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**Deliberative Process
Privilege**

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ISSUE

What are the parameters of the deliberative process or executive privilege?¹

CONCLUSION

The deliberative process privilege applies to internal communications made within the executive branch with the expectation of confidentiality. Since the privilege is qualified, the court must weigh the government's need for confidentiality against the litigant's need for production. The type of communications that may be covered by the privilege include advisory opinions, deliberations, recommendations, draft documents, proposals, suggestions, and other pre-decisional communications which are part of the policy-making process. Communications not protected by the privilege include purely factual observations; final, designated, formal or binding opinions; statements of policy; interpretations to staff; or anything else that constitutes the "working law" of the agency and affects the public.

The deliberative process privilege is waived if the communication is revealed to the public. To claim the qualified privilege, strict procedural requirements must be met.

DISCUSSION

I. Why Have Courts Created a Deliberative Process

¹ Courts also refer to this privilege as the "governmental", Pies v. U.S. Internal Revenue Serv., 668 F.2d 1350, 1351 (D.C. Cir. 1981), or "official information" privilege. Martinelli v. Dist. Court, 612 P.2d 1083, 1086 (Co. 1980).

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Privilege?

A privilege for executive branch communications reflects judicial acknowledgement of the separation of powers doctrine and the need to protect the decision-making process. U.S. v. Nixon, 418 U.S. 683 (1974).

Human experience teaches those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.

Id. at 705. The privilege ensures that subordinates feel free to give a decision maker their uninhibited opinion. Coastal States Gas Co. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). It also prevents disclosure of any communication that might prematurely disclose or inaccurately reflect agency views. Id.

II. What Are the Parameters of the Privilege?

A. Executive Branch

The privilege purports to cover internal communications within the executive branch at the federal, and state level. Nixon; Doe v. Alaska Superior Court, 721 P.2d 617 (Alaska 1986).

The extent of the privilege may depend on the position of the executive official who makes the communication. Communications of the chief executive may be privileged even though they do not meet other criteria. Nixon, 418 U.S. at 707 (presidential communications presumptively privileged regardless of whether they involve deliberation); Hamilton v. Verdow, 414 A.2d 914, 921 (Md. App. 1980) (governor entitled to same privileges and exemptions as president).

B. Types of Communications

To determine whether a privilege should be granted, a court considers "the agency's decision making mechanisms and the document's significance within that structure." Murphy v. T.V.A., 571 F. Supp. 502, 505 (D.C. Cir. 1983). For example, general counsel memoranda to the National Labor Relations Board

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directing the filing of a complaint was privileged because it initiated formal adjudication. However, general counsel memoranda concluding that no complaint should be filed was not privileged because it was unreviewable and thus a final action. Taxation With Representation Fund v. I.R.S., 646 F.2d 666 (D.C. Cir. 1981) (discussing N.L.R.B. v. Sears, 421 U.S. 132, 138 (1975)).

The direction in which a communication is made may be relevant. Information passed from a subordinate to a superior is more likely to be advisory, while communication from a superior to a subordinate suggests interpretation of standing policy. Taxation With Representation Fund at 680.

1. Privileged: Opinions, Recommendations, and Deliberations

The deliberative process privilege extends to communications made in the process of policy-making. Ethyl Corp. v. E.P.A., 478 F.2d 47, 52 (4th Cir. 1973). In the context of Freedom of Information Act litigation, the privilege is embodied in Exemption 5 and applies to documents that are "predecisional" and "deliberative."² 5 U.S.C.A. • 552 (1977 and Supp. 1993). "Predecisional" communications are those made before a policy is adopted, Coastal States Gas Co., 617 F.2d at 866, while "deliberative" documents reflect "the give-and-take of the consultative process." Id.

The type of communications covered by the privilege

² Congress patterned Exemption 5 after the executive privilege when it enacted the F.O.I.A. provision. Sears at 150. Judicial development of the Exemption has continued along the same lines as the common law privilege. Id. However some courts note that

[t]he discovery standard can only serve as a "rough guide" to the courts since decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved.

Coastal States Gas Co., 617 F.2d at 862 (citations omitted).

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includes "suggestions or recommendations as to what agency policy should be"; "suggested dispositions of a case"; "one step of an established adjudicatory process, [leading to] a formal opinion"; and "subjective or personal" opinions. Coastal States Gas Co. at 868. "Deliberative" documents also include intra-agency memoranda containing staff evaluations, recommendations, proposals, and suggestions regarding a settlement process. Murphy at 505.

