privilege under Exemption 5).

[13] 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.").

[14] 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).

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

[16] 5 U.S.C. § 552(b)(5) (2006 & Supp. IV 2010).

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"source [of withheld records] must be a government agency."[17] "'[A]gency' is defined to mean 'each authority of the Government,' . . . and includes entities such as Executive Branch departments, military departments, Government corporations, Government-controlled corporations, and independent regulatory agencies."[18] Though the "most natural reading" of this language would seem to encompass only records generated by and internal to executive branch agencies,[19] 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,"[20] and that such expert advice can "play[] an integral function in the government's decision[making]."[21] Consistent with this analysis, courts have allowed agencies to protect advice generated by a wide range of outside experts, regardless of whether these experts provided their assistance pursuant to a contract,[22] on a volunteer basis,[23] or in some other capacity,[24] creating what courts

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[17] Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 2 (2001).

[18] Id. (internal citations omitted).

[19] See DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988); Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 639 F.3d 876, 889-90 (9th Cir. 2010) (overruling district court decision that failed to differentiate between documents passed within the Executive Branch and those passed without); 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).

[20] Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

[21] 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, 790 (D.C. Cir. 1980) ("Congress apparently did not intend 'inter-agency or intra-agency' to be rigidly exclusive terms.").

[22] 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); Gov't Accountability Project v. U.S. Dep't of State, 699 F. Supp. 2d 97, 103-04 (D.D.C. 2010) (finding that documents created by contractor hired by agency meet Exemption 5 threshold even though contractor was hired to provide assistance to non-profit organization funded and supported by agency and not to agency directly); 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)

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frequently refer to as the "consultant corollary" to the Exemption 5 threshold.[25] In these cases, courts have emphasized that the agencies sought this outside advice,[26] and that in providing their expertise, the consultants effectively functioned as agency employees,[27] 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).[28]

(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).

[23] 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 counsel 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).

[24] 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).

[25] See, e.g., Klamath, 532 U.S. at 11; Nat'l Inst. of Military Justice, 512 F.3d at 682.

[26] See, e.g., Nat'l Inst. of Military Justice, 512 F.3d at 680 (discussing importance of outside advice having been solicited by agency).

[27] See Klamath, 532 U.S. at 10 (discussing prior consultant cases, and noting that 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").

[28] 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).

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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.[29] Its ruling implicitly accepted (but did not directly rule on) the concept of the consultant corollary,[30] 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,"[31] but also were "seeking a Government benefit at the expense of other applicants."[32] As a result, the records submitted to the agency by the Tribes were not deemed to fall within the threshold of Exemption 5, and so did not qualify for attorney work-product and deliberative process privilege protection in the case.[33]

Since Klamath was decided, courts have had a number of occasions to rule on whether the consultant corollary applied. In McKinley v. Board of Governors of the Federal Reserve System,[34] the Court of Appeals for the District of Columbia Circuit held that communications exchanged between the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York qualify as intra-agency memoranda under Exemption 5.[35] The D.C. Circuit found that "[u]nlike the Indian tribes [in Klamath] the [Federal Reserve Bank of New York did] not represent an interest of its own, or the interest of any other client, when it advise[d] the [Board of Governors of the

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[29] 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).

[30] 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"); see also Ctr. for Diversity v. Office of the U.S. Trade Representative, 450 F. App'x. 605, 608-09 (9th Cir. 2011) (discussing Klamath and recognizing that consultant corollary is available to fulfill Exemption 5's threshold requirement).

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

[32] Id. at 12 n.4.

[33] Id. at 16.

[34] 647 F.3d 331, 337-38 (D.C. Cir. 2011), cert denied, 132 S. Ct. 1026 (2012).

[35] Id. (holding that Federal Reserve Bank of New York's interests were aligned with Board of Governors of Federal Reserve System when advising on whether to extend loan to Bear Stearns through JP Morgan Chase).

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Federal Reserve] on the Bear Stearns loan."[36] The court found two points dispositive of the consultant corollary issue.[37] First, the court determined that the Federal Reserve Bank of New York was not representing an interest of its own or of one of its clients when it advised the Board, and second, its advice had been solicited by the Board.[38]

In another recent case, Electronic Privacy Information Center v. DHS,[39] the District Court for the District of Columbia held that "to be excluded from the exemption," the outside party "must assume a position that is 'necessarily adverse' to the government."[40] In that case, the outside party was a contractor providing security scanning equipment to the government with the ultimate goal of expanding its contractual relationship with the government.[41] The court acknowledged that the outside party was seeking a government benefit at the expense of other parties—other companies who sought contracts to provide similar services.[42] However, after noting the requirements set out in Klamath, the court ruled that "[s]elf-advocacy is not a dispositive characteristic and does not control Exemption 5's scope in this case."[43] Because the outside party's interests were not adverse to the government's interests, the court ruled that the outside party was distinguishable from the Native American tribes in Klamath and that documents passed between the government and the outside party met the Exemption 5 threshold.[44]

Similarly, 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.[45] Instead, the court noted that the consultant was not seeking a government benefit (beyond the intellectual satisfaction of

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[36] Id. at 337 (citing Klamath, 532 U.S. at 11).

[37] Id. at 336-38.

[38] Id. at 338; see Fox News Network, LLC v. U.S. Dep't of the Treasury, 739 F. Supp. 2d 515, 540 (S.D.N.Y. Sept. 2010) (holding that Federal Reserve Bank of New York and Treasury "were on the same team" and that any documents passed between them qualified as intra-agency communications).

[39] 892 F. Supp. 2d 28, 45-46 (D.D.C. 2012).

[40] Id. at 46 (quoting Klamath, 532 U.S. at 14).

[41] Id. at 45-46.

[42] Id.

[43] Id.

[44] Id.

[45] Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236, 1245 (10th Cir. 2009).

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having his advice followed) and that he was functioning "akin to an agency employee."[46] 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.[47]

Conversely, other decisions have found that the outside parties do not qualify under the consultant corollary. The District Court for the District of Columbia, in COMPTEL v. FCC, denied Exemption 5 protection for documents exchanged between the FCC and a company being investigated by the FCC on the basis that the company was not a disinterested party.[48]

In Physicians Committee for Responsible Medicine v. NIH,[49] 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.[50] In so ruling, the court referred to the fact 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.[51] This reading of Klamath was echoed by the District Court for the District of Columbia in Lardner v. DOJ,[52] 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."[53]

In Merit Energy Co. v. United States Department of the Interior,[54] 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

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[46] Id.

[47] Id.

[48] No. 06-1718, 2012 WL 6604528, at *11 (D.D.C. Dec. 19, 2012) (denying application of Exemption 5 to documents submitted by company under investigation by FCC because company submitted documents in pursuit of its own interests).

[49] 326 F. Supp. 2d 19 (D.D.C. 2004).

[50] See id. at 29-30.

[51] See id.

[52] No. 03-0180, 2005 WL 758267 (D.D.C. Mar. 31, 2005).

[53] Id. at *15 (citing Klamath, 532 U.S. at 12 n.4 (emphasis added by district court)).

[54] 180 F. Supp. 2d 1184 (D. Colo. 2001).

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advocating its own interests.[55] Similarly, in Center for International Environmental Law v. Office of the United States Trade Representative,[56] the District Court for the District of Columbia held that the United States Trade Representative could not 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.[57] 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 interest in providing neutral advice."[58]

While agencies often are the recipients of expert advice, they also occasionally provide it. In Dow Jones & Co. v. DOJ[59] 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.[60]

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[55] See id. at 1191; 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).

[56] 237 F. Supp. 2d 17 (D.D.C. 2002).

[57] See id. at 25-27.

[58] Id. at 27.

[59] 917 F.2d 571 (D.C. Cir. 1990).

[60] Id. at 574-75 (noting, however, that agencies may protect communications outside of agency if they are "part and parcel of the agency's deliberative process"); accord Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, No. 08-1023, 2009 WL 3061975, at *5 (N.D. Cal. Sept. 24, 2009) (concluding that "[t]o the extent the withheld materials reflect communications between ODNI and DOJ and members of Congress in an effort to facilitate Congress' own deliberative process to craft legislation to reform FISA, these communications do not fall under the exemption as there is no evidence that they were used in an effort to aid any agency in its own deliberative process"), amended and superseded on other grounds, 639 F.3d 876 (9th Cir. 2010); 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").

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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.[61] 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,[62] in spite of the fact that the President is not an "agency."[63] (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.[64] In reversing a lower court ruling, the D.C. Circuit recognized that the NEPDG did not qualify as an agency as defined by the FOIA.[65] 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.[66]

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[61] See Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1110 n.1 (D.C. Cir. 2004) (noting that Office of the President is not an "agency," but "embrac[ing] the definitional analysis set forth" in In re Sealed Case, 121 F.3d 729, 749-50, 752 (D.C. Cir. 1997), to protect documents covered by the Presidential Communications Privilege without any further discussion of threshold).

[62] See, e.g., Loving v. DOD, 550 F.3d 32, 37-38 (D.C. Cir. 2008) (holding, without specifically addressing threshold, that Exemption 5 "incorporates" Presidential Communications Privilege, which protects "'communications directly involving and documents actually viewed by the President,' as well as documents 'solicited and received' by the President or his 'immediate White House advisers'" (internal citations omitted)); Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 81 (D.D.C. 2008) (same); Citizens for Responsibility & Ethics in Wash. v. DHS, No. 06-0173, 2008 WL 2872183, at *2-4 (D.D.C. July 22, 2008) (same); Berman v. CIA, 378 F. Supp. 2d 1209, 1219-20 (E.D. Cal. 2005) (same), aff'd on other grounds, 501 F.3d 1136 (9th Cir. 2007).

[63] 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").

[64] See Judicial Watch, Inc. v. DOE, 412 F.3d 125, 130-31 (D.C. Cir. 2005).

[65] See id. at 129.

[66] Id. at 130.

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This ruling is in line with the Supreme Court's 1973 decision in EPA v. Mink,[67] 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."[68]

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.[69] 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.[70]

The Court of Appeals for the Fourth Circuit in Hunton & Williams v. DOJ applied the common interest doctrine to allow the withholding of communications between the Department of Justice and a private party that the Department had partnered with in litigation.[71] The court held that the common interest doctrine, while not mentioned in Klamath, was entirely consistent with the Supreme Court's opinion.[72] Specifically, the

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[67] 410 U.S. 74 (1973).

[68] 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).

[69] 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); 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).

[70] See Citizens for Responsibility & 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 agreeing that such documents provided by state agency to federal agency could meet Exemption 5's threshold).

[71] Hunton & Williams v. DOJ, 590 F.3d 272, 288 (4th Cir. 2010).

[72] Id. at 279.

