Note

THE REASONABLE GOVERNMENT OFFICIAL TEST: A PROPOSAL FOR THE TREATMENT OF FACTUAL INFORMATION UNDER THE FEDERAL DELIBERATIVE PROCESS PRIVILEGE

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> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of . . . justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.[1]

The deliberative process privilege[2] protects the internal deliberations of officials in federal government agencies or other government entities.[3] The privilege, although a relatively recent addition to the

1. United States v. Nixon, 418 U.S. 683, 709 (1974).

2. The deliberative process privilege is variously known as the "advice privilege," *see* ADAM CARLYLE BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 155 (1974), the "agency policy deliberations privilege," *see* 1 MCCORMICK ON EVIDENCE § 108(a), at 400 (John William Strong ed., 4th ed. 1992), the "general deliberative privilege," *see* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 885-86 (1990), the "official information privilege," *see* Mark S. Wallace, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 142 (1976), the "predecisional privilege," *see* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980), the "privilege for intragovernmental communications," *see In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 580 (E.D.N.Y. 1979), and the privilege for "intragovernmental documents," *see* SCM Corp. v. United States, 473 F. Supp. 791, 797 (Cust. Ct. 1979). It is also occasionally referred to as the "executive privilege," undifferentiated from other executive privileges. *See, e.g.*, 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680, at 125 (1992). The term "deliberative process privilege," however, seems to be gaining acceptance among courts and commentators. *See id.*

3. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that "[t]he cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies'" (quoting Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972))).

collection of privileges[4] available to the federal executive branch,[5] has become one of the predominant governmental privileges exercised in federal courts.[6] During its short life, the deliberative process privilege has been asserted in a wide array of litigation involving governmental entities.[7]

Courts have extended the protection of the privilege to materials that are actually related to the process by which policies are formulated[8] and that, if disclosed, would "expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[9] Generally, factual material that can be separated from opinion is not exempt from discovery under the privilege.[10] Some courts, however, have extended the privilege's protection to facts that they believe, owing to the nature of the facts or the manner in which the facts were gathered or summarized, would expose the deliberative process of a government agency.[11]

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4. Other governmental privileges include privileges protecting presidential communications, state secrets, required reports, the identity of informers, and grand jury proceedings. *See generally* 1 MCCORMICK ON EVIDENCE, *supra* note 2, §§ 106-13, at 422-48 (5th ed. 1999) (discussing the various privileges held by the federal executive branch).

5. *See* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 279 (1989); Wetlaufer, *supra* note 2, at 845.

6. *See In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) (noting that the deliberative process privilege has become "[t]he most frequent form of executive privilege raised in the judicial arena").

7. *See* Weaver & Jones, *supra* note 5, at 279-80 (citing cases where the privilege was invoked in "such diverse matters as the Vietnam War, Agent Orange, police abuse, draft resisters, aircraft accidents, civil service dismissals, anti-competition proceedings, petroleum price controls, EPA lead control regulations, and customs service investigations").

A number of commentators have questioned the grounds for the existence of a deliberative process privilege. *See* 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131 (arguing that the privilege rests on a "puny" policy rationale); Wetlaufer, *supra* note 2, *passim* (arguing that the privilege should not exist); Arthur Piacenti, Note, *The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice?*, 12 REV. LITIG. 275, 283-92 (1992) (arguing that the privilege has the effect of thwarting justice rather than facilitating candid communication).

8. *See Sears*, 421 U.S. at 150.

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

10. *See* Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 854 (3d Cir. 1995); City of Virginia Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993); Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Playboy Enters., Inc. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982).

11. *See, e.g.*, Gomez v. City of Nashua, 126 F.R.D. 432, 436 (D.N.H. 1989) (exempting facts derived from "selective note-taking"); Zinker v. Doty, 637 F. Supp. 138, 140-41 (D. Conn. 1986) (same); Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982)

The extension of the deliberative process privilege to protect factual information from disclosure poses a number of serious problems both to parties litigating with the government and to the federal judiciary. Expanding the privilege to include factual information deprives litigants of access to information relevant to litigation with the federal government, a fundamental aspect of our adversary system.[12] Additionally, "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."[13] Enlarging the bounds of the privilege allows federal bureaucrats to shield from the judicial process factual data, the protection of which is unjustified by the theoretical underpinnings of the privilege.

This Note argues that the protection of factual material under the deliberative process privilege is an unnecessary and unwarranted extension of the privilege. Part I examines the origins and policy justifications for the privilege and discusses the substantive and procedural requirements necessary for successful invocation of the privilege. Part II examines the rationale applied by the courts in exempting factual information from disclosure under the privilege. Part III addresses the arguments in favor of exempting factual information from disclosure and concludes that, based on the stated justifications for the privilege and the procedural requirements already adopted by the courts, the protection of factual information by the deliberative process privilege is unwarranted. Part IV then proposes alternative measures for dealing with factual material, most notably the "reasonable government official test," which should be applied when the line between fact and opinion becomes blurred. This test would establish the proper boundaries of the privilege in accordance with its underlying rationale when the fact/opinion distinction breaks down.

I. ORIGINS, JUSTIFICATIONS, AND REQUIREMENTS

A. History of the Privilege

As noted above, the deliberative process privilege is a relatively new addition to the cadre of privileges available to the federal executive.[14] Although at least one court has referred to the privilege as

(exempting material collected in drafting histories of the use of herbicides during the Vietnam War).

12. *See* United States v. Nixon, 418 U.S. 683, 709 (1974).

13. *Id.*

14. *See* Weaver & Jones, *supra* note 5, at 279; Wetlaufer, *supra* note 2, at 845. The delib-

"well established by a long line of decisions,"[15] this characterization has been described as a "distortion of history."[16] Until fifty years ago, little support for a privilege protecting deliberations among government officials existed,[17] and, prior to 1958, the federal judiciary had not adopted the deliberative process privilege.[18]

The origin of the privilege can be traced to two main sources: decisions of the English courts and principles borrowed by President Eisenhower from his military leadership experience.[19] A privilege protecting communications between government officials was adopted as part of the "Crown privilege"[20] in two decisions by the English courts: the 1841 case of *Smith v. East India Co.*[21] and *Duncan v. Cammell Laird & Co.*,[22] decided over a century later.[23] Although

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erative process privilege is also available to state and municipal officials in federal courts, *see* A. v. Giuliani, No. 95 CIV. 10533 (RJW), 1998 WL 132810, at *7 (S.D.N.Y. Mar. 23, 1998) (holding that mayors' deliberations are privileged); *Gomez*, 126 F.R.D. at 435-46 (holding that the Attorney General's deliberations are privileged); Moorhead v. Lane, 125 F.R.D. 680, 684-86 (C.D. Ill. 1989) (holding that the deliberations of corrections officials are privileged); Burka v. New York City Transit Auth., 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (acknowledging that the deliberations of transit authority officials are privileged). Foreign government officials may also invoke the privilege in federal courts. *See* LNC Invs., Inc. v. Republic of Nicaragua, No. 96 Civ. 6360 JFK RLE, 1997 WL 729106, at *3 (S.D.N.Y. Nov. 21, 1997). Furthermore, the privilege has been adopted by a number of state courts. *See, e.g.*, Capital Info. Group v. Office of the Governor, 923 P.2d 29, 36-37 (Alaska 1996) (adopting the deliberative process privilege for state government officials); City of Colorado Springs v. White, 967 P.2d 1042, 1050 (Colo. 1998) (en banc) (same); McClain v. College Hosp., 492 A.2d 991, 997-98 (N.J. 1985) (same); Daily Gazette Co. v. West Virginia Dev. Office, 482 S.E.2d 180, 189-91 (W. Va. 1996) (same). *But see* District Att'y v. Flatley, 646 N.E.2d 127, 129 (Mass. 1995) (refusing to adopt the deliberative process privilege for Massachusetts officials).

15. Sprague Elec. Co. v. United States, 462 F. Supp. 966, 971 (Cust. Ct. 1978) (citing cases within the previous 10 years).

16. 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 125.

17. *See* William V. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 78 (1949) (observing a dearth of American authority to support a deliberative process privilege).

18. *See* Wetlaufer, *supra* note 2, at 858 ("Before 1958, the general deliberative privilege . . . had never been considered by the federal courts of the United States.").

19. *See id*. at 857.

20. The "Crown privilege," analogous to our executive privilege, protects communications regarding matters such as state secrets, parliamentary deliberations, etc. *See* JOHN HUXLEY BUZZARD ET AL., PHIPSON ON EVIDENCE § 14-04, at 273-75 (13th ed. 1982), *cited in* Weaver & Jones, *supra* note 5, at 283 n.24. The justification for the Crown privilege is "that national security and the public interest are paramount and must override the private interests of parties or accused persons despite any resultant prejudice which may be caused to them." *Crown or State Privilege*, 3 REV. INT'L COMM'N JURISTS 29, 29 (1969), *quoted in* Weaver & Jones, *supra* note 5, at 283 n.24.

21. 41 Eng. Rep. 550 (Ch. 1841).

22. 1942 App. Cas. 624 (H.L.).

Smith adopted a form of deliberative process privilege,[24] *Duncan* is more closely analogous to the federal state secrets privilege.[25] Indeed, four years later the United States Supreme Court in *United States v. Reynolds*[26] relied heavily on the rationale and procedures expressed in *Duncan* when articulating the federal state secrets privilege.[27]

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23. Shortly after the deliberative process privilege was adopted by U.S. federal courts, the House of Lords reversed itself and abandoned the privilege, finding its rationale to be implausible. *See* Conway v. Rimmer, 1 All E.R. 874 (H.L. 1968). In rejecting the privilege, Lord Morris wondered:

> Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated.

Id. at 891. Additionally, Lord Upjohn declared, "I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject . . . by the thought that his observations might one day see the light of day." *Id.* at 915.

24. In *Smith*, documents were sought relating to the communications between the East India Company and its government-appointed Board of Control. In concluding that a Crown privilege applied, the House of Lords offered this justification for the deliberative process privilege:

> Now, it is quite obvious that public policy requires . . . that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a Court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests.

Smith, 41 Eng. Rep. at 552.