In summary, the privilege protects internal communications "which reflect advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are formulated." Dowd v. Calabrese, 101 F.R.D. 427, 430 (D.C. Cir. 1984).

2. Not Privileged: Factual Observations and Working Law

Contrasted to the advisory opinions and predecisional deliberations discussed above, courts have held that factual observations and final expressions of policy are not privileged.

Generally, factual material that stands alone or that can be severed from its deliberative context is available for discovery. Ethyl Corp., 478 F.2d at 50. However, courts have recognized that some factual material is entitled to protection, although not to the same extent as opinions and recommendations. Protection may be granted facts obtained upon a promise or understanding of confidentiality, "investigative facts underlying and intertwined with opinions and advice," or "facts the disclosure of which would impinge on the deliberative process." Hamilton v. Verdow, 414 A.2d 914 (Md. App. 1980).

Communications regarding established policy are not privileged. As the D.C. circuit court noted, a "strong theme" in judicial opinions has been that

an agency will not be permitted to develop a body of "secret law," used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as "formal,"

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"binding," or "final."

Coastal States Gas Co. at 867. As a result, courts will not recognize a privilege for "statements of policy or final opinions that have the force of law, or which explain [or implement] actions that an agency has already taken." Taxation With Representation Fund, 646 F.2d at 677. The court will require the agency "to disclose orders and interpretations which it actually applies in cases before it." Id. at 679. Even a predecisional document will not be protected if it is "subsequently 'adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public.'" Murphy v. T.V.A., 571 F. Supp. at 505.

III. How is the Privileged Waived?

An executive official waives the privilege by revealing, or permitting to be revealed, a specific communication. Once revealed, the privilege no longer protects "that same information from use or disclosure to the same or a similarly situated party who will use the information for the same purpose." Hamilton; 414 A.2 at 919.

In a case where an employee "was directed by Commission counsel not to answer 17 questions on the ground that executive privilege attached to the subject matter sought to be disclosed by plaintiff's deposition questions," the court held that

the Commission would be deemed to have waived the privilege with respect to two specific questions by allowing the witness to respond to prior questions in which the substance of the witness' advisory communications were divulged.

Smith v. F.T.C., 403 F. Supp. 1000, 1019 (D. Del. 1975).

IV. What is the Proper Procedure to Claim the Deliberative Process Privilege?

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An executive official claiming the deliberative process privilege "must satisfy strict procedural requirements." Doe v. Alaska Superior Court, 721 P.2d at 626. First, the party asserting the privilege must make a formal claim. Hamilton, 414 F. 2d at 926. That claim, usually in the form of an affidavit, must be made by the head of the applicable agency after actual personal consideration of the documents. Smith, 403 F. Supp. at 1016. The affidavit must specifically describe the documents and must provide "'precise and certain reasons for preserving' the confidentiality of the government communications." Id.

Once the privilege is properly invoked, the burden falls on the party seeking production to make a preliminary showing that the documents are not privileged or that the need for production outweighs the interest in confidentiality. Hamilton at 926; Doe at 626.

If the showing is sufficient, the court will grant in camera review. In the course of that review, the court will determine if the material is privileged, if privileged material can be severed from nonprivileged, and if the government's need for confidentiality outweighs the litigant's need for production. Hamilton at 926.

The deliberative process privilege is not absolute. The court must strike a balance between the "public interest in nondisclosure" and the "need for the information as evidence." Dowd v. Calabrese, 101 F.R.D. at 431. Some of the factors that a court may consider when making this determination are "the relevance of the document, alternative means of proof, and the presence of allegations of governmental misconduct." Id. "A 'demonstrated, specific need' for material may prevail over a generalized assertion of privilege, but the claimant must make 'a showing of necessity sufficient to outweigh the adverse effects the production would engender.'" Black v. Sheraton Corp., 564 F.2d 531, 545 (D.C. Cir. 1977).

V. Conclusion

Generally, consideration of deliberative process privilege focusses on three elements. First, who is the executive official involved and what is the administrative process? Second, what is the function of the communication?

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Finally, does the general public interest in confidentiality outweigh a litigant's need for production?

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