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Fourth Circuit stated that "[i]t would eviscerate the meaning of Exemption 5 if we were to read it to exclude communications between federal agencies and their litigation partners where those communications advance an interest that is both common [to the government and its litigation partner] and, in the government's considered view, critical to the public's interest."[73] As the Fourth Circuit explained:

> The common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims. . . . Under [the plaintiff's] reading, however, the decision of a party, here the government, to partner with others in the conduct of litigation would somehow subject that party to the loss of its most basic civil discovery privileges. . . . This is a sweeping view, and its impact on the government's ability to conduct complex and multi-faceted litigation would be staggering. We have made clear that the government was entitled . . . to a level playing field. . . . And there is nothing in FOIA that prevents the government from drawing confidential counsel from the private sector.[74]

Further, the Fourth Circuit opined that "[i]t does not matter that [the private party] was motivated by the commercial benefit that would accrue to it if it succeeded in [litigation] while the government was motivated by concern for the public interest."[75] Instead, the doctrine merely requires a unity of interest between the government and the private party.[76] The Fourth Circuit concluded that the Exemption 5 threshold requirement should not deprive the government of the ability, available to any private litigant, to obtain undiscoverable advice from a common interest partner.[77] The Fourth Circuit, in another decision, also made clear that the common interest doctrine does not attach until an agency has agreed to assist a private party.[78] While the court did not

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[73] Id.

[74] Id. at 277-78.

[75] Id. at 282-83

[76] Id.; see Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 875 (E.D. Va. 2012) (finding that "for the common interest doctrine to apply, an agency must demonstrate that, at the time of the communication in question, it had decided to support an outside party in a legal matter, and that doing so was in the public interest"), aff'd, 703 F. 3d 724 (4th Cir. 2013).

[77] Id. at 287-88

[78] Am. Mgmt. Servs., LLC v. Dep't of Army, 703 F.3d 724, 732-33 (4th Cir. 2013) (holding that "an agency must show that it had agreed to help another party prevail on its legal claims at the time of the communications at issue because doing so was in the public interest").

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require written agreement to be executed or that the agency and private parties be co-parties in litigation, for the common interest doctrine to attach there must be an "agreement or a meeting of the minds."[79] Finally, it should be noted that, while the common interest doctrine may be used to fulfill the threshold requirement of Exemption 5, it is not a privilege in and of itself.[80]

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."[81] 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.[82]

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[79] Id. at 733.

[80] United States v. Duke Energy Corp., No. 00-1262, 2012 WL 1565228, at *13 (M.D.N.C. April 30, 2012) (finding that common interest doctrine is "not a privilege in and of itself"); Am. Mgmt., 842 F. Supp. 2d at 878 ("The common interest doctrine satisfies only the inter-agency or intra-agency requirement of Exemption 5; it does not satisfy the second requirement, namely that the withheld documents be privileged.").

[81] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

[82] 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); Brown v. EEOC, No. 09-111, 2010 U.S. Dist. LEXIS 46466, at *9 (W.D. Ky. May 12, 2010) (holding that Exemption 5 was properly applied to prevent potential chilling effect on agency's discussions and undermining of agency's ability to perform its duties); Morley v. CIA, 699 F. Supp. 2d 244, 255-56 (D.D.C. 2010) (stating that privilege is "intended to prevent chilling future government employees from engaging in frank discussions during the deliberative process" (citing Coastal States, 617 F.2d at 866)), aff'd in pertinent part, vacated and remanded on other grounds, 466 Fed. App'x. 1 (D.C. Cir. 2012); 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 citation omitted); 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 (1st Cir. May 18, 2000); Greenberg v. U.S. Dep't of the Treasury, 10 F. Supp. 2d 3, 16 n.19 (D.D.C. 1998) (concluding that Exemption 5 is designed to prevent chilling of agency deliberations).

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The deliberative process privilege is designed to protect the "decision making processes of government agencies."[83] In concept, this privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.[84]

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."[85] In Wolfe v. HHS, the Court of Appeals for the

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[83] Sears, 421 U.S. at 150; see also Elec. Frontier Found. v. DOJ, 739 F.3d 1, 7 (D.C. Cir. 2014) (protecting documents that "'compris[e] part of a process by which governmental decisions and policies are formulated'" (quoting Pub. Citizen v. OMB, 598 F.3d 865, 875 (D.C. Cir. 2010))); Lahr v. NTSB, 569 F.3d 964, 982 (9th Cir. 2009) (stating that exposure of "internal deliberations . . . would discourage candid discussion and effective decisionmaking"); 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."); ACLU v. DHS, 738 F. Supp. 2d 93, 110 (D.D.C. 2010) (holding that agency properly withheld documents so as not to discourage the candid exchange of ideas and analysis required to conduct thorough investigation); AFGE v. Broad. Bd. of Governors, 711 F. Supp. 2d 139, 156 (D.D.C. 2010) (protecting emails that reflect internal deliberations of agency employees because release would reveal employees' preliminary thoughts and approaches); Wilson v. U.S. Air Force, No. 08-324, 2009 WL 4782120, at *5 (E.D. Ky. Dec. 9, 2009) (determining that an internal Air Force memorandum was covered by the deliberative process privilege because it was "not a final action by the agency and disclosure of such opinions and recommendations could have a chilling effect on the agency's discussions of such matters").

[84] 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 to protect specific materials."); Skinner v. DOJ, 744 F. Supp. 2d 185, 205-06 (D.D.C. 2010) (protecting e-mails between ATF agents and ATF attorneys discussing ongoing criminal investigation as release "'would inhibit the candid, internal discussion necessary for efficient and proper . . . preparation'" (internal citation omitted)); Judicial Watch Inc. v. Dep't of State, 650 F. Supp. 2d 28, 34 (D.D.C. 2009) (holding that agency does not have to demonstrate specific harm that would result from disclosure, only that release would reveal "pre-decisional, deliberative processes and thoughts of [agency employees]").

[85] Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc) (protecting records indicating what actions had been completed by FDA, but that awaited final decision or approval by Secretary of HHS or OMB).

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District of Columbia Circuit ordered protection for documents which would show which actions had been completed by FDA, but awaited final decision from HHS or OMB, holding that the very fact that a proposal was, or was not, forwarded to the next agency in the decisionmaking process was "the functional equivalent of an intra-agency or inter-agency memorandum that states, 'we recommend that a regulation on this [named] subject matter be promulgated.'"[86] The D.C. Circuit explained that when "subordinates are reporting to superiors, disclosure could chill discussion at a time when agency opinions are fluid and tentative."[87] The court found that Exemption 5 "allows agencies a space within which they may deliberate" and that disclosure of where a proposal was in the decisionmaking chain "would force officials to punch a public time clock" which could lead to "hasty and precipitous decisionmaking."[88] The D.C. Circuit concluded by holding that Exemption 5 was intended to avoid "just such a fishbowl."[89]

Traditionally, courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.[90] First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy."[91] 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."[92] The burden is upon the agency to show that the information in

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[86] Id.

[87] Id. at 776.

[88] Id.

[89] Id.; see also Elec. Frontier Found., 739 F.3d at 7 ("The deliberative process privilege protects agencies from being 'forced to operate in a fishbowl.'" (quoting EPA v. Mink, 410 U.S. 73, 87 (1973))).

[90] 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))); Adamowicz v. IRS, 672 F. Supp. 2d 454, 469 (S.D.N.Y. 2009) (protecting documents that "temporally precede and relate to specific agency decisions," and that "reflect the consultative process underlying the IRS's decisions").

[91] Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011) (stating that agency "recommendations are pre-decisional because they were created '[a]ntecedent to the adoption of an agency policy'" (quoting Jordan, 591 F.2d at 774)).

[92] Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); see Brennan Ctr. for Justice at New York Univ. Sch. of Law v. DOJ, 697 F.3d 184, 194 (2d Cir. 2012) (holding that documents are deliberative when they are "'related to the process by which policies are formulated'") (internal citations omitted).

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question satisfies both requirements.[93] 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.[94]

Predecisional

A document is "predecisional" if it is "generated before the adoption of an agency policy."[95] In determining whether a document is predecisional, courts have found that an agency does not necessarily have to point specifically to an agency final decision,[96]

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[93] Coastal States, 617 F.2d at 866; see ACLU v. DOJ, 655 F.3d 1, 5 (D.C. Cir. 2011) (noting that burden is upon agency to demonstrate that withheld documents are exempt from disclosure).

[94] See, e.g., Cuban v. SEC, 795 F. Supp. 2d 43, 54 (D.D.C. 2011) (holding that agency had met its burden under Exemption 5 to withhold certain documents, but had not met its burden for other documents based upon content of agency's Vaughn Index); FPL Group Inc. v. IRS, 698 F. Supp. 2d 66, 90-91 (D.D.C. 2010) (same). 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), and Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *4-5 (N.D. Cal. May 5, 2009) (same), with Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 368 (4th Cir. 2009) ("Our review leads us to conclude the 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), Elec. Frontier Found. v. DOJ, 826 F. Supp. 2d 157, 174-75 (D.D.C. 2011) (ordering agency to supplement its Vaughn Index because previous submission did not provide adequate basis for evaluating applicability of Exemption 5), Long v. DOJ, 703 F. Supp. 2d 84, 106-07 (N.D.N.Y. 2010) (same), Gerstein v. CIA, No. 06-4643, 2010 U.S. Dist. LEXIS 15578, at *16-19 (N.D. Cal. Feb. 23, 2010) (same), Info. Network For Responsible Mining (INFORM) v. Bureau of Land Mgmt., 611 F. Supp. 2d 1178, 1188-89 (D. Colo. 2009) (same), 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).

[95] Judicial Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006).

[96] Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 373 (4th Cir. 2009) ("Contrary to [plaintiff's] argument, the Agencies were not required to identify the specific policy judgment at issue in each document."); Techserve Alliance v. Napolitano, 803 F. Supp. 2d 16, 26-27 (D.D.C. 2011) (rejecting plaintiff's argument that defendants failed to show pre-decisional nature of certain documents where they did not "match the document with the corresponding final document"); Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys., 762 F. Supp. 2d 123, 136 (D.D.C. 2011) (rejecting plaintiff's contention that "the Board must identify a specific decision corresponding to each [withheld] communication"); The Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 359

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but must instead establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process."[97] 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 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.[98]

(E.D.N.Y. 2009) (noting that agencies "are not required to point to a specific agency decision in order to establish that the deliberative process is involved"); 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); 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.").

[97] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 868 (D.C. Cir. 1980); 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); Schell v. HHS, 843 F.2d 933, 941 (6th Cir. 1988) ("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."); Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Labor, 478 F. Supp. 2d 77, 82 (D.D.C. 2007) (upholding protection because agency was "generally considering" whether to support particular proposal); 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); 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); 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); see also 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").

[98] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975).

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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.[99] In a particularly 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 contributes.[100] Further, courts have found documents to be "predecisional" not only when they are circulated within the agency, but also when they originate from an agency lacking decisional authority that advises another agency possessing such authority.[101] The privilege has been found to protect "documents which the agency decisionmaker herself prepared as part of her deliberation and decisionmaking process,"[102] or documents that do not end up being considered by the agency

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[99] See, e.g., ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at *5 (W.D. Wash. Mar. 10, 2011) (holding that the FBI properly withheld four documents that "are drafts that do not reflect final agency decisions" and "are integral parts of an on-going decision-making process within the agency"), reconsideration granted on other grounds, 2011 WL 1900140 (W.D. Wash. May 19, 2011); Sierra Club v. U.S. Dep't of Interior, 384 F. Supp. 2d 1, 16 (D.D.C. 2004) (acknowledging that deliberations concerning implementation of policy are part of agency's deliberative process); Gordon v. FBI, 388 F. Supp. 2d 1028, 1038 (N.D. Cal. 2005) (protecting documents concerning government's "no-fly" list even after implementation of these lists, because withheld documents discussed potential revisions to relevant regulations); Tarullo v. DOD, 170 F. Supp. 2d 271, 277 (D. Conn. 2001) (concluding that, because withheld material consisted "primarily of specific subjective recommendations about future agency conduct and policy" and was part of ongoing policy considerations, withholding was proper);

[100] 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).

