MEMORANDUM

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ATTORNEY-CLIENT
PRIVILEGED and CONFIDENTIAL

To: Laura Denk, Esq.

From: Delaney M. DiStefano

Subject: Freedom of Information Act, Exemption 5: The Deliberative Process Privilege

I. SUMMARY

The Freedom of Information Act, 5 U.S.C. § 552(b)(5) (Exemption 5) (FOIA), also known as the deliberative process privilege, is the focus of this memorandum. The purpose of Exemption 5, generally, is to preserve the frank and candid discussions within an agency. The courts have fashioned a test to apply Exemption 5 in each case. Although, the two parts of the test tend to merge, courts continually hold that a document must be both predicisional and part of the deliberative process to be exempt. The courts named many factors are involved in weighing the applicability of the exemption in each case. For predicisional documents several of the factors taken into consideration are (1) the function and significance of the document, such as whether the document is part of an agencies working law, (2) the position of the person who drafted the document, and (3) whether that person has decision making power.

The factors taken into consideration to determine if the document is deliberative are (1) to determine whether the document is factual or if it is an expression of an opinion. Facts easily excised from a document without revealing a deliberative process are not exempt, however, facts that are inextricably intertwined with exempt material, are exempt. Summaries of factual information may be exempt if they are used by a decision maker in making his or her decision, but not exempt if the summary was just a compilation of facts. To further determine whether a document is deliberative one must, (2) examine the context in which the document is used and, (3) determine whether disclosure of the document would diminish the candor in an agency.

Finally, the Attorney General issued a general memoranda stating that the Department of Justice will apply a "forseable harm" standard to all FOIA cases. Agencies are directed to disclose all documents unless to do so would harm an interest protected by an exemption. Therefore, there must be a marriage between the court fashioned standard for Exemption 5 and the Attorney General's

standard of "foreseeble harm."

I. RELEVANT STATUTORY SECTION

This section does not apply to matters that are - - . . .

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]

III. DISCUSSION

Congress intended the FOIA to make available to the public agency rules, opinions, orders, records and proceedings to ensure that the agency was not generating any "secret laws." [2] The courts have interpreted the FOIA to be "construed broadly to provide information to the public in accordance with its purposes, for the same reason, the exemptions from production are to be construed narrowly."[3]

A. Exemption 5

Exemption 5 has the same scope as civil discovery in the relevant statutory and case law context. The courts interpret it to protect those documents that would normally be discoverable in hypothetical litigation between an agency and a public entity requesting the document. Therefore, not only does Exemption 5 cover the deliberative process privilege described herein, it covers the attorney work product privilege as well.[4]

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[1]The Freedom of Information Act 5 U.S.C § 552(b)(5) [hereinafter Exemption 5].

[2] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 687 (D.C. Cir. 1980).

[3]Ethyl Corp. v. EPA, 25 F.3d 1241, 1245 (4th Cir. 1994).

[4]NLRB, Roebuck & Co., 431 U.S. 132, 149 (1975); United States v. Weber Aircraft Co., 465 U.S. 790, 799 (1984).

The courts iinterpretExemption 5 to preserve the frank and candid discussions within an agency and to protect the process by which agencies formulate policy.[5] The Senate reasoned that agencies should not be forced to operate in a "fish bowl."[6] The Supreme Court has recognized that the quality of decisions would be lessened if agency writings and discussions were made public.[7] As stated in United States v. Nixon, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decision making process."[8]

Sharing documents and communications with other agencies would not forfeit exemption status because of the inter-agency and intra-agency language of the statute. The courts also extended the Exemption 5 privilege to encompass an agency's communications with outside consultants, so long as the communications remain part of an agency's deliberative process. [9] Please refer to Laura Denk's memoranda dated June 21, 1995 for further discussion of the outside consultant issue.