25. The state secrets privilege exempts material critical to national security from disclosure. For a general discussion of the state secrets privilege, see 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 107, at 423-27 (5th ed. 1999); 26 WRIGHT & GRAHAM, *supra* note 2, §§ 5664-72; Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982).

Duncan was brought by survivors of a submarine accident. The First Lord of Admiralty refused to provide documents, claiming that they were exempt from disclosure. The House of Lords upheld that claim. *See Duncan*, 1942 App. Cas. at 642. However, the language of the case is framed in more general terms: "[T]he rule that the interest of the state must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation." *Id.* Although *Duncan* has been read to incorporate the deliberative process privilege articulated in *Smith*, "the textual justification for this reading is weak." Wetlaufer, *supra* note 2, at 859.

26. 345 U.S. 1 (1953).

27. *See id*. at 12.

Despite its judicial roots, the first appearance of the deliberative process privilege on the federal stage was not in the courts, but rather in the political contest between President Eisenhower and Senator McCarthy.[28] In refusing to cooperate with Senator McCarthy during the course of the Army-McCarthy proceedings, President Eisenhower relied not on traditional separation of powers arguments, but rather on the deliberative process rationale.[29] After its introduction by Eisenhower, the deliberative rationale caught on so quickly within the executive branch[30] that in 1957 one commentator remarked that it seemed strange that it had not been included in earlier evidence treatises.[31] Thus, the privilege was first asserted in a political arena, not a courtroom, and it was the product of military culture, not careful judicial reasoning or empirical evidence.[32]

The deliberative process privilege made its debut in the federal courts in 1958. Justice Stanley Reed, then retired and sitting on the Court of Claims by designation, first introduced the deliberative process privilege into the federal judiciary.[33] Writing the opinion in *Kaiser Aluminum & Chemical Corp. v. United States*,[34] Justice Reed justified his adoption of the privilege in part on the doctrine of sovereign

28. *See* Wetlaufer, *supra* note 2, at 865-66 (recounting how President Eisenhower barred his subordinates from providing testimony demanded by Senator McCarthy during the Army-McCarthy proceedings).

29. President Eisenhower argued that "'it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters.'" DWIGHT D. EISENHOWER, *Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations* (May 17, 1954), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 1954, ¶ 113, at 483, 483 (1960). Further, he argued that "it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed." *Id.* at 483-84. Professor Wetlaufer argues that the evidence suggests that the source of these arguments was not the President's legal counsel, but principles of military leadership President Eisenhower brought with him from his earlier career. *See* Wetlaufer, *supra* note 2, at 867 & n.76 (providing evidence of this rationale from Eisenhower's military career).

30. *See* Wetlaufer, *supra* note 2, at 867 & n.77 (recounting the spread of the deliberative process rationale).

31. *See id.* at 867-68 & n.78 (citing Joseph W. Bishop, Jr., *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 477 (1957)).

32. *See id.* at 867 & n.76 (discussing the deliberative process rationale's origins in military culture).

33. *See id.* at 869 (attributing the origin of the deliberative process privilege within the federal judiciary to Justice Reed); Weaver & Jones, *supra* note 5, at 286-88 (same).

34. 157 F. Supp. 939 (1958).

immunity.[35] Relying on *Duncan* as the sole judicial authority for the privilege,[37] Justice Reed wrote:

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.[38]

He relied further upon *Morgan v. United States*,[39] in which the Supreme Court had held that it is not the function of the judiciary to probe the mental processes of executive officials.[40]

Once *Kaiser* was decided, the deliberative process privilege spread through the federal courts like wildfire.[41] Although neither Congress nor the Supreme Court has officially sanctioned the privilege, it has taken hold in the lower federal judiciary and is being applied in an ever-increasing number of cases.[42]

B. Expressed Justifications for the Privilege

The deliberative process privilege, like many other evidentiary privileges, is a common law privilege.[43] As such, it must be inter-

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35. *See id*. at 944-45.

37. *See id.* at 945.

38. *Id.* at 945-46.

39. 304 U.S. 1 (1938).

40. *See id*. at 18. Justice Reed's reliance upon this decision was misplaced, since he ignored the role of the cabinet secretary's quasijudicial deliberation in the Court's analysis. *See infra* notes 208-20 and accompanying text.

41. *See* Wetlaufer, *supra* note 2, at 874-75.

42. *See id*. at 848. Although the Supreme Court has decided cases dealing with Exemption 5 of the Freedom of Information Act ("FOIA"), which exempts from disclosure materials which 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," 5 U.S.C. § 552(b)(5) (1994), this statutory exemption from FOIA should not be considered congruent with the deliberative process privilege. *See infra* notes 127-40 and accompanying text.

43. *See* Wolfe v. Department of Health and Human Servs., 839 F.2d 768, 773 (D.C. Cir. 1988) (referring to the privilege as "[t]he common law discovery privilege"); 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 108, at 427 (5th ed. 1999) (referring to the privilege as a common law privilege); William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1207 n.38 (1999) (referring to the "non-

preted by the federal courts "in the light of reason and experience."[44] To facilitate interpretation, the courts have expressed four justifications for the deliberative process privilege—three based on policy grounds and one based on constitutional principles. As with all privileges, the scope of the deliberative process privilege should not be extended beyond what is necessary to accomplish its underlying purposes.[45] In light of this policy, courts have stated that "the deliberative process privilege, like other executive privileges, should be narrowly construed."[46]

The first and most often cited rationale for the privilege is that expressed by Justice Reed in *Kaiser*: the privilege "is intended to encourage the free flow of ideas and an uninhibited exchange of views among government decisionmakers."[47] Therefore, disclosure of material created in furtherance of governmental deliberations is not in the public interest because it could discourage the free and open exchange of information vital to effective and efficient policy formulation.[48] Two additional policy justifications are often cited for the de-

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constitutional deliberative process privilege"); Weaver & Jones, *supra* note 5, at 289 & n.48 (citing decisions treating the privilege as derived from the common law, not the Constitution). While there seems to be agreement that the privilege is based on common law, some argue that the mental process branch (from *Morgan*) is based on constitutional principles. *See* 2 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 9.08, at 9-17 (2d ed. 1993); 3 JACK B. WEINSTEIN & MARGARET A. BERGGER, WEINSTEIN'S FEDERAL EVIDENCE § 509.21[3], at 509-16 (Joseph M. McLaughlin ed., 2d ed. 1999) [hereinafter WEINSTEIN'S FEDERAL EVIDENCE]; Weaver & Jones, *supra* note 5, at 288-89. However, *Morgan* should not be viewed as contributing to the rationale of the deliberative process privilege. *See infra* notes 208-20 and accompanying text.

44. 10 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 501.01[2], at V-13 (2d ed. 1996).

45. *See* Gomez v. City of Nashua, 126 F.R.D. 432, 435 (D.N.H. 1989) ("The scope of the privilege is limited by its underlying purpose and should not be applied where that purpose would not be served.").

46. Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 856 (3d Cir. 1995).

47. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE 660 (1995); *see also* 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-21 to 9-22 (observing that "effective and efficient governmental decision making depends on the free and uninhibited flow of ideas"); 3 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 43, § 509.21, at 509-14 to 509-15 (asserting that the privilege is a balance between the competing interests of facilitating lawsuits and the government's need for confidentiality); 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131 (claiming that the privilege exists to ensure that there is no injury to the quality of agency decisions) (citing MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 5.02, at 5-31 (1998)); Wetlaufer, *supra* note 2, at 847 (arguing that disclosure "will chill future communications, thus diminishing the effectiveness of executive decisionmaking and injuring the public interest").

48. *See* Missouri v. United States 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 alter-

liberative process privilege. One is that it protects against premature disclosure of proposed policies before they have been fully considered or actually adopted by the agency.[49] Thus, the privilege is designed to ensure that an agency is judged by the policies it actually adopts, not those it merely considers.[50] The second is that the privilege is said to prevent the public from confusing matters merely considered or discussed during the deliberative process with those on which the decision was based.[51] As discussed in Section III.B., these two rationales more properly belong to Exemption 5 of the Freedom of Information Act ("FOIA"), not the deliberative process privilege. A final rationale is based on constitutional principles presented in *Morgan v. United States*[52] and its progeny.[53] These cases aver that the privilege protects the independence of the executive branch and preserves the separation of powers by preventing judicial probing into the thought processes of executive officials.[54]

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native avenues of action and to engage in internal debates without fear of public scrutiny."); Mead Data Cent. Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) ("[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl.'" (quoting S. REP. NO. 89–813, at 9 (1965))).

49. *See* MUELLER & KIRKPATRICK, *supra* note 47, at 660-61; 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-22.

50. *See* Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978).

51. *See* MUELLER & KIRKPATRICK, *supra* note 47, at 661; 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-22.

52. 298 U.S. 468 (1936).

53. *See infra* Section III.C.

54. *See* MUELLER & KIRKPATRICK, *supra* note 47, at 661 (stating that "the privilege protects the independence of the executive branch by limiting the extent to which the judiciary is allowed to probe the decisionmaking processes of executive officials"); 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-21 to 9-22 (observing that the judiciary does not have the authority to probe the mental thoughts of executive officials); 3 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 43, at 509-15 to 509-16 (stating that it is inappropriate for the judiciary to examine the mental processes of an executive decisionmaker); Wetlaufer, *supra* note 2, at 847-48 (arguing that the policy is justified on sovereign immunity and separation of powers grounds, known as the *Morgan* doctrine). This, however, is a misapplication of the *Morgan* doctrine and should not be considered a justification for the deliberative process privilege. *See infra* notes 208-20 and accompanying text.

The determination of whether a privilege applies is made by the court. *See* FED. R. EVID. 104(a). Such a determination is generally made in camera. *See* EPA v. Mink, 410 U.S. 73, 93 (1973); Hopkins v. United States Dep't of Hous. and Urban Dev., 929 F.2d 81, 85-86 (2d Cir. 1991); Fisher v. Renegotiation Bd., 473 F.2d 109, 114 (D.C. Cir. 1972); United States v. Hooker Chems. & Plastics Corp., 114 F.R.D. 100, 103 (W.D.N.Y. 1987); *In re* Franklin Nat'l Bank Secs. Litig., 478 F. Supp. 577, 582 (E.D.N.Y. 1979); Weaver & Jones, *supra* note 5, at 310, 312-15.