[101] 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) (holding "that views submitted by one agency to a second agency that has final decisional authority are predecisional materials"); 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); 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).

[102] Judicial Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 14 (D.D.C. 2000) (protecting notes taken by Attorney General that she did not share with others); see Nat'l Rt. to Work Legal Def. and Educ. Found. Inc. v. U.S. Dep't of Labor, 828 F. Supp. 2d 183, 190 (D.D.C. 2011) (protecting unattributed handwritten notes detailing discussion of policy issues regarding agency rulemaking); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 515-16 (S.D.N.Y. 2010)

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decisionmaker at all.[103] Lastly, it has been held that the privilege is not limited to deliberations connected solely to agency activities that are specifically authorized by Congress.[104]

Moreover, the Supreme Court has held the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision[105] or has decided not to make a final decision.[106] While the predecisional character of a document

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(withholding handwritten notes constituting senior officials' comments on another document).

[103] 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); 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 v. Dep't of the Treasury, 10 F. Supp. 2d 3, 16 (D.D.C. 1998) (rejecting argument that documents were not deliberative because they were 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").

[104] 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).

[105] See, e.g., Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979) (holding that, because Exemption 5 is intended to protect free flow of advice, issuance of decision does not remove need for protection); Smith v. Dep't of Labor, 798 F. Supp. 2d 274, 281-82 (D.D.C. 2011) (finding that fact that OIG report was published "after the citations were issued" does not alter deliberative nature of communications "because the question is whether the deliberation, not the publication of the report, preceded the citation"); 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, 102 F. Supp. 2d at 16 (rejecting as "unpersuasive" assertion that deliberative process privilege is inapplicable after deliberations have ended and relevant decision has been made).

[106] 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

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is not altered by the passage of time in general,[107] agencies are encouraged, as a matter of policy, to consider whether the passage of time has sufficiently reduced the risk of harm from release so that a discretionary release may be appropriate.[108]

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,[109] that implement an established policy of an agency,[110] or that explain actions that an agency has already taken.[111] The Supreme Court has declared that Exemption 5 ordinarily does not apply to

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ultimately not taken did not qualify as predecisional); Judicial Watch Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995) (holding that to release deliberative documents because no final decision was issued would be "exalting semantics over substance"), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); cf. Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 112 (holding that documents concerning now-abandoned agency program were nonetheless predecisional).

[107] 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).

[108] 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, 74 Fed. Reg. 51879 (Oct. 8, 2009); 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) (highlighting documents withheld under deliberative process privilege of Exemption 5 as good candidates for discretionary release).

[109] See, e.g., Elec. Frontier Found. v. DOJ, 739 F.3d 1, 10-11 (D.C. Cir. 2014); Taxation With Representation Fund v. IRS, 646 F.2d 666, 677-78 (D.C. Cir. 1981).

[110] 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).

[111] See, e.g., Sears, 421 U.S. at 153-54; Nat'l Day Laborer Organizing Network v. ICE, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) (holding that "[d]eliberations about how to present an already decided policy to the public, or documents designed to explain that policy to . . . the public, including in draft form, are at the heart of what should be released under FOIA"); 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); 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"); see

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postdecisional documents, as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted."[112] At the same time, it is possible for communications to be postdecisional in form and timing, but predecisional in content.[113]

Some courts have confronted the question of whether certain documents "are not the ideas and theories which go into the making of the law," but instead "are the law itself, and as such should be made available to the public."[114]

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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.").

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

[113] 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."); Citizens for Responsibility & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 233-34 (D.D.C. 2009) (holding that records created after an agency decision had been made could be protected because they contained discussions of predecisional deliberations); 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").

[114] Sterling Drug Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971); see Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997) ("'A strong theme of our [deliberative process] opinions has been that an agency will not be permitted to develop a body of 'secret law'. . . .'" (quoting Coastal States, 617 F.2d at 867)); Coastal States, 617 F.2d at 869 (denying protection for memoranda that "were not suggestions or recommendations as to what agency policy should be," but instead were "straightforward explanations of agency regulations in specific factual situations"); see also Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983) (holding that chief counsel opinions, indexed and afforded precedential weight, are "'statements of policy and interpretations which have been adopted'" rather than "'advisory opinions'"); 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 government wide hiring policy); Hansen v. U.S. Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (ordering disclosure of History of the Air Force, used as reference for thirty years and although "not formally published" treated "in every other way" as finished manuscript).

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Several criteria have been fashioned by the courts to clarify the "often blurred" distinction between predecisional and postdecisional documents.[115] First, an agency should determine whether the document is a "final opinion" within the meaning of one of the two proactive disclosure provisions of the FOIA.[116] In Rockwell Int'l Corp. v. DOJ, the D.C. Circuit determined that "as a general principle[, an] action taken by the responsible decisionmaker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA."[117] In addition, the D.C. Circuit held that if a final decision is accompanied by an explanation from the decisionmaker discussing the basis of the decision, that explanation would be considered part of the final decision and must be disclosed.[118] In another case discussing final opinions, the D.C. Circuit held 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."[119] The

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[115] Schlefer, 702 F.2d at 237.

[116] 5 U.S.C. § 552(a)(2)(A) (2006 Supp. & Supp. IV 2010); see Fed. Open Mkt. Comm., 443 U.S. at 360-61 n.23 (holding that "with respect to final opinions, Exemption 5 can never apply" but that "[the] 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"); Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982) (finding that Congress intended proactive disclosure provisions of FOIA "to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency'" (internal citation omitted)).

[117] 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"); see 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").

[118] Rockwell, 235 F.3d at 603.

[119] 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

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court reached this conclusion even though the opinions were found to be "nonbinding" on the ultimate decisionmakers.[120]

Second, courts have considered the nature of the decisionmaking authority vested in the office or person issuing the document.[121] If the author lacks "legal decision authority," the document is far more likely to be predecisional.[122] For example, the D.C. Circuit held that a legal memorandum from the Department of Justice's Office of Legal Counsel (OLC) to the FBI was predecisional because OLC does not have decision-making authority for the FBI.[123] The court noted that "[t]he OLC Opinion instead amounts to advice offered by OLC for consideration by officials of the FBI."[124] A crucial caveat in this regard, however, is that the D.C. Circuit has looked "beneath formal lines of authority to the reality of the decisionmaking process."[125] Hence, the D.C. Circuit has held that even though an official lacks ultimate decisionmaking authority if agency "practices" commonly accord decisionmaking authority to that official they will be considered to be final authority in the context of determining whether a document is

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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").

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

[121] 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.").

[122] Grumman, 421 U.S. at 184-85 (finding that reports prepared prior to final decision of full Board were predecisional); 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.").

[123] Elec. Frontier Found., 739 F.3d at 9 ("[DOJ's Office of Legal Counsel] is not authorized to make decisions about the FBI's investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy.").

[124] Id. at 8.

[125] Schlefer, 702 F.2d at 238; see also Nat'l Wildlife, 861 F.2d at 1123 (rejecting plaintiff's argument that Schlefer compelled release of recommendations to Regional Forester, finding that documents contained "merely opinions, recommendations, and queries aimed at improving" forest plans and were not "final, binding agency policy"); 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).

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predecisional.[126] 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.[127]

Careful analysis of the decisionmaking process is sometimes required to determine whether the records relate only to a previously made, final decision, or also relate to another, future decision.[128] Thus, agency recommendations to OMB concerning the development of proposed legislation to be submitted to Congress have been found to be predecisional because, while the agency made a final decision concerning the substance of the recommendation made to OMB, the final decision regarding the proposed legislation rested with OMB and the recommendation was predecisional to that determination.[129]

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[126] 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").

[127] See, e.g., Nat'l Wildlife, 861 F.2d at 1122-23 (finding that headquarters' comments on regional plans were opinions and recommendations); Heggestad v. DOJ, 182 F. Supp. 2d 1, 10 (D.D.C. 2000) (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 and so all document prepared prior to that decision were predecisional).

[128] See, e.g., City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1254 (4th Cir. 1993) (protecting documents discussing past decision insofar as it influences future decision); Access Reports, 926 F.2d at 1196 (finding that staff attorney memorandum on how proposed FOIA amendments would affect future cases not postdecisional working law but rather opinion on how to handle pending legislative process); Competitive Enter. Inst. v. EPA, No. 12-1617, 2014 WL 308093, at *13 (D.D.C. Jan. 29, 2014) (finding that "[d]eliberations over how to commemorate a past event are obviously 'predecisional' to the actual commemoration—they bear little, if at all, on the event itself"); 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. 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 process).

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

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Third, it is useful to examine the direction in which the document flows along the decisionmaking chain. A document "from a subordinate to a superior official is more likely to be predecisional"[130] than is one that travels in the opposite direction: "[F]inal opinions . . . typically flow from a superior with policymaking authority to a subordinate who carries out the policy."[131] However, under certain circumstances, recommendations can flow from the superior to the subordinate.[132]

Deliberative

In addition to being predecisional, in order to fall within the deliberative process privilege, the material must be "deliberative."[133] As the Court of Appeals for the District of Columbia Circuit has held, to be protected by the deliberative process privilege, the document must "reflect[ ] the give-and-take of the consultative process," either by assessing the merits of a particular viewpoint, or by articulating the process used by the

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[130] Coastal States, 617 F.2d at 868; see Casad v. HHS, 301 F.3d 1247, 1252 (10th Cir. 2002) (highlighting usefulness of identifying "relative positions in the agency's 'chain of command' occupied by the document's author and recipient" in determining whether document is predecisional); Muttitt v. Dep't of State, No. 10-202, 2013 WL 781709, at *19 (D.D.C. March 4, 2013) (citing Coastal States and noting that documents from subordinate to supervisor are more likely to be predecisional then documents flowing in other direction); Trea Senior Citizens League v. Dep't of State, No. 10-1423, 2013 WL 458297, at *10 (D.D.C. Feb. 7, 2013) (same); 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."); 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); AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1276 (D.D.C. 1986) (noting that "a reviewing court must consider such factors as whether the documents were composed by a subordinate for use by a superior who actually makes the decision"); Ashley v. U.S. Dep't of Labor, 589 F. Supp. 901, 908 (D.D.C 1983) (withholding documents "written by agency personnel who had no decisionmaking authority, and were addressed to agency superiors to help them formulate general or specific policies").

[131] Brinton, 636 F.2d at 605.

[132] 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.").

[133] McKinley v. Bd. of Governors of Fed. Res. Sys., 647 F.3d 331, 339 (D.C. Cir. 2011) ("To qualify for Exemption 5 protection under the deliberative process privilege, 'an agency's materials must be both "predecisional" and a part of the "deliberative process."'" (quoting Nat'l Inst. of Military Justice v. DOD, 512 F.3d 677, 680 n.4 (D.C. Cir. 2008))).

