EXHIBIT V

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 Procedural Requirements, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, above.)

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

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[1] 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[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 reading" 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).

[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 (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; 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).

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

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 account a party's need for the documents in ruling on a privilege's applicability.[12] This approach prevents the FOIA from

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[6] See U.S. 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.

[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.").

[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); 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. Liability 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

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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] Though the "most natural reading" of this language would seem to encompass only records generated by and internal to executive branch agencies,[17] 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,"[18] and that such expert advice can "play[] an integral function in the government's decision[making]."[19] Consistent with this analysis, courts have allowed agencies to protect

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[12](...continued)
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), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[17] See DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988); 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); Homick v. DOJ, No. C 98-00557, slip op. at 18 (N.D. Cal. Sept. 16, 2004) (holding that document exchanged between agency employee and private attorney does not qualify under threshold standard).

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

[19] 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,
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advice generated by a wide range of outside experts, regardless of whether these experts provided their assistance pursuant to a contract,[20] on a volunteer basis,[21] or in some other capacity,[22] creating what courts frequently refer to as the "consultant corollary" to the

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[19](...continued)
790 (D.C. Cir. 1980) ("Congress apparently did not intend 'inter-agency or intra-agency' to be rigidly exclusive terms."); Burt A. Braverman & Francis J. Chetwynd, Information Law: Freedom of Information, Privacy, Open Meetings, and Other Access Laws § 9-3.1 (1985 & Supp. 1990).

[20] 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); 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) (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).

[21] 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 advice 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).

[22] 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).

Exemption 5 threshold.[23] In these cases, courts have emphasized that the agencies sought this outside advice,[24] and that in providing their expertise, the consultants effectively functioned as agency employees,[25] 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).[26]

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.[27] Its ruling implicitly accepted (but did not directly rule on) the concept of the consultant corollary,[28] 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,"[29] but also were "seeking a Government benefit at the expense of other applicants."[30] Thus, records submitted to the agency by the Tribes, as "outside consultants," did not qualify for attorney work-product and deliberative process privilege protection in the case.[31]

In cases decided subsequent to Klamath, lower federal courts have differed in how

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[23] See, e.g., Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001); Nat'l Inst. of Military Justice, 512 F.3d at 682.

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

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

[26] 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), cert. denied, 129 S. Ct. 775 (2008).

[27] 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).

[28] See Klamath, 523 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").

[29] Id. at 12.

[30] Id. at 12 n.4.

[31] Id. at 16.

strictly they have adhered to the two-part test elucidated by the Supreme Court. For example, in Physicians Committee for Responsible Medicine v. NIH,[32] 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.[33] In so ruling, the court referred to both of the aforementioned elements of the Klamath threshold test: 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.[34] This reading of Klamath was echoed by the District Court for the District of Columbia in Lardner v. DOJ,[35] 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."[36]

Conversely, in Merit Energy Co. v. United States Department of the Interior,[37] 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 advocating its own interests.[38] The court did not expressly address the second part of the Klamath test -- namely, whether the tribe was advocating its interests at the expense of other parties.[39]

Similarly, in Center for International Environmental Law v. Office of the United States Trade Representative,[40] the District Court for the District of Columbia refused to allow the United States Trade Representative to 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.[41] 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

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[32] 326 F. Supp. 2d 19 (D.D.C. 2004).

[33] See id. at 29-30.

[34] See id.

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

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

[37] 180 F. Supp. 2d 1184 (D. Colo. 2001).

[38] See id. at 1191.

[39] See id.; 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).

[40] 237 F. Supp. 2d 17 (D.D.C. 2002).

[41] See id. at 25-27.

interest in providing neutral advice"[42] -- and did not address the second component of the two-part test announced in Klamath.[43]

In line with those two district courts, in 2007 the District Court for the Central District of California relied only on the first part of the Klamath test in denying a threshold claim by an agency.[44] The court held that the threshold test was not met where the agency could not show that its consultant was operating solely on the agency's behalf and not in any way advancing his own interests when the plaintiff had presented evidence that the consultant was acting in his capacity as representative of an organization with which he was affiliated.[45] This was enough to defeat the agency's consultant claim, and the court did not even consider whether the consultant had been in competition with other parties.[46] Finally, in another ruling in 2007 from the District Court for the District of Columbia, the court, in dicta, commented that it did "not agree that Klamath stands for the proposition that communications must definitely meet [both parts of the Supreme Court's test] to fall outside of Exemption 5's shield from disclosure."[47]

In the most recent significant decision on the consultant corollary principle, in a case where only the first part of the Klamath test was at issue, 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.[48] Instead, the court noted that the consultant was not seeking a government benefit (beyond the intellectual satisfaction of having his advice followed) and that he was functioning "akin to an agency employee."[49] 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.[50]

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[42] Id. at 27.