Not all communications sent to Congress are exempt. A 1990 D.C. Circuit opinion has held that Congress was not an agency for purposes of the FOIA. If an agency sends documents to Congress, with the intention of a congressional inquiry, those documents loose their Exemption 5 status, if the documents are also no longer part of an agency's deliberative process.[10] In Dow Jones & Co., the Department of Justice sent a letter to the House Ethics Committee detailing an investigation of a Congressman. The Court held that the Department of Justice ended its deliberations and decided not to prosecute, before the letter was drafted and sent to Congress. Therefore, the letter did not have the Exemption 5 privilege because (1) the Department of Justice's deliberative process had ended, and (2) Congress was not an agency.[11]

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[5]NLRB v. Sears, 431 U.S. 132, 150 (1975); Petroleum Inf. Corp. v. Department of the Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992).

[6]S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[7]NLRB v. Sears, 431 U.S. at 150-51.

[8]United States v. Nixon, 418 U.S. 689, 705 (1971).

[9]See, Formaldehyde Institute v. Department of Health and Human Serv., 889 F.2d 1118 (D.C. Cir. 1989).

[10]Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir 1990).

[11]Id. at 575.

However, if Congress were acting in a role similar to that of an outside consultant, documents transmitted to Congress would not forfeit their exempt status. In Ryan v. Department of Justice,[12] the Department of Justice was interested in determining how Senators selected potential nominations to the Federal Courts. The Department of Justice sent a questionnaire to each Senator. The results of the questionnaire were the subject of a FOIA request, but the D.C. Circuit held that the questionnaire was part of the Department of Justice's deliberative process and Congress was acting in a role similar to an outside consultant, thus, the questionnaire fell under Exemption 5.[13]

The D.C. Circuit in Jordan v. Department of Justice, lists three purposes behind the deliberative process privilege. First, it,

> protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials would be judged by what they decided, not for matters they considered before making up their minds.[14]

The burden is on an agency to demonstrate that the documents requested fall within the exemption. An example of when a court found that an agency did not carry its burden was in Ethyl Corp..[15] The Court vacated a summary judgment in favor of the EPA because it found that the EPA did not carry its burden to demonstrate that the documents were exempt. The Court found that the EPA's Vaughn index, a device used by an agency to describe the contents of the documents in question, was insufficient. Merely listing the existence of summaries, and charts of the results of testing, without reference to a deliberative process, was not enough satisfy the Exemption 5 requirement. The D.C. Circuit further admonished the EPA for failing to identify the persons who sent or received the documents or communications.[16] The Court found it, "difficult, if not impossible, to perceive how the disclosure of such documents would result in a chilling effect upon the open and frank exchange of

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[12]517 F.2d 781 (D.C. Cir. 1980).

[13]Id. at 789; Dow Jones & Co., 917 F.2d at 575.

[14]Id. at 772-73 (citations omitted).

[15]25 F.3d at 1241.

[16]Id. at 1249-50.

opinions within the agency."[17]

1. Two Part Test: Predecisional and Deliberative Process

[17] Id. at 1250.

The early cases involving Exemption 5 devised a two part test to determine if a particular document was exempt. Each document had to be predecisional and part of the deliberative process. If either of the two failed the document was not subject to exemption.[18]

a. Aspects of Predecisional Documents

Exemption 5 does not apply to postdecisional documents. Postdecisional documents tend to explain policy and positions the agency has taken on an issue. They are considered the working law of the agency, and include communications that implement a policy of the agency and "final opinions that have the force of law or which explain actions that an agency has already taken" The reasoning behind disclosure of postdecisional documents and communications is that it is unlikely that the quality of decision making will be affected by disclosure after an agency has already made a decision.[19] There seem to be three different levels of decision making at the ARRB, (1) staff decisions, (2) senior staff decisions, (3) Board decisions. The FOIA Exemption 5 for predecisional work remains intact. Disclosing of predecisional documents would result in worse decisions by an agency. Thus, the final decisions of the Review Board, the senior staff and the staff, as well as their reasons for making those decisions (if any opinion was ever written), would be disclosed under the FOIA.