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agency to formulate a decision.[134] Courts have protected under the deliberative process privilege material that would expose the opinions, advice, or recommendations offered in the course of agency decisionmaking.[135]

Generally, factual information is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel.[136] Courts have found that, not only would factual material "generally be available for discovery,"[137] but its release usually would not risk chilling agency deliberations.[138] This seemingly straightforward distinction between

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[134] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 867 (D.C. Cir. 1980) (holding that deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency").

[135] See, e.g., Elec. Frontier Found. v. DOJ, 892 F. Supp. 2d 95, 102 (D.D.C. 2012) (protecting material that "constitutes advice used by decision-makers at the FBI . . . in the context of their efforts to ensure that any [FBI] information-gathering procedures fully comply with the law") (internal quotations omitted), aff'd, 739 F.3d 1 (D.C. Cir. 2014); Elec. Frontier Found. v. DOJ, 890 F. Supp. 2d 35, 43-48 (D.D.C. 2012) (protecting materials that would reveal development of agency's negotiating position in discussions with foreign nations).

[136] 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"); Batton v. Evers, 598 F.3d 169, 183-84 (5th Cir. 2010) (holding that, while IRS agents' opinions and recommendations were properly withheld, government's declarations were insufficient to allow court to determine whether factual information had been properly segregated out and released); Coastal States, 617 F.2d at 867 (holding that deliberative process privilege only applies to "opinion" or "recommendatory" portions of documents not factual information) (citing Mink, 410 U.S. at 93); Hajro v. U.S. Citizenship & Immigration Servs., No. 08-1350, 2011 U.S. Dist. LEXIS 117964, at *44 (N.D. Cal. Oct. 12, 2011) (requiring agency to "isolate the [specific] factual information requested and disclose it"); McGrady v. Mabus, 635 F. Supp. 2d 6, 18-19 (D.D.C. 2009) (distinguishing between letters and memoranda which are deliberative and documents that contain only factual material); 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); Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (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).

[137] Mink, 410 U.S. at 87-88.

[138] See Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974) (holding that release of factual material would not be "injurious" to decisionmaking process); 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); Citizens for Responsibility & Ethics in Wash. v. DHS, 648 F. Supp. 2d 152, 158-59 (D.D.C. 2009) (holding that request for assistance in

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deliberative and factual materials can become less clear, however, where the facts themselves reflect the agency's deliberative process[139] — 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."[140] In some cases, there has simply been disagreement about whether to characterize material as "fact" or "opinion" in the first place.[141]

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."[142] Following this approach, for example, the District

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determining what sector of agency should have responsibility for particular task does not involve agency policy considerations, is factual, and does not risk chilling future agency discussions); 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); Public Citizen v. 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"). But see Kubik v. BOP, No. 10-6078, 2011 U.S. Dist. LEXIS 71300, at *23 (D. Or. July 1, 2011) (noting that withholding of factual material was proper because disclosure "has the potential to chill frank discussions").

[139] See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1118 (9th Cir. 1988) (rejecting simplistic fact/opinion distinction, and instead focusing on whether documents in question play role in agency's deliberative process); Skelton v. USPS, 678 F.2d 35, 38-39 (5th Cir. 1982) (explaining that focus should be on whether release of documents would reveal agency's evaluative process); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *5 (D.V.I. Mar. 31, 2010) (stating that factual information may be withheld if it "'would indirectly reveal the advice, opinions, and evaluations circulated . . . as part of [the] decisionmaking process'" (quoting Mead Data Cent. Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977))).

[140] Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

[141] 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 Pub. Citizen Inc. v. OMB, 598 F.3d 865, 876 (D.C. Cir. 2010) (holding that list of agencies allowed to decline to submit materials for OMB clearance was factual information and not protected under Exemption 5), Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 922-23 (9th Cir. 1992) (ruling that raw census data was 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) (citing Assembly and issuing similar ruling with regard to statistical estimates created for 2000 census).

[142] Wolfe v. HHS, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc); 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)

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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.[143] 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."[144]

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts 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,[145] 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.[146] The D.C. Circuit held that the very act of distilling the testimony, of separating the significant facts from the insignificant facts, constituted an exercise of judgment by agency personnel.[147]

(holding that facts may be withheld when they are "directly tied to the deliberative process").

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

[144] 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).

[145] 491 F.2d 63 (D.C. Cir. 1974).

[146] See id. at 71.

[147] Id. at 68; see also, 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 Co. v. U.S. Dep't of the Army, 981 F.2d 552, 562 (1st Cir. 1992) (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"); McKinley v. Bd. of Governors of Fed. Res. Sys., 849 F. Supp. 2d 47, 63-64 (D.D.C. 2012) (holding that "purely factual" material was protectible under Exemption 5 because "[defendant] culled selected facts and data from the mass of available information"); Viropharma Inc. v. HHS, 839 F. Supp. 2d 184, 193-94 (D.D.C. 2012) (noting that "[t]he choice of what factual material and prior final agency opinions to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5"); Columbia Snake River Irrigators Ass'n v. Lohn, No. 07-1388, 2008 WL 750574, at *4 (W.D. Wash. Mar. 19, 2008) (protecting agency

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Similarly, in Mapother v. DOJ,[148] 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.[149] 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.[150] In making its ruling, the court distinguished its prior holding in Playboy Enterprises v. DOJ,[151] 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

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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); 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"); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 585 (N.D. W. Va. 2005) (protecting notes of agency investigator who previously had been briefed on investigation and had geared his queries accordingly, thereby making his notes selectively recorded information); Hamilton Sec. Group Inc. v. HUD, 106 F. Supp. 2d 23, 33 (D.D.C. 2000) (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); Heggestad v. DOJ, 182 F. Supp. 2d 1, 12 n.10 (D.D.C. 2000) (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).

[148] 3 F.3d 1533 (D.C. Cir. 1993).

[149] See id. at 1538-40.

[150] Id. at 1539.

[151] 677 F.2d 931, 936 (D.C. Cir. 1982).

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would make available to members of Congress,"[152] and did not involve any decisionmaking by the Attorney General.[153] 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.[154] 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 collection of the essential facts" and "reflect[ed] no point of view."[155]

In 2007, in Trentadue v. Integrity Committee,[156] 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,[157] and declared that "[f]actual materials do

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[152] Id.

[153] 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").

[154] See Mapother, 3. F.3d at 1539 (distinguishing Playboy Enters.,); see also City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1255 (4th Cir. 1993) (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., 460 F. Supp. 2d at 71 (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. ICE, 385 F. Supp. 2d 296, 303 (S.D.N.Y. 2005) (citing Mapother and protecting notes taken in an interview that "reflect[ed] a selective recording of information"); Envtl. Prot. Servs., 364 F. Supp. 2d at 585 (protecting selectively assembled facts, on basis that such information could not be "severed from its context" (quoting Grand Cent. P'ship Inc. v. Cuomo, 166 F.3d 473, 483 (2d Cir. 1999))); Tarullo v. DOD, 170 F. Supp. 2d 271, 278 (D. Conn. 2001) (holding that "the very selection of facts could . . . reveal the nature of . . . recommendations and opinions").

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

[156] 501 F.3d 1215 (10th Cir. 2007).

[157] See id. at 1229 (discussing Mapother).

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not become privileged merely because they represent a summary of a larger body of investigation."[158] And, in situations where agencies have not 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.[159]

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.[160] Exemption 5 thus has been found to protect

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[158] Id. at 1232.

[159] 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 v. Rosen, 523 F.2d 1136, 1145 (D.C. Cir. 1975) (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").

[160] Elec. Frontier Found. v. DOJ, 739 F.3d 1, 13 (D.C. Cir. 2014) (finding that "context matters," and here entire document, including factual material, "'reflects the full and frank exchange of ideas'" so that factual portions "'could not be released without harming the deliberative processes of the government'" (citation omitted)); Quarles v. Dep't of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (withholding factual material because it would expose agency's decisionmaking process and chill future deliberations); see, e.g., Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 375 (4th Cir. 2009) (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 v. OPM, 2007 WL 1722424, at *8 (E.D. Cal. June 13, 2007) (holding factual portions of audits as non-segregable material because release would reveal "mental processes" of auditors); 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); 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); SMS Data Prods. Group Inc. v. U.S. Dep't of the Air Force, No. 88-481, 1989 WL 201031, at

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scientific reports that constitute the interpretation of technical data, insofar as "the opinion of an expert reflects the deliberative process of decision or policy making."[161] It has even been extended to cover successive reformulations of computer programs that were used to analyze scientific data.[162]

Indeed, the government interest in withholding technical data has been found to be 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."[163] 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

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*1-2 (D.D.C. Mar. 31, 1989) (holding technical scores and technical rankings of competing contract bidders predecisional and deliberative); Nat'l Wildlife Fed'n v. U.S. Forest Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (protecting variables reflected in computer program's mathematical equation); 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).

[161] Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980); 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").

[162] See Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 782-83 (D.D.C. 1993).

[163] Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984).

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such tentative assessments is precisely what the deliberative process privilege is intended to prevent.[164]

In other cases, courts have ruled that factual material is so mixed in with deliberative material that it would not be possible to release meaningful portions of a document.[165]

Applying Deliberative Process Privilege

The Court of Appeals for the District of Columbia Circuit has held that documents qualify as predecisional and deliberative only if they "reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[166] The key factor, the D.C. Circuit has stressed is the "'role, if any, that the document plays in the process of agency

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[164] 861 F.2d at 1115, 1120 (protecting "working drafts" of forest plan and "working drafts of environmental impact statements").

[165] See, e.g., Elec. Privacy Info. Ctr. v. DHS, 892 F. Supp. 2d 28, 49 (D.D.C. 2012) (holding that government must only disclose factual information that is "not inextricably intertwined with deliberative portions of the withheld records."); Metro. St. Louis Sewer Dist. v. EPA, No. 10-2103, 2012 U.S. Dist. LEXIS 27902, at *24 (E.D. Mo. Mar. 2, 2012) (holding that "[a] document does not become nondeliberative if facts are included in the deliberations"); Kellerhals v. IRS, No. 2009-90, 2011 WL 4591063, at *7 (D.V.I. Sept. 30, 2011) (allowing withholding of factual material because "[w]hile some of the documents contain factual material, that material is so intertwined with the analysis that any attempt to reveal only factual material would reveal the agency's deliberations"); Hawkins v. U.S. Dep't of Labor, No. 3:05CV269J32, 2005 WL 2063811, at *3 (M.D. Fla. Aug. 19, 2005) (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 releasable); 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.").

[166] Taxation With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981); see Elec. Frontier Found. v. DOJ, 739 F.3d 1, 10 (D.C. Cir. 2014) (holding that recommendation memorandum that "merely examines policy options available to [an agency]" is "precisely the sort of 'advisory opinion . . . comprising part of a process by which governmental decisions and policies are formulated' that is covered by the deliberative process privilege" (quoting Pub. Citizen Inc. v. OMB, 598 F.3d 865, 875 (D.C. Cir. 2010)); Pub. Citizen, 598 F.3d at 875 (concluding that "[t]o the extent the documents at issue in this case neither make recommendations for policy change nor reflect internal deliberations on the advisability of any particular course of action, they are not predecisional and deliberative despite having been produced by an agency that generally has an advisory role").