C. Substantive and Procedural Requirements of the Privilege

A proper invocation of the deliberative process privilege requires (1) that the party opposing discovery be the holder of the privilege, and (2) that the information be privileged.[55] Even when the privilege is properly invoked, however, the inquiry is not at an end. The deliberative process privilege is a qualified privilege,[56] meaning that it can be overcome upon sufficient showing of a need outweighing the grounds for confidentiality.[57] Once the government has successfully invoked the privilege, the burden shifts to the party seeking disclosure to show that its need outweighs the government's interest in confidentiality.[58] Only after the party seeking discovery has demonstrated a particularized need[59] for the privileged material will the court balance opposing interests.[60]

1. *Holder of the Privilege and Procedural Requirements*. The government is the holder of the deliberative process privilege, and only the government may assert it.[61] Although some courts permit a litigation attorney or other government official to assert the privilege,[62] the generally accepted view is that the privilege must be asserted by the head of the agency in question.[63] The term "agency head" has been interpreted to mean the top official at the governmental agency.[64] Moreover, the agency head has a nondelegable duty to consider personally the documents in

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55. *See* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 197 (3d ed. 1995).

56. *See In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997); Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995); Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 829, 854 (3d Cir. 1995); *Franklin Nat'l Bank*, 478 F. Supp. at 582.

57. *See* United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993) ("The deliberative process privilege may be overcome where there is a sufficient showing of a particularized need to outweigh the reasons for confidentiality."); Walker v. NCNB Nat'l Bank, 810 F. Supp. 11, 13 (D.D.C. 1993) ("In order to overcome the privilege, the party seeking disclosure must show that the interests in disclosure outweigh the interests in non-disclosure." (citing Bigelow v. District of Columbia, 122 F.R.D. 111, 113 (D.D.C. 1988))).

58. *See Redland Soccer Club*, 55 F.3d at 854 ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest."); Ferrell v. United States Dep't of Hous. and Urban Dev., 177 F.R.D. 425, 429 (N.D. Ill. 1998) ("Plaintiffs have the burden of showing that they have a particularized need for the documents.").

59. *See Farley*, 11 F.3d at 1390 (holding that relevance alone is insufficient and that a particularized need must be shown).

60. This balancing is made on an ad hoc basis. *See In re Sealed Case*, 121 F.3d at 737-38. The matter is reviewed de novo on appeal. *See* Soucie v. David, 448 F.2d 1067, 1071 (D.C. Cir. 1971).

question.[65] This requirement is intended to promote "consistency and prudence," since the agency head will supposedly ensure that the privilege is invoked in the best interest of the public and not merely in the agency's litigation interests.[66] In addition to the duty of personal inspection, an agency head must specifically identify and describe the documents for which the privilege is sought.[67] The requirement that the agency head identify and describe documents is usually accomplished by means of an affidavit.[68]

2. *Substantive Requirements for Privilege*. To demonstrate that information is privileged, a party must show that (1) the information is predecisional, (2) the information is deliberative, (3) the government has maintained confidentiality, (4) the government has a legitimate need for the information, and (5) the government would be impaired in acquiring this type of information absent the

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61. *See* First E. Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994) (emphasizing that "only the government can assert its deliberative process privilege"); IMWINKELRIED, *supra* note 55, at 197 (observing that "the government agency receiving the information is the holder" of the privilege).

62. *See* Weaver & Jones, *supra* note 5, at 307-09.

63. *See Ferrell*, 177 F.R.D. at 428; Scott Paper Co. v. United States, 943 F. Supp. 489, 497 (E.D. Pa. 1996) [hereinafter *Scott Paper I*]; Wainwright v. Washington Metro. Area Transit Auth., 163 F.R.D. 391, 396 (D.D.C. 1995); 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 110, at 438 (5th ed. 1999) (detailing requirements for asserting the privilege). This procedural requirement is identical to the requirement adopted by the Supreme Court for asserting the state secrets privilege. *See* United States v. Reynolds, 345 U.S. 1, 8-12 (1953) (adopting an executive privilege protecting state secrets from disclosure and requiring that the privilege be asserted by the agency head).

64. *See Scott Paper I*, 943 F. Supp. at 497. ("[W]hen courts refer to the 'head of the agency claiming the privilege', they are referring to the top official.").

65. *See Ferrell*, 177 F.R.D. at 428; Scott Paper Co. v. United States, 943 F. Supp. 501, 502-03 (E.D. Pa. 1996) [hereinafter *Scott Paper II*]; *Scott Paper I*, 943 F. Supp. at 497; *Wainwright*, 163 F.R.D. at 396; *see also* Wetlaufer, *supra* note 2, at 852-53. However, a litigation attorney may claim the privilege when the evidence under consideration is testimonial evidence. *See* Scott v. PPG Indus., 142 F.R.D. 291, 293-94 (N.D. W. Va. 1992) ("Even if the requirement that the agency head consider allegedly privileged material and personally invoke the privilege makes sense with regard to documents, it is ludicrous to suggest that the agency head rather than the litigation attorney should be required to invoke the deliberative process privilege in a deposition.").

66. Piacenti, *supra* note 7, at 279.

67. *See Ferrell*, 177 F.R.D. at 428; *Scott Paper II*, 943 F. Supp. at 502; *Scott Paper I*, 943 F. Supp. at 496-97; *Wainwright*, 163 F.R.D. at 396; Walker v. NCNB Nat'l Bank, 810 F. Supp 11, 13 (D.D.C. 1993); *see also* Wetlaufer, *supra* note 2, at 852-53.

68. *See Ferrell*, 177 F.R.D. at 428. In addition to an affidavit, the court may require the submission of a "Vaughn index." *See* Weaver & Jones, *supra* note 5, at 300-12.

protection of the privilege.[69] The burden of demonstrating these elements rests upon the government agency resisting disclosure.[70]

a. Predecisional. To demonstrate that information is exempt from disclosure under the deliberative process privilege, the party resisting disclosure must first show that the material is "predecisional."[71] While predecisional materials may be exempt from disclosure under the privilege, "postdecisional" materials are not.[72] Although the term implies that materials must be chronologically predecisional, chronology alone is insufficient. Even if material predates a final agency action, it does not satisfy the predecisional prong if the material did not contribute to that decision.[73] Materials are predecisional if they are "designed to assist agency decisionmakers in arriving at their decisions" and contain "the personal opinions of the writer rather than the policy of the agency."[74] Documents prepared by officials who lack the authority to take final agency action have been found to be necessarily predecisional.[75]

A final decision does not automatically waive the privilege for deliberative documents that contributed to a decision.[76] Nor is it al-

69. *See* IMWINKELRIED, *supra* note 55, at 197-98 (asserting that to establish a prima facie case for invoking the privilege the government must establish the five aforementioned elements).

70. *See* Tax Analysts v. IRS, 117 F.3d 607, 616 (D.C. Cir. 1997); Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 829, 854 (3d Cir. 1995); Becker v. IRS, 34 F.3d 398, 403 (7th Cir. 1994); City of Virginia Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993); Hopkins v. United States Dep't of Hous. and Urban Dev., 929 F.2d 81, 85 (2d Cir. 1991).

71. *See* Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 (1975); *Tax Analysts*, 117 F.3d at 616; Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 147 (2d Cir. 1994); Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994); Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 945 (11th Cir. 1992).

72. *See Sears*, 421 U.S. at 151-52; *Redland Soccer Club*, 55 F.3d at 854; Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

73. *See Assembly of Cal.*, 968 F.2d at 921.

74. Missouri v. United States Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998); *accord Maricopa Audubon Soc'y*, 108 F.3d at 1093; City of Virginia Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993); *Assembly of Cal.*, 968 F.2d at 920; *Florida House*, 961 F.2d at 945; *Hopkins*, 929 F.2d at 84.

75. *See A. Michael's Piano*, 18 F.3d at 147; *Hopkins*, 929 F.2d at 85.

76. *See* Fisher v. Renegotiation Bd., 473 F.2d 109, 115 (D.C. Cir. 1972); Manna v. United

ways necessary that a specific final decision be identified—the party resisting disclosure must simply show that the materials are part of the deliberative process generally.[77] The government is not required to identify a specific deliberation. Since agencies are continually re-examining their actions and policies, material that is deemed deliberative may qualify for exemption even in the absence of a specific deliberative process.[78]

b. Deliberative. Predecisional documents are not exempt merely because of their predecisional status. The materials must also be "deliberative," meaning that they are a part of the give-and-take process by which decisions are made and policy is formulated.[79] Courts have developed a number of different tests to determine whether materials are deliberative. Some courts look to see if the material was in fact related to the process through which decisions are typically made.[80] Another approach focuses on whether the disclosure of the materials in question would expose the government's decisionmaking processes in such a way that the free flow of information would be chilled and the agency's ability to perform its functions effectively would be undermined.[81] Other courts require that the materials be a direct part of the agency's deliberative

States Dep't of Justice, 815 F. Supp. 798, 815 (D.N.J. 1993).

77. *See City of Virginia Beach*, 995 F.2d at 1255; Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 51 (D.D.C. 1996). Although the identification of a specific final decision is not required, the absence of a final decision may weaken or be fatal to a privilege claim. *See* Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975). *But see* Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (requiring that the agency pinpoint the decision to which the documents contributed).

78. *See* Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975).

79. *See* Tax Analysts v. IRS, 117 F.3d 607, 616 (D.C. Cir. 1997); *Maricopa Audubon Soc'y*, 108 F.3d at 1093; *City of Virginia Beach*, 995 F.2d at 1253; *Assembly of Cal.*, 968 F.2d at 920; *Florida House*, 961 F.2d at 945; *Hopkins*, 929 F.2d at 84-85.

80. *See, e.g.*, *Hopkins*, 929 F.2d at 84-85 ("[T]he privilege focus[es] on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (alterations in original) (internal quotation marks omitted)).