Predecisional documents are ones that represent agency "give and take" and are exempt. They are,

> prepared in order to assist an agency decision maker in arriving at his decision, and may include recommendations, draft document, proposals, suggestions and other subjective documents, which reflect the personal opinions of the writer rather than the policy of the agency.[20]

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[18] Formaldehyde Institute v. Health and Human Services, 889 F.2d 1118, 1121-22 (D.C. Cir. 1989).

[19] 421 U.S. at 151.

[20] Formaldehyde Institute, 889 F.2d at 1121 (citations omitted).

Generally, documents created before the final decision is made are exempt, even if those documents were used in making the final decision.[21] Those documents that assist in the making of the final decision tend to be the opinion of the person submitting them to the final decision maker and "must remain uninhibited and thus undisclosed, in order to supply maximum assistance."[22] In Renegotiation Board,[23] the FOIA request made by Grumman Aircraft asked for the Regional Board Reports which concerned whether a government contractor made excessive profits. The Supreme Court denied disclosure to Grumman Aircraft of the Regional Board and Division Reports, because only the full Board had the ability to make binding decisions.[24] The Supreme Court found that the Regional Board and Division Reports were exempt because they were predecisional documents and carried no legal weight.[25] Although the Division Reports were prepared by at least one member of the Board, and the conclusion may have been the same as that adopted by the Board, the reasoning of the Division Report was never adopted. The Supreme Court further held that there was no evidence to support the notion that the reasoning given in the Regional Board report was the reason the Board ultimately decided the way it did. Therefore, the Division Report remained predecisional.[26]

The D.C. Circuit has also held that the predecisional nature of a document allows exemption, even if that document was used in making the final decision. In Taxation with Representation,[27] although the Court ultimately required release of the IRS General Counsel's Memoranda (GCM), it stated that in the predecisional phases of the memoranda, such as when the GCM is being researched or finished and it had been forwarded to the Office of the Assistant Commissioner (Technical),[28] it was purely deliberative and predecisional. It was not until the GCM were adopted *and* released, by the Commissioner that they become final documents and not exempt.[29]

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[21] Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 186 (1975).

[22] Id. at 186.

[23] Id. at 168.

[24] Id. at 184.

[25] Id. at 181.

[26] Id. at 189; Taxation with Representation Fund v. Internal Revenue Service, 646 F.2d 666, 680 (DC. Cir. 1981).

[27] 646 F.2d at 666.

[28] Id. at 669.

[29] Id. at 682.

Applying the reasoning of Renegotiation Board to the ARRB documents and communications generated by the staff on postponements are examples of predecisional work and would pass the first part of the test. They have no binding authority, and are merely recommendations to the Review Board, ones which the Board are free to accept or reject.

I. Function and Significance of the Document

To determine whether a document is part of the working law of the agency or merely an opinion or recommendation, one must look to the function and significance of the document. Again, in Taxation with Representation Fund,[30] the D.C. Circuit found that the GCM were used by personnel for guidance on agency positions, and therefore, not exempt. Although, these memoranda were created to assist the Assistant Commissioner (Technical) on specific issues, they were also used by the agency as precedent and often cited. Thus, the Court decided the function of the memoranda were more of a "body of 'working law,'"[31] than an opinion or proposal.

Not all deliberative documents are predecisional. The D. C. Circuit also required disclosure of legal memoranda interpreting how agency regulations would be applied under specific facts. The Court held that the documents did not, "contain subjective, personal thoughts on a subject, . . . Nor . . .[did] they discuss the wisdom or merits of a particular agency policy, or recommended new agency policy . . . rather, they simply explain[ed] and appli[ed] established policy."[32]

ii. The Relative Position of the Person Issuing the Document in Question

The D. C. Circuit also noted in Access Reports v. Department of Justice[33] that a key feature in determining whether a document is predecisional and deliberative is the relation between the author and recipients of the documents. "[A] document from a junior to senior is likely to reflect his or her own subjective opinions and will clearly have no binding effect on the recipient. By contrast, one moving from senior to junior is far more likely to manifest decision making authority and be the denouncement of the decision making rather than part of its give and take."[34] This is not a fool

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[30]646 F.2d at 666.