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deliberations.'"[167] There are several categories of documents that are routinely protected by the deliberative process privilege. Among them are "'all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'"[168] They are protected because, by their very nature, their release would

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[167] Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (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.").

[168] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (internal citations omitted); accord Taxation With Representation Fund, 646 F.2d at 677 (noting that "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated" are routinely protected by deliberative process privilege); 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 Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1121 (9th Cir. 1988) ("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 v. SSA, No. 98-CV-0116E, 2000 WL 1209383, at *2 (W.D.N.Y. Aug. 22, 2000) (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 of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (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).

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likely "stifle honest and frank communication within the agency."[169] Materials of this nature go to 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."[170]

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.[171]

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[169] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); see also Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs, 147 F.3d 708, 711 (8th Cir. 1998) (holding that "it was not improper for the [agency] to conclude that open and frank intra-agency discussion would be 'chilled' by public disclosure"); Schell v. HHS, 843 F.2d 933, 942 (6th Cir. 1988) ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect."); Judicial Watch, Inc. v. U.S. Dep't of State, 875 F. Supp. 2d 37, 44-46 (D.D.C. 2012) (protecting emails discussing which agency employees to invite to meeting because "the presence or absence of a name conveys an agency's or employee's opinion about a potential attendee's value to the meeting" and stating that "[d]isclosure of potential invitees would also have a chilling effect on . . . interagency discussions"); 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 Energy Power Generation Inc. v. FERC, 520 F. Supp. 2d 194, 205 (D.D.C. 2007) ("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).

[170] Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001); see also Casad v. HHS, 301 F.3d 1247, 1251 (10th Cir. 2002) (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).

[171] See, e.g., Access Reports, 926 F.2d at 1196-97 (holding that memorandum written for purpose of preparing senior agency officials for Congressional testimony was protected under deliberative process privilege and noting, in dictum, that "talking points" memoranda are predecisional); Competitive Enter. Inst. v. EPA, No. 12-1617, 2014 WL 308093, at *11 (D.D.C. Jan. 29, 2014) (holding that internal agency communications discussing "'*how* to communicate with members of Congress . . . and *how* to prepare for potential points of debate or discussion [in upcoming congressional testimony],'" and "'related to . . . how to prepare for potential points of debate or discussion'" are predecisional) (internal citation omitted); Judicial Watch, Inc. v. DHS, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012) (holding that deliberations regarding "how to present [a previously decided] policy in the press" qualified as a decisionmaking process for purposes of the deliberative process privilege and finding that documents prepared in advance of that type of press statement were

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predecisional); Performance Coal Co. v. U.S. Dep't of Labor, 847 F. Supp. 2d 6, 15-16 (D.D.C. Mar. 7, 2012) (allowing withholding of documents that discussed how to respond to certain allegations made against government agency); St. Louis Sewer Dist., No. 10-2103, at *18 (E.D. Mo. Mar. 2, 2012) (holding that EPA properly asserted deliberative process privilege to withhold e-mail communications, "press releases, talking points and 'Q & A,'" drafts, and briefing materials); Judicial Watch, Inc. v. DOJ, 800 F. Supp. 2d 202, 218-19 (D.D.C. 2011) (finding that records created in order to prepare public statements about litigation, and to respond to media and Congressional inquiries on issues related to dismissal of case, are covered by deliberative process privilege); ACLU v. DHS, 738 F. Supp. 2d 93, 112 (D.D.C. 2010) (concluding that talking points are also predecisional because "the document itself suggests that a public statement was anticipated at the time of its creation, and given that no official statement has yet been made, the talking points remain ripe recommendations that are ready for adoption or rejection by the Department"); 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); 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); Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1026 (W.D. 1998) (holding paper prepared to brief commissioner for meeting protectible); Thompson v. Dep't of the Navy, No. 95-347, 1997 WL 527344, at *4 (D.D.C. Aug. 18, 1997) (protecting materials created to brief senior officials who were preparing to respond to media inquiries, on 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); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 52 (D.D.C. 1996) (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).

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Draft documents have frequently been found exempt under the deliberative process privilege.[172] Many courts have found that the very process by which a "draft" evolves into a "final" document can itself constitute a deliberative process warranting protection.[173] As a result, some courts have noted that a draft document may be

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[172] See, e.g., Abdelfattah v. DHS, 488 F.3d 178, 183 (3d Cir. 2007) (protecting draft ICE incident report); City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (highlighting draft documents as well as recommendations, proposals, and suggestions as protectible material); Town of Norfolk v. U.S. Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992) (protecting draft letter that was never signed and ultimately rejected); Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987) (protecting draft document because disclosure of editorial process would "stifle the creative thinking and candid exchange of ideas necessary to produce good historical work"); Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (withholding draft manuscript because release could lead to "confusion of the public"); Lead Indus., 610 F.2d 70, 85-86 (2d Cir. 1979) (protecting draft documents containing factual material as compilation in draft document reflected deliberative process); Nat'l Sec. Archive v. CIA, 859 F. Supp. 2d 65, 70-72 (D.D.C. 2012) (allowing agency to withhold entire volume of multivolume agency history because volume in question was a draft and was not included in final published version); Weigel Broad. Co. v. FCC, No. 11-236, 2012 U.S. Dist. LEXIS 37065, at *8 (N.D. Ill. Feb. 17, 2012) (concluding that FCC properly asserted deliberative process privilege to withhold certain "draft decisions and orders on plaintiff's applications [to transfer its broadcasting licenses], internal memoranda and e-mails discussing the agency's possible decisions on the applications, its procedures with respect to the possible decisions and its response to an inquiry about the status of the review"); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1012 (D. Mont. 2011) (protecting draft documents); Dolin, Thomas & Solomon LLP v. U.S. Dep't of Labor, 719 F. Supp. 2d 245, 250 (W.D.N.Y. 2010) (holding that drafts may be withheld because "[t]o the extent that the letters are identical to the DOL's final determination, they are duplicative of information already produced to plaintiff, and to the extent they differ, they pose a substantial risk of confusing the public, and/or intruding on the deliberative process privilege by revealing the DOL's chain of reasoning"); Antonelli v. BOP, 623 F. Supp. 2d 55, 59 (D.D.C. 2009) (holding that draft of administrative adjudication was properly withheld); 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 Serv., 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. Emps. for Envtl. 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).

[173] See, e.g., Nat'l Wildlife, 861 F.2d at 1122 ("To the extent that [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

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protected regardless of whether it differs from its final version.[174] At the same time, however, the D.C. Circuit has declared that the designation of a document as a draft "does not end the inquiry,"[175] and some courts have denied protection.[176]

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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."); Hooker v. HHS, 887 F. Supp. 2d 40, 59 (D.D.C. 2012) (withholding documents discussing development of draft because disclosure would reveal "ongoing, collaborative dialogue about the manuscript"); Pub. Emps. for Envtl. Responsibility v. Off. of Sci. & Tech. Pol'y, 881 F. Supp. 2d 8, 17 (D.D.C. 2012) (protecting draft documents because they would reveal specifics of how agency working group makes decisions); 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"); Nevada v. DOE, 517 F. Supp. 2d 1245, 1264 (D. Nev. 2007) (citing Dudman and Russell and noting that meaningful inquiry into nature of "draft" document is required); 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").

[174] See 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); Exxon Corp. v. DOE, 585 F. Supp. 690, 698 (D.D.C. 1983) ("[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 from the final document."); see also Tigue v. DOJ, 312 F.3d 70, 79 (2d Cir. 2002) (protecting documents discussing which parts of draft to include in final, public version because "editorial decisions such as determining which parts, if any, of a confidential document to include in a public record are precisely the type of internal agency decisions that Exemption 5 was designed to protect"); Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta) (noting that "deliberative process privilege protection under exemption 5 is available to a draft document regardless of whether it differs from its final version"); 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); Reliant, 520 F. Supp. 2d at 204 (same).

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Relatedly, 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,[177] even in circumstances in which a final version of the document in question has been released to the public.[178]

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[175] Arthur Andersen & Co. v. IRS, 679 F.2d 254, 257 (D.C. Cir. 1982) (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).

[176] See, e.g., ACLU v. DOJ, No. 09-0642, 2012 U.S. Dist. LEXIS 137204, at *4 (W.D. Wash. Sept. 21, 2012) (declining protection for four documents withheld in full "solely on the ground that they are drafts"); 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 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"); 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 v. U.S. Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (concluding that unpublished internal document lost its draft status when consistently treated by the agency as finished product over many years).

[177] 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); Cofield v. City of LaGrange, 913 F. Supp. 608, 616-17 (D.D.C. 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 v. HHS, 839 F.2d 768, 775-76 (D.C. Cir. 1988) (en banc) (discussing how particularized disclosure can chill agency discussions); Greenberg v. Dep't of the Treasury, 10 F. Supp. 2d 3, 16 n.19 (D.D.C. 1998) (holding that mere redaction of authors' names would not remove chilling effect on decisionmaking process).

[178] 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).

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In Petroleum Information Corp. v. United States Department of the Interior,[179] the D.C. Circuit held that withheld material should be released in part because it did not involve "some policy matter."[180] Though the materials in question in the case were factual in nature,[181] some courts have applied this ruling to cases involving more traditional deliberative materials when they were found not to be sufficiently connected to "policy."[182]

However, in National Wildlife Federation v. United States Forest Service, the Court of Appeals for 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.[183] In part, these

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[179] 976 F.2d 1429 (D.C. Cir. 1992).

[180] Id. at 1435.

[181] See id. at 1438 (discussing "technical, objective tenor" of withheld materials).

[182] See Elec. Frontier Fond. v. DOJ, 826 F. Supp. 2d 157, 169 (D.D.C. 2011) (denying Exemption 5 protection to emails summarizing factual matters and not relating to formation of policy); CREW v. DHS, 648 F. Supp. 2d 152, 160 (D.D.C. 2011) (requiring release of portion of memorandum not discussing policy); 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); 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").

[183] 861 F.2d 1114, 1118 (9th Cir. 1988); 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. v. U.S. Dep't of the Army, 981 F.2d 552, 560 (1st Cir.

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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.[184]

1992) (citing Nat'l 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 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 Nat'l 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).

[184] See Fox News Network, LLC v. Dep't of Treasury, No. 09 Civ. 3045(FM), 2012 WL 5931808, at *10 (S.D.N.Y. Nov. 26, 2012) (allowing withholding of public relations documents when "their release would reveal the status of internal agency deliberations or substantive policy matters" rather than mere messaging regarding past events); Judicial Watch, Inc., 800 F. Supp. 2d at 218-19 (citing Petroleum Info. and protecting emails discussing internal report designed to prepare agency officials prior to public statements and interviews); ACLU, 738 F. Supp. 2d at 108-09 (allowing withholding of documents discussing development of talking points because agency "must be allowed to make discretionary judgments and consider policy choices in an environment protected from public scrutiny and unnecessary disclosures or otherwise the environment "would tend to 'discourage candid discussion within an agency.'" (citing Petroleum Info., 976 F.2d at 1434)). 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"), 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

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Adoption and Incorporation

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."[185] Courts consider recommendations to be adopted when an agency decisionmaker accepts the rationale of a recommendation as the agency's policy.[186] Relatedly, courts consider recommendations to be incorporated into the final decision when an agency decisionmaker references a particular recommendation in the public statement of the agency's final decision.[187] The Court of Appeals for the District of Columbia Circuit has suggested that "formal or informal" -- as opposed to express -- adoption might be sufficient to remove the protection of the deliberative process privilege, though the court did not elaborate on what might constitute "informal" adoption of a document.[188] In general, courts do not find

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concerning employee's performance do not constitute "deliberations on Department policy, personnel or otherwise").