81. *See, e.g.*, Missouri v. United States Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998) ("A document is deliberative if its disclosure would expose the agency's decisionmaking process in a way that would discourage candid discussion and thus undermine the agency's ability to perform its functions."); *Maricopa Audubon Soc'y*, 108 F.3d at 1093 ("A predecisional document is part of the deliberative process, 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." (alteration in original) (internal quotations omitted)).

processes in that they express opinions or make recommendations on matters of policy.[82] Another approach focuses only on whether "the information reflect[s] the give-and-take of the consultative process."[83] Opinions expressed by individuals who are not a part of the deliberative process are not protected by the privilege.[84] The privilege also does not protect materials that are only peripheral to the decisionmaking process.[85] Thus, summaries of past decisions and investigations regarding past agency actions are not exempt from disclosure under the privilege.[86] Some courts, however, have held that materials created outside of the decisionmaking process, the release of which would expose that process or the substance of deliberations within the process, may be protected by the privilege.[87] In order to determine whether materials in question are deliberative, courts require that the government provide sufficient information about its deliberative process to establish that the materials actually are a part of that process.[88]

c. Maintaining confidentiality. This element of the analysis focuses on whether the government's protection of the information in question has been sufficient to preserve confidentiality, or whether the privilege has been effectively waived. Courts have generally taken a lenient view with respect to the government's position. While clear or explicit incorporation of deliberative material into an agency's final policy will place the material outside the privilege's

82. *See, e.g.*, Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992) (defining a deliberative document as one that "makes recommendations or expresses opinions on legal or policy matters").

83. *Florida House*, 961 F.2d at 949.

84. *See* 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 146 ("[T]he privilege does not apply to those whose opinions don't count . . . .").

85. *See* Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994) ("[T]he privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment.").

86. *See* J.R. Norton Co. v. Arizmendi, 108 F.R.D. 647, 649 (S.D. Cal. 1985) ("Summaries or commentaries on past administrative determinations or investigations of past agency acts are not protected.").

87. *See* Weinstein v. United States Dep't of Health and Human Servs., 977 F. Supp. 41, 45 (D.D.C. 1997) ("[T]he deliberative process privilege protect[s] a document created outside the deliberative process whose release would reveal the substance of the comments made within that process.").

88. *See* Lurie v. Department of the Army, 970 F. Supp. 19, 33 (D.D.C. 1997) (holding that a government agency must provide sufficient information about its decisionmaking process to show that the materials sought to be withheld actually are a part of that process).

protection,[89] incorporation that is less than clear or explicit will not.[90] Prior disclosures need not result in automatic waiver of the privilege.[91] Rather, the fact that material has been disclosed simply becomes a factor in the waiver analysis.[92] Likewise, the release of similar or related material does not suffice to waive the privilege—the party seeking disclosure must show that the specific facts in question have entered the public domain.[93] The privilege is also not waived through inadvertent disclosure of the deliberative material.[94] Moreover, prior involuntary disclosure may not result in waiver of the privilege.[95] At least one court has held that an individual agency employee's comments reiterating her own recommendations or opinions expressed during the deliberative process cannot waive the government's right to assert the privilege with regard to that

89. This is because agencies will not be permitted to develop a body of "secret law" by hiding final policy decisions behind the shield of the deliberative process privilege. *See* Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997).

90. *See* Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 945 n.4 (11th Cir. 1992) (stating that only material expressly adopted is discoverable); North Dartmouth Properties, Inc. v. United States Dep't of Housing and Urban Dev., 984 F. Supp. 65, 69 (D. Mass. 1997) ("A 'pre-decisional' document can lose its protection, but only if an agency *expressly* chooses to adopt it or incorporates it by reference in announcing its decision."); United States v. J.B. Williams Co., 402 F. Supp. 796, 799 (S.D.N.Y. 1975) ("[W]here it is clear that an agency has adopted material in an otherwise exempt document as the basis of a non-exempt decision, some courts have held that the adopted material loses its immune status."). Mere agreement between final decision and deliberative materials is insufficient to warrant disclosure. *See* Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184-85 (1975); Skelton v. United States Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982).

91. *See* Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 923 n.5 (9th Cir. 1992) ("Agencies should not be penalized for openness. We consider prior disclosures only to determine whether the disclosure of these tapes would expose the decision-making process any more than it has already been disclosed."). *But see* Melendez-Colon v. United States, No. Civ. 97-2192(JP), 1999 WL 388207, at *3 (D.P.R. May 25, 1999) (holding that prior disclosure to insurance adjusters constituted waiver of the privilege).

92. *See Assembly of Cal.*, 968 F.2d at 923 n.5.

93. *See* Public Citizen v. Department of State, 11 F.3d 198, 201 (D.C. Cir. 1993) ("[A]lthough an agency bears the burden of proving that a FOIA exemption applies to a given document, a plaintiff asserting that information has been previously disclosed bears the initial burden of pointing to specific information in the public domain that duplicates that being withheld.").

94. *See* Scott v. PPG Industries, 142 F.R.D. 291, 294 (N.D. W. Va. 1992) (holding that inadvertent FOIA disclosure, where agency policy required that documents not be disclosed, does not constitute waiver of the deliberative process privilege).

95. *See Florida House*, 961 F.2d at 946 (stating that materials involuntarily disclosed by means other than FOIA would not result in a waiver of rights of confidentiality under FOIA Exemption 5). Presumably, however, previous FOIA disclosure of the specific information would be fatal to subsequent efforts to protect that information under FOIA.

information.[96] With respect to interagency communications, disclosure of confidential documents by one government agency to another does not waive the privilege.[97] Additionally, one government agency cannot waive the privilege protecting materials that reflect the decisionmaking process of another agency.[98]

d. Legitimate need for information. No cases have refined the meaning of this requirement.[99] It appears that courts assume that government agencies have a legitimate need for any predecisional, deliberative materials that are a part of an agency's decisionmaking process. The basis for this assumption, however, is unclear.

e. Denial of the privilege would impair the free flow of information. This last requirement for establishing a prima facie case for invoking the privilege derives from the justifications for the

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96. *See* North Dartmouth Properties, Inc. v. United States Dep't of Hous. and Urban Dev., 984 F. Supp. 65, 68 (D. Mass. 1997) (stating that such comments must be protected to "avoid revealing the ingredients of the decision-making process" (internal quotations omitted)). Presumably such disclosure is considered inadvertent on the part of the government, even though the disclosure is intentional on the part of the employee. The privilege is held by the government, and only the government can waive it. *See supra* note 61 and accompanying text.

97. *See* FTC v. Digital Interactive Assocs., Inc., No. 95-Z-754, 1997 WL 524905, at *3 (D. Colo. Mar. 17, 1997).

98. *See id.* (holding that the FTC could not waive the FCC's privilege).

99. Despite the fact that Professor Imwinkelried identifies this element as necessary for a prima facie case for asserting the privilege, *see* IMWINKELRIED, *supra* note 55, at 197, courts generally seem to skip this step of the analysis and to move directly to step five.

The requirement that the government demonstrate a legitimate need for the information in question illustrates the relative importance of the four stated justifications for the privilege. *See supra* notes 47-54 and accompanying text. Of the four rationales, this requirement is related only to the rationale encouraging the free flow of ideas within agency deliberations. The dangers associated with disclosure of proposed policies before they have been considered or adopted, and the dangers associated with public confusion regarding the true basis for agency decisions, likely are not reduced when the government does not have a legitimate need for the information. Presumably, these dangers are increased. For example, if an agency does not, in fact, have a legitimate need for certain information, the probability that the information will be considered, processed, and acted upon is diminished. The agency, therefore, may be exposed to an increased risk that it will be judged on the basis of matters other than its actual decisions. This would also increase the risk of public confusion. If the public is confused by disclosure of materials not actually affecting the final decision, the release of additional materials unrelated to a final decision, and accorded even less protection than other deliberative materials, would seem to present a greater risk of confusion. Finally, this requirement does not bear any relation to the *Morgan* doctrine, discussed *infra* at notes 208-20 and accompanying text. Judicial intrusion into the mental processes of executive officials is still intrusion, regardless of whether the executive can demonstrate a legitimate need for materials relating to those mental processes.

privilege itself: "A ruling that the privilege applies 'should . . . rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.'"[100] The government bears the burden of showing that the disclosure of information "'would actually inhibit candor in the decision-making process if made available to the public.'"[101] This requirement clearly reflects the underlying rationale of the privilege that the flow of information should be unhindered.[102]

3. *Exceptions to the Privilege*. As with other qualified privileges, the deliberative process privilege is subject to exceptions. As mentioned above, the privilege protects materials involved in the deliberative process but does not protect final decisions made by governmental agencies.[103] Courts will not allow agencies to develop a body of "secret law" by protecting final decisions from disclosure under the deliberative process privilege.[104] The privilege is also unavailable when the decisionmaking process itself is the subject of litigation.[105] Courts will also not allow the government to invoke the privilege in cases in which the purpose of disclosure is to expose government malfeasance.[106]

4. *Balancing of Interests*. Although the deliberative process privilege is a qualified privilege[107] and may, as such, be overcome by a

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100. Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997) (quoting Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)).

101. Animal Legal Defense Fund v. Department of the Air Force, 44 F. Supp. 2d 295, 300 (D.D.C. 1999) (quoting Army Times Publ'g Co. v. Department of the Air Force, 998 F.2d 1067, 1072 (D.C. Cir. 1993)).

102. *See supra* notes 47-48 and accompanying text.

103. *See supra* note 89 and accompanying text.

104. *See Tax Analysts*, 117 F.3d at 617. A body of "secret law" is an undisclosed collection of orders, interpretations, rules, etc., with precedential value that the agency actually applies to cases before it. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 867-68 (D.C. Cir. 1980) (discussing "secret law").

105. *See In re* Subpoena Duces Tecum, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (holding that when a cause of action turns on the government's intent, the deliberative process privilege does not apply); Burka v. New York City Transit Auth., 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (holding that where the process itself is the issue, the information relating to that process must be disclosed).

106. *See In re Subpoena*, 145 F.3d at 1424 ("If Congress creates a cause of action that deliberatively exposes government decisionmaking to the light, the privilege's raison d'être evaporates."); Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (rejecting the assertion of the privilege where government malfeasance was involved).