[31]Id. at 682.

[32]Coastal States Gas Corp., 617 F.2d at 869.

[33]826 F.2d 1192 (D.C. Cir. 1991).

proof test but merely used as guidance by some of the courts.

Applying this reasoning to the ARRB, if a senior staff member were to send a memo to the staff stating that, from now on, requests for documents from the FBI were to be done in a certain manner, this memo would not be exempt pursuant to Exemption 5. Thus, in this hypothetical scenario, the memo was a direction from a senior to a junior, implementing a decision that has been made and going to be part of the ARRB's working law. However, if a staff member were to write a memo to a senior staff member requesting that to facilitate obtaining documents from the FBI, a certain method should be used, the memo would be exempt pursuant to Exemption 5 because no decision had been made, the memo was only the opinion of a member of the staff and thus, is able to be protected.

iii. Other Aspects of Predecisional documents

[34] Id. at 1195.

Generally, the predecisional nature of a document is a defense against a FOIA request (assuming that the document was also deliberative). However, if the ARRB were to expressly adopt a written opinion of a staff member in whole or by reference in a final opinion, that predecisional document would lose its exempt status.[35] The Supreme Court noted that the documents adopted by reference would probably be factual and not exempt.[36] Thus, ARRB regulations that are adopted by the board, in full, would loose exempt status.

[35]NLRB v. Sears, 421 U.S. at 161; accord, Coastal States, 617 F.2d at 866 (holding a predecisional document "can lose that status if it is adopted formally, or informally, the agency's position on an issue or is used . . . in its dealings with the public."A formally adopted document is one that represents an agency's final opinion, where as an informally adopted document is one that is used by the agency, though not formally adopted, in its dealings with the public, and may be characterized as the secret law of an agency.) cf., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 558 (1st Cir. 1992) (holding an agency's failure to take action does not imply adoption of a predecisional document).

[36]NLRB v. Sears, 421 U.S. at 161 n.27.

The D.C. Circuit interpreted the term "final opinion" broadly. In, SafeCard Serv., Inc. v. Securities and Exchange Commission[37] the Court determined that the SEC did not meet its burden in demonstrating that the minutes of several meetings were predecisional. The Court stated that it needed to know whether "the document explain[ed], directly or by reference, the reason for the agency's decision."[38] The SEC argued that the minutes were not final opinions and therefore the incorporation principle did not apply. The Court found otherwise, holding that a final opinion was not an "exhaustive" term.[39] The Court further held that if,

> any portion of the minutes recounting a Commissioner's explanation of why he or she voted in a particular way could not be considered predecisional, any more than would that Commissioner's separate written opinion accompanying the agency's final order. Additionally, if, in explaining its collective decision, the commission expressly adopts or incorporates any element of a Commissioner's or a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as predecisional.[40]

The D.C. Circuit recently decided not to require that a final decision be "pinpointed," the purpose of the decision is to protect the decisional *process*, some "processes might not "ripen into agency decisions.'"[41] It stated in Access Reports, "any requirement of a specific decision after the creation of the document would defeat the purpose of the exemption".[42] The Supreme Court, in NLRB v. Sears,[43] also noted that a specific decision need not be identified. "Our emphasis on the need to protect predecisional 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."[44]

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[37]926 F.2d 1197 (D.C. Cir. 1991).

[38]Id. at 1204.

[39]Id..

[40]Id. at 1205.

[41]Access Reports, 926 F.2d at 1196, quoting NLRB v. Sears, 421 U.S. at 151 n.18.