[185] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975); see, e.g., Elec. Frontier Found. v. DOJ, 739 F.3d 1, 10 (D.C. Cir. 2014) (explaining that adoption occurs when it is evident that "'reasoning in the report is adopted by the [agency] at its reasoning,'" which is different showing than simply demonstrating that agency "'agrees with the conclusion of a report'" (quoting Sears, 421 U.S. at 168)); 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"); Pub. Emps. for Envtl. Responsibility v. U.S. Sec. Int'l Boundary & Water Comm'n, 839 F. Supp. 2d 304, 322-23 (D.D.C. 2012) (holding that document lost its predecisional status because agency's website indicated that it was ultimately adopted and implemented by agency); Bhd. of Locomotive Eng'rs v. Surface Transp. Bd., No. 96-1153, 1997 WL 446261, at *4-5 (D.D.C. July 31, 1997) (finding that staff recommendation was adopted in both written decision and commission vote 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).

[186] See Sears, 421 U.S. at 161 (holding that when a recommendation is "adopted, the reasoning becomes that of the agency"); Nat'l Day Laborer Organizing Network v. ICE, 827 F. Supp. 2d 242, 252-53 (S.D.N.Y. 2011) (holding that recommendation of agency employee becomes adopted when agency accepts conclusion and rationale of recommendation as its own).

[187] See Sears, 421 U.S. at 161 (holding that "if an agency chooses [to] expressly . . . incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion" that memorandum loses its predecisional status).

[188] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) ("[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the

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"approval" of a predecisional document to constitute express incorporation of its underlying rationale,[189] and courts have not generally inferred incorporation on the agency's part.[190] This is consistent with the Supreme Court's ruling in Renegotiation

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agency in its dealings with the public."); see also Am. Soc'y of Pension Actuaries v. Agency for Int'l Dev., 746 F. Supp. 192, 192 (D.D.C 1990) (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).

[189] 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 the 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).

[190] See, e.g., Casad v. HHS, 301 F.3d 1247, 1252-53 (10th Cir. 2002) (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 Aircraft and rejecting argument that burden is on agency to prove that documents were not adopted as basis for policy); N. Dartmouth Properties Inc. v. HUD, 984 F. Supp. 65, 69-70 (D. Mass. 1997) (holding that fact that agency ultimately reached conclusion advocated by author of withheld document did not constitute adoption of author's reasoning); Perdue Farms Inc. v. NLRB, No. 2:96-CV-27-BO(1), 1997 U.S. Dist. LEXIS 14579, at *20-23 (E.D.N.C. Aug. 5, 1997) (holding that fact that document was created only two days before issuance of final decision was insufficient to give rise to inference of adoption); Greyson v. McKenna & Cuneo, 879 F. Supp. 1065, 1069 (D. Colo. 1995) (deciding that use of phrase "the evidence shows" not enough for inference of adoption); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (concluding that record did not suggest either "adoption" or "final opinion" of agency); 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.").

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Board v. Grumman Aircraft Engineering Corporation, 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.[191]

The Court of Appeals for the Second Circuit found adoption to have occurred and ordered the release of a DOJ memorandum concerning enforcement of immigration law by state and local law enforcement agencies.[192] 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.[193] The Second Circuit found that this evidence of adoption went beyond "mere speculation," which would have been insufficient.[194] Furthermore, the appeals court pointed 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.[195] Rather, the court found, DOJ had "publicly and

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[191] 421 U.S. 168, 184-85 (1975); see also Afshar v. Dep't of State, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983) (holding that "only express adoption in a nonexempt memorandum explaining a final decision will serve to strip [otherwise predecisional] memoranda of their predecisional character. . . [because if] the agency merely carried out the recommended decision without explaining its decision in writing, [the court] could not be sure that the memoranda accurately explained the decisionmaker's thinking" but ultimately concluding that, in instant case, "substantial evidence" existed indicating that adoption had occurred and remanding case for further findings) (internal citations omitted); cf. New York Times Co. v. DOJ, No. 11 Civ. 9336, 2013 WL 50209, at *35 (S.D.N.Y. Jan. 3, 2013) (requiring some public indication that otherwise predecisional document was relied on in establishing agency policy); ACLU v. DOJ, No. 12 Civ. 794, slip op. at 59-61 (S.D.N.Y. Jan. 2, 2013) (requiring existence of evidence beyond "sheer speculation" indicating that particular document was adopted as agency policy).

[192] Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 361 (2d Cir. 2005); accord Brennan Ctr. for Justice at New York Univ. Sch. of Law v. DOJ, 697 F.3d 184, 205 (2d Cir. 2012) (explaining that when an agency "referenc[es] a protected document as authoritative, it cannot then shield the authority upon which it relies from disclosure"); Nat'l Day Laborer Organizing Network, 827 F. Supp. 2d at 259 (discussing and applying La Raza to hold that memorandum was adopted because "agency has continually relied upon and repeated in public the arguments made in the Memorandum").

[193] See La Raza, 411 F.3d at 358 (noting statements by agency official relying on document in question as sole means of explaining agency position on matter at issue).

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

[195] See id. at 358 ("Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis. . . ."); see also Elec. Frontier Found., 739 F.3d at 10 ("We have thus recognized that 'the Court has refused to equate reference to a report's

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repeatedly depended on the Memorandum as the primary legal authority justifying and driving . . . [its policy decision] and the legal basis therefore."[196] The Second Circuit noted that this distinguished the case from Grumman Aircraft,[197] 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."[198]

Other courts have rejected claims of adoption in the absence of sufficient evidence that it has occurred.[199] For instance, the D.C. Circuit recently held that an opinion written by DOJ's Office of Legal Counsel was not adopted by the FBI because the FBI never publicly invoked or relied upon the OLC opinion as the basis for an agency decision.[200] While DOJ's Office of the Inspector General had referenced the OLC opinion in a public report, and the FBI had answered Congressional inquiries about the OLC opinion, the court found that this did not demonstrate that the FBI adopted the OLC opinion.[201]

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conclusions with adoption of its reasoning, and it is the latter that destroys the privilege.'" (quoting Access Reports v. DOJ, 926 F.2d 1192, 1197 D.C. Cir. 1991))).

[196] La Raza, 411 F.3d at 358; see also Bronx Defenders v. DHS, No. 04 CV 8576, 2005 WL 3462725, at *4-5 (S.D.N.Y. Dec. 19, 2005) (ordering release of memorandum because government had cited it in multiple public documents as basis for government policy).

[197] 421 U.S. at 184.

[198] Id.

[199] See, e.g., Elec. Frontier Found., 739 F.3d at 11 (finding that plaintiff failed to "point to any evidence supporting its claim" of adoption); 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); Elec. Frontier Found. v. DOJ, 890 F. Supp. 2d 35, 45 (D.D.C. 2012) (rejecting argument that deliberative process privilege may not apply to documents recommending negotiating position because "there is no indication that the agencies that participated in the [High Level Contact Group (HLCG)] negotiations . . . formally or expressly adopted the [HLCG's] negotiating positions in any publicly-available document or publication"); Pub. Emps. for Envtl. Responsibility, 839 F. Supp. 2d at 323 (holding that public citation of "a few lines of text" from otherwise predecisional document was insufficient to prove that agency had adopted document). But cf. 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, Inc. 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 v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (citing Judicial Watch, 297 F. Supp. 2d at 261, for same proposition).

[200] Elec. Frontier Found., 739 F.3d at 11-12.

[201] Id. at 11 ("The OIG's references to the OLC Opinion do not establish that *the FBI* adopted the Opinion as *its own* reasoning. Nor does [the FBI's] response to inquiries from members

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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.[202] As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny,[203] the Court of Appeals for the District of Columbia Circuit has held that the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.[204] The privilege is not limited to civil proceedings, but rather extends to administrative proceedings[205] and to criminal matters as well.[206] Similarly,

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of Congress establish that the FBI adopted the OLC opinion's reasoning as *its own* reasoning. . . . Far from publicly using the OLC Opinion to justify the FBI's positions, [the FBI's] testimony [before Congress] indicates that the OLC Opinion *did not* determine the FBI's actions or policy.").

[202] See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Adionser v. DOJ, 811 F. Supp. 2d 284, 297 (D.D.C. 2011) (concluding that EOUSA properly invoked attorney work-product privilege "to protect records reflecting 'such matters as trial preparation, trial strategy, interpretations, and personal evaluations and opinions pertinent to Plaintiff's criminal case'" (quoting Coastal States Gas Corp. v. DOE, 617 F.2d 854, 864 (D.C. Cir. 1980))); Judicial Watch, Inc. v. DOJ, 800 F. Supp. 2d 202, 212-13 (D.D.C. 2011) (concluding that documents created in reasonable anticipation of motion to be filed in ongoing case were properly withheld under work-product privilege); Citizens for Responsibility & Ethics in Wash. v. NARA, 715 F. Supp. 2d 134, 138-39 (D.D.C. 2010) (protecting "'documents prepared in contemplation of litigation'" (citing Coastal States Gas Corp. v. DOE, 617 F.2d 854, 864 (D.C. Cir. 1980))); Amnesty Int'l USA v. CIA, No. 07-5435, 2010 WL 5421928, at *4 (S.D.N.Y. Dec. 21, 2010) (holding that attorney work-product privilege protects documents constituting mental impressions of federal prosecutor about anticipated or ongoing litigation); Wolfson v. United States, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (concluding that attorney work-product privilege was properly invoked to withhold information whose disclosure "would reveal . . . attorneys' thought processes and litigation strategy and would reveal the agency's deliberations prior to the decision to seek authorization for continued monitoring of oral communications"); see also Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure).

[203] See Jordan v. DOJ, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc).

[204] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 865 (D.C. Cir. 1980).

[205] 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"); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 586 (N.D. W. Va. 2005) (protecting documents prepared in advance of EPA administrative enforcement proceeding); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999) (allowing withholding of documents prepared by attorneys in anticipation of INS

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the privilege has also been held applicable to documents generated in preparation of an amicus brief.[207]

To fall within the protection of the attorney work-product privilege litigation need not have actually commenced, so long as specific claims have been identified which make litigation probable.[208] Significantly, the D.C. Circuit has ruled that the privilege

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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) (holding that work-product privilege applied to documents prepared before 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) (upholding use of privilege for documents prepared for 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).

[206] 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), abrogated on other grounds, DOJ v. Landano, 508 U.S. 165 (1993); Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983) (ruling privilege applicable in bank-fraud prosecution); Lazaridis v. DOJ, 766 F. Supp. 2d 134, 143 (D.D.C. 2011) (holding that agency properly asserted Exemption 5 to withhold "predominantly as attorney work-product but also as deliberative process material" various records prepared by the U.S. Attorney's Office pertaining to plaintiff's "'pending kidnapping case'" (internal citations omitted)); 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); 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).