107. *See supra* notes 56-57 and accompanying text.

sufficient showing of need,[108] courts rarely override the privilege.[109] Nevertheless, the courts have determined that the policy justifications for the privilege warrant only a qualified privilege,[110] and then only when the requirements enumerated in Section II.B are satisfied. Consequently, such a de facto transformation of the privilege into a quasi-absolute privilege is unjustified. The courts have identified a number of factors that establish a workable standard for balancing the interests of the government in resisting disclosure against the interests of litigants in gaining access to information.[111]

One factor is the identity of the author of the deliberative materials, as well as the position of that individual and the recipient of the materials within the deliberative hierarchy.[112] The greatest protection should be granted to communications between the ultimate decisionmakers within a governmental agency.[113] Following this reasoning, where communications involve individuals closer to the bottom of the deliberative hierarchy, the materials should be given less protection. A closely related factor is the possibility of future timidity of government agency employees caused by the realization that deliberative materials may be violable.[114] As discussed in Section II.B.5, this factor is actually an element of a prima facie assertion of the privilege.

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108. *See supra* notes 57-60 and accompanying text.

109. *See* Piacenti, *supra* note 7, at 289; Weaver & Jones, *supra* note 5, at 319. Most cases in which courts finds sufficient need to override the privilege involve government malfeasance or failure to satisfy procedural requirements, although even these cases do not always trigger rejection. *See* Piacenti, *supra* note 7, at 289-90.

110. *See, e.g.*, *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997); *Texaco P.R.*, 60 F.3d at 885; Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 854 (3d Cir. 1995); United States v. Farley, 11 F.3d 1385, 1389-90 (7th Cir. 1993); *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 582 (E.D.N.Y. 1979).

111. The factors that follow are not presented in any particular order. The factors applied and the weight assigned to each will vary from case to case. *See* United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 165 (E.D.N.Y. 1994).

112. *See* Ethyl Corp. v. EPA, 25 F.3d 1241, 1249 (4th Cir. 1994); Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 586 (D.C. Cir. 1987); Animal Legal Defense Fund v. Department of the Air Force, 44 F. Supp. 2d 295, 300 (D.D.C. 1999).

113. *See* United States v. J.B. Williams Co., 402 F. Supp. 796, 800 (S.D.N.Y. 1975) (noting that "nowhere is [the] protection [of nondisclosure] more needed than between the ultimate decision-makers within an agency" (alterations in original)).

114. *See In re Sealed Case*, 121 F.3d at 737-38; *Redland Soccer Club*, 55 F.3d at 854; *Phelps Dodge*, 852 F. Supp. at 165.

Additional factors include the relevance of the evidence sought,[115] the availability of other similar evidence,[116] the importance of the information to a litigant's case,[117] the seriousness of litigation and the issues involved,[118] the government's role in the litigation,[119] the strength of a litigant's case,[120] and the interests of the litigants.[121] In addition to the interests of the participating litigants, the court should also consider a number of societal interests: society's interest in accurate factfinding,[122] the public's interest in securing honest, effective government,[123] and the federal government's interest in the enforcement of federal law.[124] Finally, courts may consider the availability and effectiveness of protective measures.[125]

5. *FOIA Exemption 5*. When considering the balancing of interests under the deliberative process privilege, one must be careful to consider the interplay between the privilege and Exemption 5 of FOIA.[126] Exemption 5 provides that FOIA does not require disclo-

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115. *See In re Sealed Case*, 121 F.3d at 737-38; *Redland Soccer Club*, 55 F.3d at 854; *Phelps Dodge*, 852 F. Supp. at 165.

116. *See In re Sealed Case*, 121 F.3d at 737-38; *Redland Soccer Club*, 55 F.3d at 854; *Phelps Dodge*, 852 F. Supp. at 165.

117. *See Phelps Dodge*, 852 F. Supp. at 165.

118. *See In re Sealed Case*, 121 F.3d at 737-38; *Redland Soccer Club*, 55 F.3d at 854; *Phelps Dodge*, 852 F. Supp. at 165.

119. *See In re Sealed Case*, 121 F.3d at 737-38; *Redland Soccer Club*, 55 F.3d at 854; *Phelps Dodge*, 852 F. Supp. at 165. When the government is the defendant or a third party, this factor should favor exemption of deliberative materials from disclosure. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 109 (5th ed. 1999) (discussing the effects of the government's presence as either a third party or a defendant); Piacenti, *supra* note 7, at 277 ("Generally the privilege is held applicable when the agency is a defendant or third party . . . ." (footnote omitted)). However, when the government agency is the plaintiff or prosecutor, disclosure should be favored. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 109 (5th ed. 1999) (arguing that when the government is the plaintiff or prosecutor, generally either the information should be disclosed or the action dismissed); Piacenti, *supra* note 7, at 277 (citing cases which hold that the privilege is generally not held applicable when the government is the prosecutor or plaintiff).

120. *See Phelps Dodge*, 852 F. Supp. at 165.

121. *See* Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995). Any relevant interests should be evaluated on a case-by-case basis. *See Phelps Dodge*, 852 F. Supp. at 165.

122. *See Texaco P.R.*, 60 F.3d at 885.

123. *See id.*

124. *See* Piacenti, *supra* note 7, at 283.

125. *See* 3 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 43, §509.22[3], at 509-21.

126. This interplay is also discussed in 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 108, at 428-30 (5th ed. 1999). For an extended treatment of FOIA Exemption 5, see United States Dep't of Justice, *Freedom of Information Guide* (last modified Sept. 1998)

sure of materials 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."[127] Exemption 5 incorporates the deliberative process privilege,[128] in addition to other privileges that the government enjoys.[129] Since courts rarely distinguish clearly between the common law deliberative process privilege and the privilege under FOIA, FOIA cases provide valuable guidance in establishing the boundaries of the privilege.[130]

The underlying rationale of Exemption 5 is essentially the same as the justifications for the deliberative process privilege. Exemption 5 is intended to protect the free flow of information within an agency, to ensure that agency officials are judged by what they actually decide as opposed to what they merely consider, and to protect against the public confusion that would result from premature disclosure of deliberative material.[131] While there are similarities between FOIA Exemption 5 and the deliberative process privilege analyses[132]—and in many instances, the two can be treated as essentially the same[133]—a fundamental difference must be considered when analyzing claims arising under the privilege.

FOIA does not address the question of admissibility of evidence,[134] and therefore Exemption 5 should not be considered a con-

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<http://www.usdoj.gov/oip/exemption5.htm#exemption> (on file with the *Duke Law Journal*).

127. 5 U.S.C. § 552(b)(5) (1994).

128. *See* EPA v. Mink, 410 U.S. 73, 86-88 (1973); Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999); Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997); Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993); Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 944-45 (11th Cir. 1992); Hopkins v. United States Dep't of Hous. and Urban Dev., 929 F.2d 81, 84 (2d Cir. 1991).

129. *See* Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context . . . .").

130. *See* 2 STONE & TAYLOR, *supra* note 43, § 9.10, at 9-24.

131. *See Cuomo*, 166 F.3d at 481 (articulating the policies behind Exemption 5); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) (same).

132. For example, courts have stated that Exemption 5 is also to be narrowly construed. *See Maricopa Audubon Soc'y*, 108 F.3d at 1093; Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994); *Mapother*, 3 F.3d at 1537; *Florida House*, 961 F.2d at 944. It does not apply to final opinions, *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975), does not protect the adopted decisions and policies of governmental agencies, *see id*. at 151-52, and does not protect segregable facts, *see Ethyl Corp*., 25 F.3d at 1250.

133. *See* 2 STONE & TAYLOR, *supra* note 43, § 9.10, at 9-24.

134. *See Sears*, 421 U.S. at 143 n.10 (describing FOIA as "fundamentally designed to inform the public about agency action and not to benefit private litigants").

gressional enactment of the deliberative process privilege,[135] even though it may incorporate the rationale of the privilege. FOIA protects materials subject to "*routine* disclosure" by the government.[136] Any material that is protected by a privilege, whether absolute or qualified, is clearly not subject to routine disclosure under FOIA.[137] In other words, once the government makes a prima facie showing for invoking the privilege, analysis under FOIA Exemption 5 stops and does not proceed to the balancing of interests. This is an important distinction between the deliberative process privilege and FOIA. While a litigant's need for information may be sufficient to override the privilege, such need would not remove that information from the category of material that is normally privileged.[138] Therefore, while FOIA may properly be viewed as defining the maximum limits of the privilege,[139] the privilege itself should be interpreted as being somewhat less protective than Exemption 5.[140]

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135. *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) ("[T]he FOIA was not intended to supplement or displace rules of discovery."); Association for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977) ("FOIA neither expands nor contracts existing privileges, nor does it create any new privileges."); 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 108, at 429 (5th ed. 1999) ("FOIA itself does not address the question of evidentiary admissibility, and thus cannot be said to be a statutory enactment of the privileges in question.").

136. FTC v. Grolier Inc., 462 U.S. 19, 27 (1983).

137. *See id*.

138. *See id*. 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."); 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 130:

> One reason why the deliberative process privilege will never be congruent with the exemption is that the privilege is only a qualified one, that is, in deciding whether to uphold a claim of the privilege, the court must balance the government's claimed need for secrecy against the court's own need for evidence to resolve a dispute before it.

(footnote omitted).

139. *See* MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 5.01, at 5-8 n.17 (1998) ("Availability under FOIA should always defeat a claim of privilege."); 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 108, at 429 (5th ed. 1999) ("[I]t is obvious that [the privilege and FOIA] are critically interrelated and that the exemption provisions mark the outermost limits of the privileges. It would be anomalous in the extreme to deny evidentiary admission on grounds of confidentiality to material available on request to even the casually interested.").

140. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 108, at 430 n.17 (5th ed. 1999) (quoting *Hearings on Proposed Federal Rules of Evidence Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93rd Cong. 274 (1973) (testimony of Friendly, J.)):

> The problems of what a citizen should be able to get from a Government agency when he has simply the general interest of the citizen in finding out what is going on and the problems of the litigant who has a particular need are obviously very differ-

II. PROTECTIONS ACCORDED FACTUAL INFORMATION BY THE COURTS

Purely factual information that is severable from deliberative opinions is not protected under the deliberative process privilege or FOIA Exemption 5.[141] The line between severable and non-severable facts becomes somewhat blurred, however, when facts are a more integral part of the deliberative process. The treatment of such factual material under the deliberative process privilege and FOIA Exemption 5 has been inconsistent.