[42] 926 F.2d at 1196. But see, Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (holding that for an exemption to be predecisional the agency must be able to pinpoint a decision).

[43]421 U.S. at 131.

[44]Id. at 53 n.18.

Therefore, if a specific line of research turns up a dead end, and nothing was brought to the Board, any documents generated continue to be exempt even though no final decision resulted.

iv. Brief Summary of Points

- If the documents explain agency policy then they are more likely to be post decisional.
- Predecisional documents assist a decision maker in making a decision.
- Predecisional documents tend to be recommendations.
- Predecisional documents tend to be drafts, proposals or suggestions.
- Predecisional documents tend to represent opinions of the writer and not the agency.
- Predecisional documents tend to have been written before the decision was made.
- Look to the function and significance of the document. If a document is used for guidance by an agency staff or is cited to in other documents for precedence, then it is likely ***not*** to be predecisional.
- Documents drafted by senior staff are ***not*** likely to be predecisional.
- Documents adopted into agency policy, expressly or by reference, are ***not*** likely to be predecisional.

b. Documents that are Part of the Deliberative Process and the Fact/Opinion Distinction

Originally, the courts drew a distinction between deliberative material and the factual material. Purely factual material was not exempt because the release of factual material would not adversely effect the decision making process which Exemption 5 was designed to protect. Deliberative material, on the other hand, was exempt, because it would reveal the decision maker's thoughts and mental processes. Directions to the staff to conduct an investigation were held to be the very beginning of the deliberative process.[45]

i. The Fact/Opinion Distinction

Because factual material was not exempt, courts required disclosure of that material. If factual material was contained in an otherwise exempt document, but it was severable from the exempt portion of the document, it was ordered disclosed after the document was redacted. If the factual material was inextricably intertwined with exempt material or that the factual material was so interspersed in the document as to be of no use, then the whole document was exempt from FOIA.[46]

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[45] United States v. J. B. Williams Co., Inc., 402 F. Supp. 796, 800 (S.D.N.Y. 1975).

[46] Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 260 (D.C.

Cir. 1977).

It was quickly realized that too rigid a standard could lead to absurd results. "[T]he release of materials plausibly labeled 'factual' . . . [would] occasionally reveal much about that process."[47] Exemption 5 was created not to protect deliberative documents but the deliberative *process* within the agencies.[48]

a. Inextricably Intertwined Facts

Inextricably intertwined facts tend to be material if revealed, the facts would expose the deliberative process underneath, such as the relative importance of the facts. Inextricably intertwined also describes instances where the factual material is not reasonably segregable.[49] For example in Quarles v. Department of the Navy,[50] the facts were inextricably intertwined and to reveal them would have revealed the deliberative process underneath. The documents generated by the Navy, in this case, attempting to search for battleship ports, were held exempt. A newspaper reporter sought to obtain the cost estimate report prepared by the Navy. The Court held that the numbers were not just facts, fixed in time, but were "derive[d] from a complex set of judgments- projecting needs, studying prior endeavors and assessing possible suppliers."[51]

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[47] Dudman Communications v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

[48] Id. at 1567.

[49] Id. at 260-61 (Department of the Air Force asserted that the factual material was not reasonably segregable from the exempt portion of the document).

[50] 839 F.2d 390 (D.C. Cir. 1990).

[51] Id. at 392-93; see also, Russell v. Department of the Air Force 682 F.2 1045 (D.C. Cir. 1982) (by disclosing the draft, which facts were edited out, would reveal the deliberative process of the editor); Lead Indus. Assoc. Inc v. Occupational Safety and Health Admin., 610 F.2d 70, 85 (2nd Cir. 1979) (the factual material was inextricably intertwined, to disclose the information would reveal which facts were considered significant).

