

**FOIA: Exemption 5
Outline**

I. TEXT

- A. “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.” 5 U.S.C. § 552(b)(5).

II. SCOPE

- A. Scope is generally the same as civil discovery privileges. Formaldehyde at 1121.
- B. Includes; [Formaldehyde at 1121, *citing* Sears]
1. Deliberative Process (executive privilege)
 2. Attorney Work-Product
 3. Attorney-Client

III. DELIBERATIVE PROCESS

A. CONSTRUCTION/SCOPE

1. construed expansively
 - a. actually, should be construed “as narrowly as is consistent with efficient Govt. operation.” Ryan at 790, *cited in* Formaldehyde at 1122.
 - i. but, *efficient* Government operation requires open discussions among all...policy-makers and advisors” Id.
 - b. “inter-agency” and “intra-agency” are not “rigidly exclusive terms, but ... include any agency document that is part of the deliberative process.” Ryan at 790.
[Hooper v. Bowen, No. 88-1030, slip op. at 18 (C.D. Cal. May 23, 1989) (“courts have regularly construed this threshold test expansively rather than hypertechnically”); **FOIA Update, June 1982, at 10** (“FOIA Counselor: Protecting ‘Outside’ Advice”).]
2. types of things protected
 - a. “advice, recommendations, *opinions*, and other material reflecting deliberative or policy-making processes” Soucie at 1077 (*see* string cite of cases); *cited in* Wu at 1032.

B. POLICY

1. free exchange of ideas/candid discussions; Wu at 1032-1034 (great discussion); Soucie at 1077; Ryan at 789-790 **See, Bristol-Myers Co. V. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970).**
2. protects against premature disclosure of proposed policies before they are finally adopted and also against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency’s action. **Russell v. Department of the Air Force, 682 F. 2d 1-45, 1048 (D.C. Cir. 1982), Jordan v. United States Dept. of Justice, 591 F.2d 753, 772-773 (D.C. Cir. 1978) (en banc), Citizens Comm’n on Human Rights v. FDA, No. 92-5313, slip op. at 23 (C.D. Cal. May 10, 1993)** (release of predecisional documents may confuse public about agency policy and procedure).

C. TWO PRONGED TEST

1. **NEED BOTH PRONGS;** Formaldehyde at 1120-1121.
2. **PRE-DECISIONAL**

- a. defn
 - i. a document “prepared in order to assist an agency decisionmaker in arriving at his decision.” Formaldehyde at 1122.
 - ii. “Ex. 5 applies only to communications before the adoption of an agency policy; communications that promulgate or implement an established policy are not privileged.” Ryan at 791.
- b. DOJ flow chart
 - i. Is the document a “final opinion” within the meaning of one of the automatic disclosure provisions of the FOIA?
 - ii. Who authored the document? What is the extent of that person’s decisionmaking authority. [If the author lacks “legal decision authority,” the document is far more likely to be pre-decisional.]
 - iii. Analyze the flow of the document along the decisionmaking chain. A document from a subordinate to a superior official is more likely to be predecisional.
 - iv. What role does the document play in the process of agency deliberations?

3. DELIBERATIVE

- a. defn
 - i. “if ‘the disclosure of the materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.’” Formaldehyde at 1122.
- b. **DISTINGUISHING b/t “PURELY FACTUAL” MATERIALS and DELIBERATIVE MATERIALS**
 - i. Ex. 5 does not protect purely factual materials; Soucie at 1077.
 - ii. Functional Test
 - A. courts look at the *role* the document plays in the process of agency deliberations, rather than at the document itself or the document’s author. Formaldehyde at 1122
 - B. *SUB-PRONG: would disclosure of the material inhibit the agency’s ability to fulfill its Congressional mandate?* (by exposing an agency’s decisionmaking process so as to discourage candid discussion within the agency and undermine the agency’s ability to perform its functions) Formaldehyde at 1123.
 - 1. look at statute to determine agency functions; Id. at 1124.
 - 2. examine how document used to accomplish functions; Id. at 1124.
 - 3. Examine whether release of the information would chill future comments. Id. at 1125.
 - a. People temper their remarks in anticipation of public dissemination to the detriment of the decisionmaking process. Id. at 1125, *citing Sears*.
 - iii. Must be *purely* factual; Wu at 1033.
 - A. almost all memos will have some facts
 - 1. In Wu, 5 scholars gave agency their opinions on

a grant application. The recommendations had factual material, but it was only incidental to the primary purpose, which was to give an opinion and assist the agency in reaching a decision on the grant. 1033.

- B. even factual segments are protected if:
 - 1. manner of selecting or presenting those facts would reveal the deliberative process
 - 2. or if the facts are “inextricably intertwined” with the policy-making process. Ryan at 790.
- C. cases tend to release materials that is predominantly, if not purely, factual info. that is not gen’ly avail. to the public
- iv. Can be overused
 - A. purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only “those internal working papers in which opinions are expressed or policies formulated and recommended.”
Bristol-Myers Co.
- v. subjective things are not factual
 - A. opinions are not factual. Wu at 1033; Formaldehyde at 1122.
 - B. edits are subjective, and thus, deliberative. Formaldehyde at 1123.