In *Soucie v. David*,[142] the United States Court of Appeals for the District of Columbia Circuit found that factual information is subject to Exemption 5 protection "only if it is inextricably intertwined with policy-making processes."[143] As an example, the court noted that factual materials prepared in response to specific questions by a government official may be protected since they would expose the official's deliberative processes to unnecessary public scrutiny.[144] The court also warned, however, that "courts must beware of 'the inevitable temptation of a government litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue.'"[145]

The federal courts have wrestled with how to apply the deliberative process privilege to factual information gathered by lower-level government employees, particularly when the information is not in response to a specific question from a higher-level official. In *Florida House of Representatives v. United States Department of Commerce*,[146] the United States Court of Appeals for the Eleventh Circuit rejected a FOIA disclosure request for adjusted block-level census data. The court expressly held that, once material is determined to be delibera-

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ent and almost by hypothesis what is the right solution for the first can not be the right solution for the second.

141. *See* EPA v. Mink, 410 U.S. 73, 87-88 (1973); Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999); Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 854 (3d Cir. 1995); City of Virginia Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993); Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Skelton v. United States Postal Serv., 678 F.2d 35, 38 (5th Cir. 1982); Playboy Enter. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982).

142. 448 F.2d 1067 (D.C. Cir. 1971).

143. *Id*. at 1078.

144. *See id*.

145. *Id*. (quoting Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969)).

146. 961 F.2d 941 (11th Cir. 1992).

tive, any additional analysis is inappropriate.[147] Therefore, the court recognized a single test for determining whether facts should be protected by the privilege or FOIA: "Does the information reflect the give-and-take of the consultive [sic] process"?[148] If this question is answered in the affirmative, then the material is privileged.[149] This analysis failed to address the final element required to establish a prima facie case for invoking the privilege: whether the government would be impaired in acquiring this type of information if it were not exempt from disclosure.[150]

The same year the Eleventh Circuit decided *Florida House*, the United States Court of Appeals for the Ninth Circuit decided *Assembly of California v. United States Department of Commerce*.[151] As in *Florida House*, the California state assembly sought FOIA disclosure of statistically adjusted census figures. The court ruled that the Department of Commerce had already exposed so much of its deliberative process that there was no purpose in its continued protection.[152] In the process, the Ninth Circuit reasserted its approval of the "functional test,"[153] rather than the "fact/opinion distinction" applied in *Florida House*.[154] The Ninth Circuit stated that the distinction between fact and opinion is simply a "useful rule-of-thumb favoring disclosure of factual documents, or the factual portions of deliberative documents where such a separation is feasible."[155] Applying the functional test, the court focused on whether "revealing the information exposes the deliberative process" of the government agency.[156] The court assumed that any materials which might expose the deliberative process were protected by the privilege.[157] The functional test applied by the Ninth Circuit ignored the issue of whether disclosure of the information would chill future deliberations or hinder the government in acquiring this type of information.

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147. *See id*. at 949.

148. *Id*.

149. *See id*.

150. *See supra* notes 99-102 and accompanying text.

151. 968 F.2d 916 (9th Cir. 1992).

152. *See id.* at 923.

153. The functional test was enunciated in *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1118-19 (9th Cir. 1988).

154. *See Assembly of Cal.*, 968 F.2d at 921-22 & n.3.

155. *Id.* at 921.

156. *Id*.

157. *See id*.

Also in 1992, then-Judge Ginsburg, writing for a majority of the D.C. Circuit, approved a FOIA disclosure request for a legal land-description file from the Bureau of Land Management.[158] In the course of her analysis, Judge Ginsburg noted that the "fact/opinion distinction . . . is not always dispositive" and that the "key question" in these cases is "whether disclosure would tend to diminish candor within an agency."[159] Thus, unlike her colleagues in the Ninth and Eleventh Circuits, Judge Ginsburg included an analysis of whether disclosure would impair future governmental deliberations. However, since the requested information in *Petroleum Information* was publicly available from other sources at the time of trial, the D.C. Circuit did not provide much guidance as to when disclosure of information would chill future deliberations.

The *Petroleum Information* test was refined a year later by the D.C. Circuit in *Mapother v. Department of Justice*.[160] *Mapother* concerned a report prepared by lower-level officials at the Department of Justice to assist the Attorney General in determining whether to deny entry of a foreign official into the United States.[161] The information was not compiled in response to specific questions, but was rather gathered to accomplish two objectives: "to provide the Attorney General with the information on which to decide whether [the official] should be excluded from the United States, and to provide the means for defending a decision to exclude him against legal challenge."[162] The court explained that the key to the deliberative process analysis is the relationship between the factual information and the decisionmaking process of the agency.[163] The court determined that the factual summaries were privileged because they would assist a higher-level official in making a policy decision.[164] In effect, the court held that the factual information was privileged because of the possible effect disclosure would have on the higher-level official.[165]

158. *See* Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1439 (D.C. Cir. 1992).

159. *Id*. at 1434-35.

160. 3 F.3d 1533 (D.C. Cir. 1993).

161. *See id*. at 1536.

162. *Id*.

163. *See id.* at 1539.

164. *See id*.

165. Recently, the United States District Court for the District of Columbia resorted to an earlier test to determine the applicability of the deliberative process privilege. Relying on a test formulated in 1987, the court stated:

[T]he ultimate question in deciding whether the deliberative process privilege applies

III. ANALYSIS OF THE ARGUMENTS IN FAVOR OF PROTECTING FACTUAL INFORMATION FROM DISCLOSURE

The purpose of testimonial privileges is to foster candor in relationships that courts deem important.[166] Additional justifications for the existence of privileges include the necessity of protecting privacy and freedom in important relationships, as well as facilitating trust and honor.[167] Privileges, however, are rights that require justification because they "are not designed to enhance the reliability of the fact-finding process," and, in fact, "impede the search for truth."[168] They impose serious costs to litigants and should be rare exceptions to the disclosure of evidence, not a general rule.[169]

In *United States v. Nixon*,[170] Chief Justice Burger, writing for a unanimous Court, explained why courts must interpret privileges with caution. Acknowledging that privileges "are in derogation of the search for truth,"[171] he cautioned that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive."[172] The ends of justice, he wrote, "would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."[173] Accordingly, limitations on discovery "'are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational

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> is not whether the material is "factual" or not. . . . Instead, the critical question is whether "disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."

Chemical Weapons Working Group v. United States Envtl. Protection Agency, 185 F.R.D. 1, 3 (D.D.C. 1999) (mem.) (quoting Dudman Communications v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). In making this decision, the court looked to the underlying policies of the privilege to determine whether disclosure of the information would conflict with these policies. *See id.*

166. *See* MUELLER & KIRKPATRICK, *supra* note 47, at 428.

167. *See id*. at 429-30.

168. *Id*. at 427.

169. *See* Wetlaufer, *supra* note 2, at 883.

170. 418 U.S. 683 (1974).

171. *Id*. at 710.

172. *Id.* at 709.

173. *Id*.

means for ascertaining truth.'"[174] Therefore, a party seeking to assert an established privilege bears the heavy burden of demonstrating that exclusion of evidence is warranted.

Additionally, courts should be cautious when analyzing assertions of governmental agencies. Bureaucratic entities naturally try to avoid disclosure to increase their power and to further their own interests.[175] Thus, in light of governmental self-interest, courts should be hesitant to accept governmental claims of the necessity of secrecy in a given situation. To strike the proper balance between the interests of the government litigant and the interests of the judiciary in promoting the search for truth, governmental privileges should be construed as narrowly as possible.[176] Consequently, the deliberative process privilege should not be extended beyond what is necessary to accomplish its underlying purposes.[177]

A. Chilling of the Free and Open Flow of Information

The primary rationale for the deliberative process privilege is that the privilege prevents the chilling of the free flow of information within the deliberative process that would occur if the information were subject to disclosure.[178] This argument has been criticized as unsubstantiated.[179] In *United States v. Nixon*, the Supreme Court con-

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174. *Id.* at 710 n.18 (quoting Elkins v. United States, 364 U.S 206, 234 (1960) (Frankfurter, J., dissenting)).

175. *See* Wetlaufer, *supra* note 2, at 885. Max Weber writes:

> Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": in so far as it can it hides its knowledge and action from criticism . . . . The tendency toward secrecy in certain administrative fields follows their material nature: everywhere that the power interests of the domination structure toward *the outside* are at stake . . . we find secrecy.

MAX WEBER, *Bureaucracy*, *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233 (H.H. Gerth & C. Wright Mills eds. & trans., 1946); *see also* Wetlaufer, *supra* note 2, at 885 n.161.

176. *See Nixon*, 418 U.S. at 710 (declaring that privileges are not "lightly created or expansively construed"); *see also supra* notes 45-46 (citing cases stating that the deliberative process privilege is to be narrowly construed).

177. *See* Gomez v. City of Nashua, 126 F.R.D. 432, 435 (D.N.H. 1989) ("The scope of the privilege is limited by its underlying purpose and should not be applied where that purpose would not be served.").

178. *See supra* notes 47-48 and accompanying text.

179. *See, e.g.*, 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131 (referring to this instrumental rationale as "puny"); Wetlaufer, *supra* note 2, at 887-88 (arguing that it is not clear that this rationale actually underlies the nondisclosure decisions).

cluded that this rationale was probably not sound: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."[180] The British House of Lords also reversed its earlier decisions recognizing the privilege, concluding that the chilling rationale was implausible.[181] The courts, however, have generally opted to follow the nonbinding precedent of the Court of Claims, while ignoring the Supreme Court's reasoning in *Nixon*. Courts do not generally engage in any significant analysis of whether this danger is likely to occur.[182]

Little, if any, empirical evidence exists to support the claim that such chilling actually occurs.[183] Indeed, there appears to have been little attempt even to determine the impact of disclosure on government officials in those cases in which the courts have refused to apply the privilege.[184] Instead, courts seem to base their analysis on "hunches and intuition,"[185] "parrot[ing] the harms suggested by Justice Reed in *Kaiser*," rather than analyzing the possible chilling effect of disclosure on the free flow of information.[186] The accumulated empirical evidence of the effect of privileges does not support the proposition that a relatively low risk of disclosure chills open communication. The evidence indicates that such chilling may occur

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180. *Nixon*, 418 U.S. at 712. The Court cited an earlier opinion concerning the potential of chilling the deliberations of a petit jury in criminal proceedings. The Court stated:

> "A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice."