[207] 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).

[208] See, e.g., Margolin v. NASA, No. 09-00421, 2011 U.S. Dist. LEXIS 40882, at *24-25 (D. Nev. Mar. 31, 2011) (holding that communications between agency attorneys produced "in the course of [the development of] an agency's response to administrative claims against the agency and in contemplation of potential litigation against the agency are not 'normally' or 'routinely' subject to disclosure in civil litigation and therefore are exempt from mandatory disclosure under Exemption 5, without regard to the status of any litigation"); 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

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"extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."[209] 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."[210] The privilege has also been applied to situations where

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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).

[209] Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992), abrogated on other grounds by Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011); 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); Media Research Ctr. v. DOJ, 818 F. Supp. 2d 131, 141 (D.D.C. 2011) (concluding that "when government attorneys act as 'legal advisors' to an agency considering litigation that may arise from challenge to a government program, a specific claim is not required to justify the assertion of [the attorney work-product] privilege"); 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)).

[210] SafeCard Servs. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991); see, e.g., Darui v. Dep't of State, 798 F. Supp. 2d 32, 39 (D.D.C. 2011) (holding that e-mails "prepared by attorneys for DOJ and State," which "'were prepared in connection with a law enforcement proceeding'" are protected by the attorney work-product privilege) (internal citation omitted); Durrani v. DOJ, 607 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 prosecution 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

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litigation was contemplated, but an affirmative decision was made not to initiate legal proceedings.[211]

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."[212] 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.[213]

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

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(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").

[211] Gov't Accountability Project v. DOJ, 852 F. Supp. 2d 14, 24-26 (D.D.C. 2012) (holding that both attorney work-product and deliberative process privileges applied to e-mails between attorneys discussing whether or not to file criminal charges in matter referred to DOJ by another agency).

[212] 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).

[213] See, e.g., McKinley v. Bd. of Governors of the Fed. Reserve Sys., 647 F.3d 331 (D.C. Cir. 2011) (holding that defendant properly asserted attorney work-product privilege to withhold document that was prepared by defendant's consultant's attorneys in anticipation of litigation by another party against defendant); 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 concerning 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); Heggestad 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).

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the document was created at least in part because of the prospect of litigation.[214] However, documents prepared in an agency's ordinary course of business, not under circumstances sufficiently related to litigation, may not be accorded protection.[215]

The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation.[216] It has also been used to protect the recommendation to close a litigation or pre-litigation matter.[217] Conversely, documents

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[214] 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 Hertzberg, 273 F. Supp. 2d at 80 (D.D.C. 2003) (rejecting "primary purpose" test); Bhd. of Locomotive Eng'rs, 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); But see 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), aff'd in part & rev'd in part on other grounds, 276 F.3d 634 (D.C. Cir. 2002).

[215] 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); Zander v. DOJ, 885 F. Supp. 1, 11 (D.D.C. 2012) (finding "two e-mails do not fall under the attorney work product doctrine because the e-mails are communications to and from clients regarding litigation, rather than actual preparation by attorneys for litigation (or anticipated litigation)"); 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).

[216] 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 Fischer v. DOJ, 723 F. Supp. 2d 104, 113-14 (D.D.C. 2010) (protecting drafts of settlement agreement related to plaintiff's criminal case which were prepared by U.S. Attorney's Office); 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).

[217] 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); Heggestad, 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.

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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.[218] Moreover, courts have found that 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.[219]

Courts have found that not only do documents prepared by agency attorneys who are responsible for the litigation of a case which is being defended or prosecuted by DOJ qualify for the privilege,[220] but also documents prepared by an attorney "not employed as a litigator,"[221] or even documents prepared by someone not employed primarily as an attorney.[222] Courts have also accorded work-product protection to materials prepared by non-attorneys who are supervised by attorneys.[223] The premise in such cases is that

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Apr. 1, 1999) (holding exemption applicable to records concerning determination whether to appeal lower court decision).

[218] See Senate of P.R., 823 F.2d at 586; Rashid v. 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. 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).

[219] 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 v. DOD, No. 04-2425, slip op. at 13 n.13 (S.D. Cal. June 6, 2005).

[220] 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) (protecting documents "prepared in contemplation of pending litigation and in an obvious effort to influence or discuss litigation strategy").

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

[222] 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).

[223] See, e.g., Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at *22 (D. Colo. Sept. 8, 2009) (extending privilege to documents created by paralegals for agency attorneys in anticipation of litigation); Antonelli v. BOP, 623 F. Supp. 2d 55, 59 (D.D.C. 2009) (protecting documents prepared in connection with tort claim investigations, including staff

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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.[224]

The work-product privilege has been held to remain applicable when the information has been shared with a party holding a common interest with the agency.[225] For example, this situation may arise when the government shares documents with a

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memoranda and documents prepared by investigators working at behest of agency counsel); 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).

[224] 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); 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).

[225] See, e.g., 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) aff'd in part, vacated & remanded on other grounds, 590 F.3d 272 (4th Cir. 2010); Nishnic, 671 F. Supp. at 775 (protecting documents shared with foreign nation because DOJ and foreign government were involved in litigation against common adversary); 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).

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private party with whom it is jointly prosecuting a qui tam suit,[226] or when an agency has a common fiscal interest with a private party.[227]

The Supreme Court's decisions in United States v. Weber Aircraft Corp.[228] and FTC v. Grolier Inc.,[229] 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."[230] 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."[231] 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,[232] such materials are not "routinely" or "normally" discoverable and, as a result, the Supreme Court has held, factual material is protected under the attorney work-product privilege recognized under the FOIA.[233] As a result, courts have found that no

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[226] Akin, Gump, Strauss, Hauer & Feld, LLP v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007).

[227] Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 877 (2012) (stating that "it is entirely appropriate for the Army's financial interest to be the basis of the common interest doctrine").

[228] 465 U.S. 792 (1984).

[229] 462 U.S. 19 (1983).

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

[231] 462 U.S. at 26; accord NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 146 & n.16 (1975) (noting that Exemption 5 was intended to allow disclosure of documents that would "routinely be disclosed" in civil litigation); Wood v. FBI, 312 F. Supp. 2d 328, 338-39 (D. Conn. 2004) (noting that because in civil discovery context work-product privilege can be overcome only upon showing of substantial need, such documents are never "routinely disclosed" and hence are always protected in FOIA context), aff'd in part & remanded in part on other grounds, 232 F.3d 78 (2d Cir. 2005).

[232] 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).

[233] Grolier, 462 U.S. at 27; accord 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.").

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segregation of factual information is required for information falling within the privilege.[234]

Finally, the work-product privilege also has been found applicable even when the document has become the basis for a final agency decision.[235] In NLRB v. Sears,

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[234] See Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) ("The work-product privilege simply does not distinguish between factual and deliberative material."); accord 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"); 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."); Meza v. DOJ, 719 F. Supp. 2d 1, 6 (D.D.C. 2010) (holding that "'if [as shown here] a document is fully protected as work-product, then segregability is not required'" (quoting Judicial Watch, 432 F.3d 371)); Trentadue v. CIA, No. 08-788, 2010 U.S. Dist. LEXIS 29324, at *10-11 (D. Utah Mar. 26, 2010) (holding that CIA was not required to segregate and release factual materials, "because attorney work-product 'shields both opinion and factual work-product from discovery'" (citations omitted)); 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); Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 5 (D.D.C. 2009) (holding that "factual material is itself privileged when it appears within documents that are attorney work-product" (citing Judicial Watch, 432 F.3d at 371)); Raytheon, 183 F. Supp. 2d at 1292 (rejecting plaintiff's contention that agency must segregate and release factual work-product material); 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); 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); 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); see also, e.g., 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"); 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"); 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). But see Nickerson v. United States, No. 95-C-7395, 1996 WL 563465, at *3 (N.D. Ill. Oct. 1, 1996) (ruling that facts must be segregated under privilege); Fine v. U.S. DOE, 830 F. Supp. 570, 574-76 (D.N.M. 1993) (refusing to follow Martin).

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Roebuck & Co.,[236] the Supreme Court allowed the withholding of a final agency decision on the basis that it was shielded by the work-product privilege,[237] 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),"[238] the proactive disclosure provision of the Act.[239] Any potential confusion caused by this opinion was cleared up by the Supreme Court in Federal Open Market Committee v. Merrill.[240] In Merrill, the Court explained its statements in Sears,[241] 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.[242] (For a discussion of the proactive disclosure requirements of subsection (a)(2), see Proactive Disclosures, Subsection (a)(2): Making Records Available for Public Inspection, above.)

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

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[235] 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.'").

[236] 421 U.S. 132 (1975).

[237] Id. at 160.

[238] Id. at 153-54.

[239] See FOIA Update, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

[240] 443 U.S. 340 (1979).

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

[242] 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").

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material was held discoverable only upon a showing of necessity and justification.[243] Applying the "routinely and normally discoverable" test of Grolier and Weber Aircraft, the D.C. Circuit has held that witness statements are protectible the attorney work-product privilege of Exemption 5.[244] Indeed, witness statements were the very records at issue in Hickman v. Taylor,[245] the seminal case in which the Supreme Court first articulated the attorney work-product privilege doctrine.[246] 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[247] and applied under the FOIA in Weber Aircraft.[248] (For further discussion on this privilege, see Exemption 5, Other Privileges, below.)

Finally, the Supreme Court's decision in Grolier resolved a split in the circuits by ruling that the termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work-product.[249] Thus, under the Supreme Court's ruling, there is no temporal limitation on work-product protection under the FOIA.[250] The D.C. Circuit has found that such protection may be vitiated if the

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

[244] See Martin, 819 F.2d at 1187 (applying Hickman and Weber to hold that witness statements are protected under attorney work-product privilege). 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).

[245] 329 U.S. at 497.

[246] 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.").

[247] 316 F.2d 336, 338 (D.C. Cir. 1963).

[248] 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.").

[249] 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)).

[250] 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

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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.[251] Otherwise, the District Court for the District of Columbia has held that there is no "public interest" exception to the application of the work-product privilege under Exemption 5.[252]

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."[253] Unlike the attorney

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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).

[251] 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.").

[252] See Winterstein v. DOJ, 89 F. Supp. 2d 79, 82 (D.D.C. 2000) (noting that by enacting specific FOIA exemptions, Congress determined that disclosure of material protected under an exemption is not in public interest).

[253] 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); Sensor Sys. Support Inc. v. FAA, No. 10-262, 2012 U.S. Dist. LEXIS 66320, at *13-14 (D.N.H. May 11, 2012) (concluding that attorney-client privilege was properly applied to e-mail which "was sent [by FAA employee] to an agency attorney for the purpose of obtaining legal advice" and was not shared with third parties); Families for Freedom v. U.S. Customs & Border Prot., 837 F. Supp. 2d 287, 302-03 (S.D.N.Y. 2011) (protecting, under attorney client privilege, memorandum prepared by Assistant U.S. Attorney discussing standards applicable to immigration checks performed by Border Patrol agents); Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375, 395-96 (S.D.N.Y. 2011) (finding that training memoranda "fall squarely within the attorney client privilege" because they "were created by attorneys . . . and contain legal analysis and guidance to Border Patrol agents regarding the use of race or ethnicity in executing their duties, and [finding that] analysis of case law concerning racial profiling in law enforcement" constituted attorney-client documents and were not a body of "secret law"); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *5 (D.V.I. Mar. 31, 2010) (applying attorney-client privilege to communications between IRS agent and IRS and DOJ counsel where agent was seeking advice on development and interpretation of law); Harrison v. BOP, 681 F. Supp. 2d 76, 82 (D.D.C. 2010) (noting that attorney-client privilege "exists to protect 'open and frank communication' between counsel and client).