E. OUTSIDE CONSULTANTS

1. “Govt. may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity” Soucie at 1078 and *cited in* Wu at 1032.
 - a. Courts encourage Federal agencies to seek the assistance of outside consultants to unravel their “knotty complexities.” Formaldehyde at 1122.
2. Volunteer consultants’ work product was protected even though they were not internal employees or paid consultants. Wu at 1032.
3. Need for frank discussion of policy matters with outside consultants. Formaldehyde at 1122.
4. No need for a *formal relationship* between the agency and the consultant. Formaldehyde at 1123 (look at role of document)
5. Outside consultants need not have been solicited by the agency. Formaldehyde at 1124.
6. Where agency personnel had to regularly rely upon comments of temporary consultants in order to fulfill their Congressional mandate, it was deliberative. Formaldehyde at 1125.

**Access Reports v. Dep't of Justice, 926 F.2d 1192 (D.C. Cir. 1991).
Exxon Corp. v. FTC, 476 F. Supp. 713 (D.D.C. 1979).
****Formaldehyde Institute v. HHS, 889 F.2d 1118 (D.C. Cir. 1989).
Hoover v. Dep't of Interior, 611 F.2d 1132 (5th Cir. 1980).
**Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979).
***NLRB v. Sears, Roebuck & Co., 421 U.S. 191 (1975).
Petroleum Information Corporation v. Dep't of Interior, 976 F.2d 1429 (D.C. Cir. 1992).
****Ryan v. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980).
****Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).
United States v. J.B. Williams Co., 402 F. Supp. 796 (S.D.N.Y. 1975).
**Wolfe v. HHS, 839 F.2d 768 (D.C. Cir. 1988) (en banc).
****Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972).

That the worksheet is a staff working document and not a reflection of any official determinations by the Board is indicative of the fact that the document is a “pre-decisional memoranda” and a “valuable deliberative tool” which need not be subject to public scrutiny.¹ See, United States v. J.B. Williams, 402 F.Supp. at 800 (instructions to staff to conduct an investigation is at the very starting point of the deliberative process.)

FLOW CHART

- 1) Is the document PRE-DECISIONAL?
 - a) Was the document prepared in order to assist the Board in arriving at decisions?
 - i) If yes, more likely to be pre-decisional.
 - b) Was the document created before the Board took a position or adopted a policy on the subject of the document?
 - i) If yes, more likely to be pre-decisional.
 - ii) If no, has the Board adopted the position taken in the document since the document was created?
 - A) If yes, less likely to be pre-decisional.
 - c) Does the document serve to explain positions that the Board has taken or decisions that the Board has made?
 - i) If yes, less likely to be pre-decisional.

- 2) Is the document DELIBERATIVE?

¹Under the Exemption 5 “deliberative process” doctrine, the relevant portions of the worksheet will have to be disclosed if the Review Board specifically decides that they will follow up on certain leads listed in the worksheet. See Sterling Drug v. FTC, 450 F.2d at 708. In other words, once the “pre-decisional” worksheet becomes a basis for an actual decision, it is no longer part of the “deliberative process.” Materials containing attorney work-product, on the other hand, remain within the scope of Exemption 5 even if they serve as the basis for a final decision by the Board. Exxon Corporation v. F.T.C., 476 F. Supp. 713 (D.D.C. 1979).

b. Impact on Agency Decisionmaking

If “disclosure of the document would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions,” the document is deliberative, even if it contains factual materials. Formaldehyde Inst. v. HHS, 889 F.2d at 1122.

The first set of experts conference documents are pre-conference documents regarding staff selection of conference participants and topics for discussion. These documents overwhelmingly consist of staff opinions and recommendations about which experts and what discussions would be most useful in terms of identifying and locating assassination records.

As described above, the worksheet distills comments from the conference into a coherent list and then categorizes the range of suggestions into an agency by agency view. The distilling that Kevin and I did with the list is exactly the type of deliberative process that the courts contemplate under Exemption 5. In Montrose Chemical Corp. v. Train, 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 deliberative process. 491 F.2d at 71. The very act of distilling the testimony, of separating the significant facts from the insignificant facts, constituted an exercise of judgment by agency personnel. Id. at 68. Such “selective” facts are therefore entitled to the same protection as that afforded to purely deliberative materials, as their release would “permit indirect inquiry into the mental processes,” and so “expose” predecisional agency deliberations. Williams v. United States Dep’t of Justice, 556 F. Supp. at 65, Meada Data Cent., Inc. v. United States Dep’t of the Air Force, 566 F.2d at 256, Lead Indus. Ass’n v. OSHA, 610 F.2d at 85 (disclosing factual segments of summaries would reveal deliberative process by “demonstrating which facts in the massive rule-making record were considered significant to the decisionmaker”)

In the Formaldehyde Inst. case, the D.C. Circuit looked at the agency’s statutory mandate and then examined how the agency used particular materials to fulfill its statutory mandate. The court questioned whether release of the information in question would inhibit the agency’s ability to make decisions in the future. 889 F.2d at 1124-1125. Likewise, in Wu v. National Endowment for Humanities, 460 F.2d at 1033, scholarly Opinions and other subjective products are not factual. Wu v. National Endowment for Humanities, 460 F.2d at 1033; Formaldehyde Inst. v. HHS, 889 F.2d at 1122.