Id. at 712 n.20 (quoting Clark v. United States, 289 U.S. 1, 16 (1933)). Additionally, at least one state supreme court has refused to adopt the privilege rationale. *See* District Att'y v. Flatley, 646 N.E.2d 127, 129 (Mass. 1995).

181. *See supra* note 23.

182. *See* 3 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 43, § 509.21[1], at 509-14; Weaver & Jones, *supra* note 5, at 315-16 ("Most courts engage in only the most perfunctory analysis.").

183. *See* Weaver & Jones, *supra* note 5, at 316 (noting the absence of any such study); Wetlaufer, *surpa* note 2, at 886-87 (noting the absence of empirical evidence, as well as even a single specific and verifiable anecdote).

184. *See* Weaver & Jones, *supra* note 5, at 316 ("Courts rarely examine whether these harms really occur.").

185. *Id*.; *see* Wetlaufer, *supra* note 2, at 886-87.

186. Weaver & Jones, *supra* note 5, at 315-16.

where the risk of disclosure is high or the incentive to communicate is weak.[187] However, where the risk of subsequent disclosure is low or the incentive to communicate is significant, people are unlikely to modify their communications.[188]

The protection of factual materials under the privilege presents such a case where the risk of disclosure is low,[189] yet incentive to communicate is significant. Materials containing factual information are usually prepared by lower-level officials.[190] These lower-level officials have clear incentives to communicate. First, their job is to prepare such materials. Their employment may depend on preparing these materials as thoroughly and completely as possible. Second, lower-level officials will want to impress their superiors at the agency. Few lower-level officials will want to retain those positions for their entire careers. The credit they receive for performing their jobs well may be reflected in future salary increases or promotions, while poor performance may result in such promotions' going to other employees. Finally, any political fallout from a decision likely would not reach a lower-level official. Such employees are more likely to be concerned with their employers' opinions rather than with the opinions of the public at large. This is presumably why an individual's position in the deliberative hierarchy is a factor that some courts consider in balancing the interests of litigants.[191] This inquiry, however, should not be delayed until the balancing phase of the analysis. The fifth element of a prima facie demonstration that information is privileged requires the government to demonstrate that it would be impaired in acquiring this type of information absent the protection of the privilege.[192] Since materials containing factual information generally will not require protection from disclosure under this rationale,[193] courts should not extend the scope of the privilege to protect such materials.

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187. *See Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1450, 1474-77 (1985) (collecting and summarizing empirical critiques).

188. *See id*.

189. Professor Wetlaufer argues that, under the deliberative process privilege generally, the risk of disclosure is low. *See* Wetlaufer, *supra* note 2, at 887-88. If the risk is low for disclosure under the privilege generally, the risk is likely even lower that factual information will be disclosed.

190. *See* 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-22 (recognizing that such material is usually compiled prior to the start of any deliberative process or discussion).

191. *See supra* notes 112-13 and accompanying text.

192. *See* IMWINKELRIED, *supra* note 55, at 197-98.

193. *See* 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-21 to 9-22 (arguing that materials

Additionally, the procedural requirements involved in successful invocation of the privilege undermine this rationale with respect to factual information. The lower-level officials who author the materials containing the facts in question are not allowed to assert the privilege. Most courts require that the deliberative process privilege be asserted by the agency head after personal consideration of the matter in question.[194] A privilege that is outside an individual's control likely would not have any effect on that individual's candor. Indeed, it is unlikely that a higher-level official would be encouraged to communicate by a privilege that "is under the control of the political head of the agency who will be only too happy to waive the privilege when it serves his need to scapegoat his underlings for bad advice and thus avoid political responsibility for bad agency decisions."[195] This would be especially true for lower-level officials. Although a very small percentage of lower-level officials might be discouraged from communicating freely and openly, the courts should still follow the Supreme Court's reasoning and concern themselves only with whether a reasonable person might be discouraged.[196] Therefore, materials containing factual information generated by lower-level officials should only satisfy the fifth element of the prima facie case for protection of the privilege when a reasonable government official's communications would be chilled.

Finally, some argue that disclosure of factual reports made by lower-level officials would impede effective and efficient policy formulation by discouraging higher-level officials from requesting such information.[197] With the exception of the agency head,[198] the same ar-

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prepared by lower-level officials are "less likely to require protection" under the rationale of the privilege). Additionally, Justice Reed's language in *Kaiser* "suggests that the [deliberative process] privilege might be restricted to the deliberations of high-level administrative officials, such as agency or department heads." Weaver & Jones, *supra* note 5, at 299.

194. *See supra* notes 61-68 and accompanying text.

195. 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131-32; *see* Wetlaufer, *supra* note 2, at 888 ("[I]t is common knowledge that everyone who really matters will, at the earliest possible moment, publish his account of the deliberations in which he was involved.").

196. *See supra* note 180.

197. *See, e.g.*, *Developments in the Law*, *supra* note 187, at 1476-77 (collecting sources and summarizing arguments that disclosure of factual reports by subordinates will chill communications of superiors).

198. It seems unlikely that there would be a sufficiently significant amount of factual material reported by lower-level officials in response to a request made directly by the head of an agency to warrant additional analysis. However, the agency head would presumably have incentives similar to those of other higher-level officials discussed below. *See infra* notes 199-04 and accompanying text.

guments concerning who can and cannot assert the privilege apply to higher-level officials.[199] Additionally, the interests of higher-level officials are best served by requesting such information, since higher-level officials "are people who are presumed to be committed to the success of the agency for which they work and who have a strong incentive to help solve problems that confront that agency and to get credit for their contributions."[200] Just as lower-level officials, higher-level officials have strong incentives to communicate and likewise face a low risk of disclosure of those communications.[201] Therefore, the potential disclosure of factual information contained in reports by lower-level officials is unlikely to affect the candor of higher-level officials.[202]

B. Risk of Premature Disclosure and Risk of Public Confusion

Two further justifications for the privilege involve the risks that a government agency will be judged for what it considers, rather than what it actually decides, and that public confusion may result from premature disclosure of deliberative materials.[203] These justifications deal largely with "pending decisions and will seldom be applicable to a disclosure in litigation."[204] These rationales should properly be considered to belong to FOIA, not to the deliberative process privilege itself. The case law and commentary from which these two justifications arise deal with the application of FOIA Exemption 5.[205] No

199. *See supra* notes 194-97 and accompanying text.

200. Wetlaufer, *supra* note 2, at 888.

201. *See id*. at 887-88.

202. *See supra* notes 187-90 and accompanying text.

203. *See supra* notes 49-51 and accompanying text.

204. 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131.

205. Mueller and Kirkpatrick cite one case and Stone and Taylor cite an additional case to support the two rationales that they attribute to the deliberative process privilege. *See* MUELLER & KIRKPATRICK, *supra* note 47, at 661 nn.6-7 (citing Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Dir. 1978)); 2 STONE & TAYLOR, *supra* note 43, § 9.09, at 9-22 n.120 (citing *Jordan* and Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980)). These cases, however, are really FOIA cases offering rationales for Exemption 5. *See Coastal States*, 617 F.2d at 866-69; *Jordan*, 591 F.2d at 772-73. The United States District Court for the District of Columbia attributed all three rationales discussed above to the deliberative process privilege rather than Exemption 5. *See* Chemical Weapons Working Group v. United States Envtl. Protection Agency, 185 F.R.D. 1, 3 (D.D.C. 1999) (mem.). The case cited by *Chemical Weapons Working Group* to support its claim that all three purposes underlie the common law privilege, however, is actually a FOIA case and articulates the underlying purposes of Exemption 5. *See id.* at 3 (citing Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (citing *Jordan*, 591 F.2d at 772-73) (ruling on a FOIA Exemption 5

cases dealing solely with the deliberative process privilege have cited these justifications for the privilege. These two rationales are not a part of the prima facie case for invocation of the privilege,[206] nor should they be. Absent evidence of a danger of chilled communications, justice would be compromised if the government were allowed to withhold relevant information from opposing litigants based on claims that disclosure of such information would result in public confusion or a governmental agency's being judged on what it considered, rather than on what it decided. Perhaps justice can allow the government to protect deliberations in order to preserve the effective functioning of government;[207] however, absent evidence of chilled deliberations, public confusion is not congruent with ineffective government. Therefore, any application of these rationales to factual information reported by lower-level officials should be restricted to cases in which disclosure is brought under FOIA.

C. The Morgan *Doctrine*

The final justification for the deliberative process privilege is based upon the *Morgan* doctrine, which protects the thought processes of executive officials from judicial intrusion.[208] The *Morgan* line of cases[209] "represent[s] a category of cases that are analytically and functionally distinct from those that fall within the realm of the [deliberative process] privilege."[210] *Morgan* establishes a "quasi-judicial deliberative privilege."[211] The *Morgan* Court was not dealing with deliberations for the formulation of policy, as protected by the deliberative process privilege, but with the deliberations of the Secretary of

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claim)).

206. *See* IMWINKELRIED, *supra* note 55, at 197-98; *see also supra* Section I.C.2. The fourth and fifth prongs of the prima facie invocation of the privilege clearly incorporate considerations of chilling, but the prima facie elements do not incorporate these two justifications.

207. Some commentators, however, have argued that even this protection is not required. *See supra* note 7.

208. *See supra* notes 52-54. For further discussion of separation of powers issues with respect to the deliberative process privilege, see Wetlaufer, *supra* note 2, at 899-905.