The First Circuit found in Providence Journal Co. v. United States Dep't of the Army,[52] that the findings of fact in an investigation of officers in the Rhode Island Army National Guard were exempt, not because they were a summary of facts, but because the findings of fact in the report were inextricably intertwined with exempt material. The facts were "premised on an assessment and resolution of the relative credibility of . . . [the] statements, as well as subjective judgments as to the probity of other evidence developed during the investigation."[53]

Applying this reasoning to the AARB, if a FOIA request were to come in asking for information on the number of comments received in response to the proposed agency regulations appearing in the Federal Register, and a memo was written with this information in it, but it also contained opinions as to the quality of those comments, this information would probably not be inextricably intertwined with the opinion material that it could not be taken out and released.

b. Summaries in the Fact/Opinion Distinction

A summary may fall within Exemption 5 if the facts chosen would themselves disclose the deliberative process of a decision maker. A summary may fall outside Exemption 5 if it was a mere compilation of facts. In Lead Industries Ass'n v. OSHA[54] the Second Circuit found that the reports generated by the outside consultants in assisting to make a new lead standard were not only summaries of factual material, but also analysis as well.[55] The factual material could be severable but, "[d]isclosing factual material segments from the . . . summaries would reveal the deliberative process of summarization itself by demonstrating which facts in the massive rule-making record were considered significant by the decision maker."[56]

The Court in Montrose Chemical Corp of California v. Train,[57] similarly held that the staff summary of a hearing for the Administrator of the EPA was exempt because (1), the facts were all in the public record, (2), sifting through the facts to pick out relevant ones was part of the deliberative process, and (3), disclosure would allow for inquiry into the Administrator's deliberative processes because he

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[52]981 F.2d 552 (1st Cir. 1992).

[53]Id. at 562.

[54]Lead Indus. Assoc. Inc., 610 F.2d at 70.

[55]Id. at 83.

[56]Id. at 85.

[57]491 F.2d 63 (D.C. Cir. 1973).

would rely on the summary to make his decision.[58]

[58] Id. at 71.

However, if the summary is merely a compilation of factual information and no decision will be based on the representations made in that summary then it is unlikely that it will fall under Exemption 5. In Playboy v. Department of Justice,[59] the District of Columbia Circuit held that the summary of facts contained in a report, named the Rowe Report, was distinguishable from Montrose. The Rowe Report was a summary of an investigation of an FBI informant who had been involved in violence surrounding the Selma Freedom March. The report was turned over to Senator Kennedy.[60] While in Montrose, disclosure would "have permitted inquire into the mental Processes of the Administrator . . . The Rowe Report, on the other hand was prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress."[61]

1. Brief Summary of Points

- Are the facts reasonably segregable?
- Are the facts meaningless with out the deliberative material contained in the document?
- Would revealing the facts reveal the deliberative process underneath? Example, revealing the factual answers to questions also reveal the questions asked, which are deliberative in nature.
- Are the facts merely a compilation of facts or statements, or will a decision be based on the representations made in the summary?

ii. More Recent Developments in the Fact/Opinion Distinction

[59] 677 F.2d 931 (D.C. Cir. 1982).

[60] Id. at 933.

[61] Id. at 936 (allowing conclusions in the Rowe Report which were severable to be redacted).

Recently, the courts have acknowledged that predecisional and deliberative process merge into one and have taken a more functional approach. As stated in Access Reports,[62] "the 'deliberative' and 'predecisional' tend to merge. Both terms have come to apply only to documents that contribute to an on going deliberative process within an agency."[63] In essence, they represent the give and take of an agency's deliberation. The Court in Access Reports theorized that the fact/opinion distinction was an outgrowth of the deliberative process.[64]

This movement was further solidified by the decision in Petroleum Inf. Corp.,[65] written by now Justice Ruth Bader Ginsburg. She stated that the first step to determine if a document qualifies as deliberative was to examine the context in which the materials. . . [were] used."[66] This step is the fact/opinion distinction reincarnated *but* it recognized that factual material may reveal the deliberative process.