[43] See Klamath, 532 U.S. at 12 ("[T]he dispositive point is that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors.").

[44] See Natural Res. Def. Council v. DOD, No. 04-2062, slip op. at 9 (C.D. Cal. Aug. 13, 2007).

[45] See id.

[46] See id. (rejecting use of Exemption 5 because defendants could not establish that consultant had not acted with his own interests in mind when advising them).

[47] People for the Am. Way Found. v. U.S. Dep't of Education, 516 F. Supp. 2d 28, 37 (D.D.C. 2007); see also Judicial Watch v. Dep't of the Army, 435 F. Supp. 2d 81, 92 n.6 (D.D.C. 2006) (criticizing, in dicta, DOJ's explanation of Klamath's two-part test in favor of decision in Center for International Environmental Law).

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

[49] Id.

[50] Id.

While agencies often are the recipients of expert advice, they also occasionally provide it. In Dow Jones & Co. v. DOJ,[51] 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[52] (though the court also held that agencies may protect communications outside of an agency if they are "part and parcel of the agency's deliberative process"[53]).

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.[54] 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,[55] in spite of the fact that the President is not an "agency."[56] (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.[57] In reversing a lower court ruling, the D.C. Circuit recognized that the NEPDG did not qualify

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[51] 917 F.2d 571 (D.C. Cir. 1990).

[52] Id. at 574-75; 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").

[53] Dow Jones, 917 F.2d at 575.

[54] See Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1110 n.1 (D.C. Cir. 2008) (noting that Office of the President is not an "agency").

[55] See, e.g., Loving v. DOD, 550 F.3d 32, 37-38 (D.C. Cir. 2008); Judicial Watch, 365 F.3d at 1113; Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 81 (D.D.C. 2008); Citizens for Responsibility & Ethics in Wash. v. DHS, No. 06-0173, 2008 WL 2872183, at *2 (D.D.C. July 22, 2008); Citizens for Responsibility & Ethics in Wash., 514 F. Supp. 2d at 42; Berman v. CIA, 378 F. Supp. 2d 1209, 1219-20 (E.D. Cal. 2005), aff'd on other grounds, 501 F.3d 1136 (9th Cir. 2007).

[56] 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").

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

as an agency as defined by the FOIA.[58] 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.[59]

This ruling is in line with the Supreme Court's 1973 decision in EPA v. Mink,[60] 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."[61]

Lastly, 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.[62] 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.[63]

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[58] See id. at 129.

[59] Id. at 130.

[60] 410 U.S. 74 (1973).

[61] 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).

[62] 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).

[63] See Citizens for Responsibility and 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 not disagreeing that such documents provided by state agency to federal agency could meet Exemption 5's threshold); 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); cf. United States v. Allsteel, Inc., No. 87-C-4638, 1988 WL 139361, at *2 (N.D. Ill. Dec. 21, 1988) (protecting
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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."[64] 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.[65]

Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies."[66] In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.[67]

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[63](...continued)
documents exchanged between federal and state co-regulators) (non-FOIA case).

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

[65] 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); 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 quotation marks omitted); Heggestad v. DOJ, 182 F. Supp. 2d 1, 12 (D.D.C. 2000) (protecting memoranda containing recommendations based on perjured testimony, finding that they "have no probative value to the public since they are based on misrepresentations"); 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, at *3 (1st Cir. May 18, 2000). But see ITT World Commc'ns, Inc. v. FCC, 699 F.2d 1219, 1237-38 (D.C. Cir. 1983) (dictum) (suggesting that otherwise exempt predecisional material "may" be ordered released so as to explain actual agency positions), rev'd on other grounds, 466 U.S. 463 (1984).

[66] Sears, 421 U.S. at 150; see also 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.").

[67] 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
(continued...)