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work-product privilege, the attorney-client privilege is not limited to the context of litigation.[254] Although it fundamentally applies to facts divulged by a client to his attorney,[255] courts have found that this privilege "also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts,"[256] as well as

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[254] 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) (noting that attorney-client privilege is not limited to context of litigation (citing Mead Data and Crooker v. IRS)); 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.").

[255] Vento v. IRS, 714 F. Supp. 2d 137, 151 (D.D.C. 2010) (stating that attorney-client privilege protects facts given to attorney by client).

[256] Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 114; see McKinley v. Bd. of Governors of Fed. Res. Sys., 849 F. Supp. 2d 47, 65 (S.D.N.Y. 2012) (finding that attorney-client privilege covers facts divulged by client to attorney and opinions given by attorney to client based on those facts (citing Elec. Privacy Info. Ctr.)); Judicial Watch, Inc. v. Dep't of the Army, 466 F. Supp. 2d 112, 121 (D.D.C. 2006) (same); 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); Barmes v. IRS, 60 F. Supp. 2d 896, 901 (S.D. Ind. 1998) (protecting material "prepared by an IRS attorney in response to a request by a revenue officer to file certain liens pursuant to collection efforts against the plaintiffs"); Wishart v. Comm'r, No. 97-20614, 1998 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

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"communications between attorneys that reflect client-supplied information."[257] The Court of Appeals for the District of Columbia Circuit, however, has also 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.[258] 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.[259]

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."[260] 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.[261] and in FTC v. Grolier Inc.[262] that the scopes of the various privileges are

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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.").

[257] 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 requester).

[258] Brinton, 636 F.2d at 603.

[259] 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); Fox News Network, LLC v. U.S. Dep't of the Treasury, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010) (holding that "involvement of . . . a third party to the attorney-client relationship, [] does not destroy the privilege because the communications are covered by the common interest doctrine"); Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *10 (N.D. Cal. May 5, 2009) (finding that "attorney-client privilege [can be extended] to multiple parties who share a common interest in a legal matter"); 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).

[260] 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").

[261] 465 U.S. 792 (1984).

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coextensive in the FOIA and civil discovery contexts.[263] Finally, just as in the discovery context, the privilege can be waived by the client, who owns it, but it cannot be waived unilaterally by the attorney.[264]

The D.C. Circuit has held that confidentiality between an attorney and client may be inferred when the communications suggest that "the government is dealing with its attorneys as would any private party seeking advice to protect personal interests,"[265] but in other cases it, as well as other courts, have required the government to demonstrate the confidentiality of the attorney-client communications.[266] In Upjohn Co. v. United States, the Supreme Court held that the attorney-client privilege covers attorney-client

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[262] 462 U.S. 19 (1983).

[263] 465 U.S. at 799-800; 462 U.S. at 26-28.

[264] See Hanson, 372 F.3d at 293-94 (holding that agency attorney's unauthorized release of otherwise privileged document, though it breached document's confidentiality, did not prevent agency from invoking privilege because "an attorney may not unilaterally waive the privilege that his client enjoys").

[265] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 863 (D.C. Cir. 1980).

[266] 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); Cuban v. SEC, 744 F. Supp. 2d 60, 79-80 (D.D.C. 2010) (requiring agency to "demonstrate that confidentiality was expected in the handling of these communications," and that steps were taken to keep the records confidential in order to apply attorney-client privilege); Chesapeake Bay Found. Inc. v. U.S. Army Corps of Eng'rs, 722 F. Supp. 2d 66, 71-72 (D.D.C. 2010) (requiring agency to establish "that the purported 'legal advice' was conveyed 'as part of a professional relationship in order to provide [the agency] with advice on the legal ramifications of its actions'" (citing Mead Data, 566 F.2d at 253)); Citizens for Responsibility & Ethics in Wash. v. DHS, 648 F. Supp. 2d 152, 162 (D.D.C. 2009) (ordering release of information because "redacted material does not contain confidential client information, nor does it solicit legal advice"); 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").

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communications when the specifics of the communication are confidential, even though the underlying subject matter is known to third parties.[267]

The Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-level employees.[268] This broad construction of the attorney-client privilege acknowledges the reality that such lower-level personnel often possess information relevant to an attorney's advice-rendering function.[269] 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.[270]

The D.C. Circuit has held that otherwise confidential agency memoranda are not protected under the attorney-client 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."[271] 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.[272]

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[267] 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).

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

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

[270] See 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").

[271] Tax Analysts, 117 F.3d at 619.

[272] 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

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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.[273] Rule 501 of the Federal Rules of Evidence[274] allows courts to create privileges as necessary,[275] and new privileges are recognized from time to time by federal courts,[276] and occasionally are thereafter

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for documents that reflect actual agency policy); Brennan Ctr. for Justice at NYU School of Law v. DOJ, No. 09-8756, 2011 U.S. Dist. LEXIS 99121, at *17-20 (S.D.N.Y. Aug. 30, 2011) (concluding that memoranda from the Office of Legal Counsel to HHS and USAID that would otherwise be covered by the attorney-client privilege lost that protection when HHS and USAID adopted the OLC memoranda as 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).

[273] See United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier Inc., 462 U.S. 19, 26-27 (1983).

[274] Fed. R. Evid. 501.

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

[276] 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).

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recognized under Exemption 5.[277] 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.[278]

In 1979, in Federal Open Market Committee v. Merrill,[279] 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.[280] 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.[281] The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by endangering consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should . . . serve as relevant criteria."[282]

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.[283] 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."[284]

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[277] 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).

[278] 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).

[279] 443 U.S. 340 (1979).

[280] Fed. R. Civ. P. 26(c)(7).

[281] Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979).

[282] Id. at 363.

[283] 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).

[284] 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

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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,[285] as have documents containing communications between agency personnel, potential buyers, and real estate agents concerning a proposed sale of government-owned real estate,[286] an agency's background documents which it used to calculate its bid in a "contracting out" procedure,[287] and portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors.[288] By contrast, purely legal memoranda drafted to assist contract-award deliberations have been found not to be encompassed by this privilege.[289]

The Supreme Court in United States v. Weber Aircraft Corp.[290] held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations.[291] Broadening the holding of Merrill that a privilege "mentioned in the legislative history of Exemption 5 is incorporated by

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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).

[285] 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.").

[286] 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).

[287] 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).

[288] 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").

[289] 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).

[290] 465 U.S. at 799.

[291] 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).

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the exemption,"[292] 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.[293] The "plain statutory language"[294] and the clear congressional intent to sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations[295] supported this result.[296] This privilege also has been applied to protect statements made in Inspector General investigations.[297]

Similarly, in Hoover v. Department of the Interior,[298] the Court of Appeals for the Fifth Circuit recognized under Exemption 5 a privilege based on Federal Rule of Civil Procedure 26(b)(4),[299] which limits the discovery of reports prepared by expert witnesses.[300] The document at issue in Hoover was an appraiser's report prepared in the course of condemnation proceedings.[301] 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.[302]

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

[293] Id. at 804; Karantsalis v. Dep't of the Navy, No. 12-23469, 2013 WL 1768659 at *3 (S.D. Fla. April 24, 2013) (recognizing applicability of Machin privilege under Exemption 5 and holding that witness statements and opinions of air crash investigators are protectible under this privilege).

[294] Id. at 802.

[295] See id.

[296] 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).

[297] 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). 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).

[298] 611 F.2d 1132 (5th Cir. 1980).

[299] Fed. R. Civ. P. 26(b)(4).

[300] Hoover, 611 F.2d at 1141.

[301] Id. at 1135.

[302] 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).

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In 2004, in Judicial Watch, Inc. v. DOJ,[303] 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.[304] The D.C. Circuit found that 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.'"[305] 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.'"[306] Nevertheless, 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.'"[307]

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 by the President himself;[308] (2) that the privilege could be lost simply due to the passage of time;[309] (3) that the privilege only covers documents whose

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[303] 365 F.3d 1108 (D.C. Cir. 2004).

[304] Id. at 1114.

[305] Id. at 1113 (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)); see also Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (finding "that all twenty documents reflect or memorialize communications between senior presidential advisers and other United States government officials and are therefore properly withheld").

[306] 365 F.3d at 1113 (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).

[307] 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).

[308] 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").

[309] See Citizens for Responsibility & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 237 (D.D.C. 2009) (holding that "failure to formally invoke any executive privileges [at the time of a prior investigation] did not preclude the White House's future reliance on those

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release would "reveal the President's mental processes;"[310] and (4) that the privilege does not apply to documents that memorialize otherwise protected communications.[311] The D.C. Circuit has also held that in cases involving the presidential communications privilege, the person protected by the privilege is the President himself, and not an individual discussed in the documents solicited by the President.[312] 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."[313] 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.[314] 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.[315] and United States v. Weber Aircraft Corp.,[316] so the court accordingly ruled that the agency's invocation of the privilege had been proper.[317]

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privileges"); Berman, 378 F. Supp. 2d at 1221 (protecting the documents created during the Administration of President Lyndon B. Johnson).

[310] Elec. Privacy Info Ctr., 584 F. Supp. 2d at 81.

[311] 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).

[312] 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).

[313] 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."), appeal dismissed voluntarily, No. 09-5014, 2009 WL 4250490 (D.C. Cir. Nov. 13, 2009).

[314] See Berman, 378 F. Supp. 2d at 1221.

[315] 462 U.S. 19, 26 (1983).

[316] 465 U.S. 792, 799 (1984).

[317] 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); 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)).

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Although in a 2003 non-FOIA case, the Court of Appeals for the Sixth Circuit recognized a civil discovery privilege for settlement negotiation documents,[318] the Court of Appeals for the Federal Circuit recently declined to follow that decision holding "that settlement negotiations . . . are not protected by a settlement negotiation privilege."[319] To date, in the FOIA context, the privilege has only been recognized once and that was under Exemption 4.[320]

Lastly, courts also have recognized the applicability of other privileges, whether traditional or recently recognized, in the FOIA context.[321] Among those other privileges that have been recognized for purposes of the FOIA are the presentence report privilege,[322] the expert materials privilege,[323] the confidential report privilege,[324] and the

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

[319] In re MSTG, Inc., 675 F.3d 1337, 1342-48 (Fed. Cir. 2012) (analyzing and declining to follow Goodyear Tire) (non-FOIA case); see also 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).

[320] M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (applying settlement privilege under Exemption 4).

[321] 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").

[322] 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").

[323] 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).

[324] 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).

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critical self-evaluative privilege,[325] though it should be noted that the last two of these have been recognized under Exemption 4, not Exemption 5.

[325] 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").

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