Courts tend to hold drafts of official histories exempt, even where the material edited was purely factual, because it would reveal editorial changes and "stifle the creative thinking and candid exchange of ideas necessary to produce good historical work."[67] Another reason why drafts are exempt is because, as drafts, they are opinions of the writer, *not* of an agency. Disclosing portions of a draft manuscript may lead to public confusion. Exemption 5 is to protect against the possibility of a document read as an agency position when it is only a personal opinion.[68]

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[62]926 F.2d at 1192.

[63]Id. at 1195.

[64]Id. at 1195.

[65]976 F.2d at 129.

[66]Wolf v. Department of Health and Human Serv., 839 F.2d 768, 774 (D.C. Cir. 1988) (as cited in Petroleum Inf. Corp. v. United States Dep't of the Interior, 976 F.2 1429, 1434 (D.C. Cir. 1992); see also, Coastal States 617 F.2d at 868.

[67]Dudman Communications, 815 F.2d at 1569; Russell, 682 F.2d at, 1048 (1982).

Russell, 682 F.2d at 1048; see also, Coastal States Gas Corp., 617 F.2d at 866 ; Pfeiffer v. Central Intelligence Agency, 721 F. Supp. 337 (D.D.C. 1989).

This reasoning was extended to include those changes where the source of the edits are not identifiable.[69] In Dudman,[70] where the history went through several editorial stages. The Court stated that, even if there were numerous persons involved in the editorial process, and no one person could be singled out, there was a real danger that the editors, generally, could put pressure on the historians to "toe the party line."[71] The Court warned in dicta that an agency may not withhold facts by stating they are included in a draft document. Plaintiffs, in this case, were requesting a draft document, which contained the factual information they sought, not just the factual information itself. In such a case where the factual information was contained in a draft document and the FOIA request asked for the factual information exclusively, the agency could "excise" the material from the document, and release the information without revealing the source of the material, and thus, protect the deliberative process.[72]

In Wolf,[73] the Court, to determine what could be revealed, looked beyond the factual material to examine the context in which the factual material was used. The plaintiff sought log records of what actions had been completed by the FDA, and awaited approval by the Secretary of HHS or the OMB. By looking at this log one could track a proposal through the FDA, to the HHS and finally the OMB.[74] Despite it being a log of dates and to whom the recommended regulations were sent (purely factual information), the D.C. Circuit held the document exempt because the record would reveal the outcome of the proposals prematurely and "the source of any decision not to regulate."[75]

The next step, to determine if a document was part of the deliberative process, is that the "materials must bear on the formulation or exercise of agency policy oriented judgement."[76] If a document was just a restatement of fact or policy, then the document is not likely to be deliberative. As mentioned above, in Playboy Enter., the Row Report was ordered disclosed because there was no

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[69] Dudman Communications, 815 F.2 at 1569.

[70] Id. at 1565.

[71] Id. at 1569.

[72] Id. at 1569.

[73] 839 F.2 at 768.

[74] Id. at 771.

[75] 839 F.2 at 775.

[76] Petroleum Inf. Corp, 976 F.2 at 1434.

policy formulation involved, it was purely factual investigative material gathered to give a report to Congress.[77]

[77] 677 F.2 at 1435.

Finally, the key question was whether "disclosure would tend to diminish candor within an agency."[78] Material that are factual and don't involve an agency opinion are unlikely to diminish candor in an agency as well as disclosure of information what is already public. Bader Ginsburg in Petroleum Inf. Corp.,[79] found that the Legal Land Description (LLD) file not exempt.[80] The LLD was an incomplete computer record of public lands which the Department of the Interior was converting to a computer data base from available public record books. Although the Bureau of Land Management argued that the LLD was part of the deliberative process, it was incomplete, it had errors, and disclosure would confuse the public, Bader Ginsburg found the LLD not exempt because the LLD file came from documents already publicly available, it lacked an "association with a significant policy decision,"[81] and there was no deliberative process involved. The purpose in this case was not to "select and edit as to reorganize and repackage a mass of dispersed public information."[82] She also found little merit in the argument of public confusion as a rationale for the privilege. "This rationale has special force with respect to disclosures of agency positions or reasoning concerned *proposed policies*. The rationale, however, does not support a blanket exemption for information marred by errors, particularly when the information is in large part already public."[83]

a. Brief Summary of Points

- Examine the context in which the documents were used.
- Are documents a restatement of fact or policy or are they opinions? If fact or policy then, then the documents are probably not deliberative.
- Would disclosure diminish the candor in the agency? If no then, the documents are probably not deliberative.

B. Tension Between Court Interpretation and Attorney General's Guidelines

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[78] Petroleum Inf. Corp., 976 F.2 at 1435; Dudman Communications, 815 F.2 at 1568.

[79] Petroleum Inf. Corp., 976 F.2 at 1429.

[80] Id. at 1431.

[81] Id. at 1437.

[82] Id. at 1438.

[83] Id. at 1436, n.10 (citations omitted).

Attorney Janet Reno, in her memorandum on the Freedom of Information Act, reaffirmed the principle behind the FOIA as openness.[84] She stated that the Department of Justice will "apply a presumption of disclosure."[85] The Department of Justice will "no longer defend an agency's withholding of information merely because there is a substantial legal basis for doing so."[86] She goes on to state,

> in short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that inclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.[87]

This 'foreseeable harm' standard is to be applied on a case by case bases. Even where a document may be exempt based on case law, the foreseeable harm standard must then be applied. The Spring 1994 Office of information and Privacy Guidance on Foreseeable Harm Standard for Exemption 5 lists a number of factors to be taken into consideration. They are as fallows,

> •The nature of the decision involved--Some agency decisions are highly sensitive and perhaps even controversial; most of them are far less so.
> •The nature of the decision making process--Some agency decision making processes require total candor and confidentiality; many others are not nearly so dependent.
> •The status of the decision--If the decision is not yet made, then there is a far greater likelihood of harm from disclosure; conversely, with decisions already made there is far less likelihood.
> •The status of the personnel involved--Are the same agency employees, or other employees who are similarly situated, likely to be affected by the disclosure?
> •The potential for process impairment--How much room is there for actual diminishment of deliberative quality if the personnel involved do feel inhibited by potential disclosure?

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[84]Attorney General's Memorandum Freedom of Information Act October 4, 1993 IV FOIA Guidance (Access Reports) 600-2.

[85]Id..

[86]Id. at 600-2 (internal quotation omitted).

[87]Id. at 600-2.

- **The significance of any process impairment**--In some cases, an anticipated "chilling effect" on the agency's decision making process might be so minimal as to be practically negligible.
- **The age of the information**--While there is no universally applicable age-based litmus test, the sensitivity of all information fades with the passage of time.
- **The sensitivity of individual record portions**--Apart from any other factor or consideration, FOIA officers ultimately must focus on the individual sensitivity of each item of information.[88]

An example where the foreseeable harm standard may be used at the ARRB was the determination of how much to compensate each expert at the Expert's Conference. The "debate" back and forth between staff members on e-mail, would most likely be considered, under the case law, deliberative and predecisional and therefore, fall under Exemption 5. The communications occurred before the final decision was made, and disclosing the communications would reveal the opinion and the reasons behind the opinion of those staff members involved.

However, a decision of this nature would probably fail the foreseeable harm standard determined by the Attorney General and would have to be disclosed. The decision of how much to pay the experts was not highly sensitive or controversial. The decision has already been made. Disclosure of the communications would probably not be harmful to those staff members whose opinions were revealed, nor would it lesson candor in the future for similar decisions.

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[88]Office of Information and Privacy Guidance on Foreseeable Harm Standard for Exemption 5, IV FOIA Guidance (Access Reports) 620-1,620-2 (internal citations and quotations omitted).