209. The *Morgan* line of cases includes: Morgan v. United States, 298 U.S. 468 (1936) [hereinafter *Morgan I*]; Morgan v. United States, 304 U.S. 1 (1938) [hereinafter *Morgan II*]; United States v. Morgan, 307 U.S. 183 (1939) [hereinafter *Morgan III*]; and United States v. Morgan, 313 U.S. 409 (1941) [hereinafter *Morgan IV*].

210. Wetlaufer, *supra* note 2, at 906. Professor Wetlaufer also argues that *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), does not change this analysis. *See* Wetlaufer, *supra* note 2, at 907-08.

211. *Id.* at 906.

Agriculture, who was acting under congressional mandate to perform "adjudicatory functions."[212] The proceeding was essentially a "judicial proceeding," and the Secretary had dealt with information in a manner closely resembling that of a judge.[213] This proceeding had all the essential elements of contested litigation,[214] and the Secretary's decision was subject to appeal.[215] The Court viewed the proceedings as a "collaborative instrumentalit[y] of justice"[216] and accorded the Secretary "the same deference, respect and immunity it would have given to another court."[217] Comparing the functions of an executive official in a quasijudicial process to the functions of a judge, *Morgan* concluded that probing an executive's thought processes in this context would compromise the integrity of the quasijudicial proceeding.[218]

The cases relying on the *Morgan* doctrine as authority for the deliberative process privilege generally do not account for the quasijudicial aspect of the decisions.[219] However, the language that was so central to the *Morgan* decisions must not be ignored. Courts should not simply cite *Morgan*, without more, as justification for the deliberative process privilege. The *Morgan* doctrine should apply only in those cases in which the information sought is part of an agency's quasijudicial activities.

Even if the *Morgan* doctrine applies to agency deliberations of a non-quasijudicial nature, sound policy would not call for exclusion of all materials potentially implicating the thought processes of any member or employee of the executive branch, regardless of how low that individual's position is within the deliberative hierarchy. Primarily factual materials do not necessarily represent the thought processes of executive officials. Facts, by their very nature, have an existence independent of the thought process of government officials. Consequently, the *Morgan* doctrine should not protect such factual information. When litigants are seeking only the facts and have no

212. *Morgan IV*, 313 U.S. at 421.

213. *Id.* at 422.

214. *See Morgan I*, 298 U.S. at 479-80.

215. *See* Wetlaufer, *supra* note 2, at 906.

216. *Morgan IV*, 313 U.S. at 422; *accord Morgan III*, 307 U.S. at 191.

217. Wetlaufer, *supra* note 2, at 906; *accord Morgan IV*, 313 U.S. at 422; *Morgan III*, 307 U.S. at 191.

218. *See Morgan IV*, 313 U.S. at 422.

219. *See* Wetlaufer, *supra* note 2, at 906-08 (demonstrating the quasijudicial nature of the *Morgan* line of cases and arguing that the *Morgan* doctrine is inapplicable in the deliberative process privilege context).

interest in reconstructing the mental processes of government officials, such facts should not fall within the reach of the *Morgan* doctrine.[220] This should hold true even when largely factual materials reflect some part of the thought processes of lower-level officials (as in the cases of fact selection). Some courts have already adopted this approach.[221]

Assume *arguendo* that the *Morgan* doctrine does apply to deliberative process privilege cases. The interests of parties in litigation with the government (who need access to relevant information), of the federal judiciary (which needs access to facts to decide cases properly), and of the federal government (which has an interest in seeing federal law enforced and obeyed) would not be well served by allowing executive officials to protect any facts they wished simply by claiming that they were a part of their deliberative processes. The Supreme Court of West Virginia adopted a more sound approach. It refused to apply the privilege to factual matters, even if such material might have been used by government decisionmakers in their deliberations.[222] In so doing, the court's decision prevented government bureaucrats from shielding facts simply by funneling them through a deliberative process. The *Morgan* doctrine should not provide executive officials with a means of thwarting justice by covering up all factual materials they may merely consider.

IV. PROPOSAL FOR THE TREATMENT OF FACTUAL INFORMATION

To strike the proper balance between the interests of the government litigant and the interests of the judiciary in promoting the

220. Similarly, the attorney-client privilege protects the communications between attorney and client, but does not allow facts to become protected merely because they were considered by an attorney. *See* Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981); 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 89, at 356-60 (5th ed. 1999); 1 STONE & TAYLOR, *supra* note 43, § 1.24, at 1-77 to 1-79. An analogous situation is found in copyright law. The Supreme Court has held that copyright law does not protect facts, but does protect compilations of facts. *See* Feist Publications, Inc. v. Rural Tele. Serv. Co., 499 U.S. 340, 346-49 (1991). However, even in compilations of facts, the protected material is the organization itself. *See id*. Facts, even when included in an otherwise protected compilation, are not protected. *See id*.

221. *See, e.g.*, Playboy Enters. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982) (concluding that the selection of facts that an executive official thinks are material does not by itself warrant protection of those facts); Lurie v. Department of the Army, 970 F. Supp. 19, 34 (D.D.C. 1997).

222. *See* Daily Gazette Co. v. West Virginia Dev. Office, 482 S.E.2d 180, 190 (W. Va. 1996) ("[T]he deliberative process privilege does not extend to materials which are factual in nature, even if such material may have been used by government decision makers in their deliberations.").

search for truth, governmental privileges should be construed narrowly.[223] Therefore, the deliberative process privilege should not be extended beyond what is necessary to accomplish its underlying purposes.[224] As argued above, factual information should not be protected by the privilege, regardless of whether it was selectively collected or summarized.[225]

In many cases, a distinction between fact and opinion may be made by looking to the source of the information. If the information exists independently and apart from a government official's report, it can properly be deemed a fact. On the other hand, if the sole source of the information is the government official, the information is more properly considered opinion. A class of information exists, however, that could be categorized as something between purely factual data and opinion (such as cost estimates, which are based partly on objective reality and partly on subjective evaluation of that reality). This category of information has received conflicting treatment from the circuit courts. In three 1992 cases, three circuits adopted different tests to determine whether factual information should be protected by the deliberative process privilege. The Eleventh Circuit adopted the fact/opinion test whereby the court's analysis depends on whether material "reflect[s] the give-and-take of the consultive [sic] process."[226] The Eleventh Circuit expressly avoided analyzing whether disclosure of information would chill future deliberations.[227] The Ninth Circuit explicitly disagreed with the Eleventh Circuit and endorsed a

223. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (declaring that privileges are not to be "lightly created or expansively construed"); *see also supra* notes 45-46 (citing cases stating that the deliberative process privilege is to be narrowly construed).

224. *See* Gomez v. City of Nashua, 126 F.R.D. 432, 435 (D.N.H. 1989) ("The scope of the privilege is limited by its underlying purpose and should not be applied where that purpose would not be served.").

225. In those cases in which the public disclosure of material outside the scope of the privilege might prove harmful to individuals or to the agency itself, a number of alternatives are available. Where an individual might suffer harm or undue embarrassment from disclosure, the identity of the author can be protected instead of protecting the information itself, as is currently done with the informer's privilege. *See* 2 STONE & TAYLOR, *supra* note 43, § 9.11, at 9-35 to 9-36; 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131-32; Weaver & Jones, *supra* note 5, at 298. Additionally, a variety of protective orders are available under Federal Rule of Civil Procedure 26(c)(7), such as limiting inspection to certain individuals. *See* 2 STONE & TAYLOR, *supra* note 43, § 9.11, at 9-35 to 9-36.

226. Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 949 (11th Cir. 1992); *see also supra* notes 146-50 and accompanying text.

227. *See id.* ("To engage in such an additional analysis contradicts the very premise that the distinction relies on, namely, that data classified as advice or opinion necessarily involves the deliberative process.").

functional test determining whether "revealing the information exposes the deliberative process."[228] The implicit assumption in this test is that exposing the deliberative process would chill deliberations within an agency. The D.C. Circuit adopted a test more in keeping with the purposes of the privilege. The court concluded that the "key question" in these cases is "whether disclosure would tend to diminish candor within an agency."[229] The D.C. Circuit later clarified this test, explaining that the focus should be on the relationship between the higher-level official and the information in question.[230] Thus, the analysis under the *Petroleum Information–Mapother* test focuses on whether the deliberations of a higher-level official would be impaired by the disclosure of factual information reported by a lower-level official.

A. The "Reasonable Government Official Test"

In cases regarding factual information that also seems to be deliberative, a modification of the test adopted by the D.C. Circuit is more in keeping with justifications of the privilege. The first four prongs of the test would be identical to those of the test for determining the availability of the deliberative process privilege in general: (1) the information must be predecisional, (2) the information must be deliberative, (3) the government must have maintained confidentiality, and (4) the government must show that it has a legitimate need for the information.[231] Under the fifth prong of this test, the requirement that the government be impaired in acquiring this type of information absent the protection of the privilege,[232] there are two primary considerations: (a) the position in the deliberative hierarchy of the author of the materials containing the information in question, and (b) the likelihood that a reasonable person in that position would be discouraged from communicating freely and openly by the disclosure of that information. This "reasonable government official test," proposed by this Note, is more in accord with the legitimate purposes and proper scope of the privilege.

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228. Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 921 (9th Cir. 1992); *see also supra* notes 151-57 and accompanying text.

229. Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992); *see also supra* notes 158-59 and accompanying text.

230. *See* Mapother v. Department of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993); *see also supra* notes 160-64 and accompanying text.

231. *See supra* text accompanying notes 69-99.

232. *See supra* text accompanying notes 100-02.

The test adopted by the Eleventh Circuit stops short in its analysis of whether information should be privileged. The fifth and final element of a prima facie case under the deliberative process privilege is whether denial of the privilege would impair the free flow of information within the agency.[233] Not only must material be deliberative, but its disclosure must also pose the risk of chilling the exchange of similar information in the future. The Ninth Circuit's test implicitly included all five elements of the deliberative process privilege analysis, but did not provide guidance as to the court's focus in determining whether disclosure of factual material would chill future deliberations. The test employed by the D.C. Circuit is more refined, not only focusing on whether disclosure would diminish candor, but also noting the position in the deliberative hierarchy to which a court should look in determining whether future deliberations would be chilled. However, as discussed above, the proper focus in these cases is not the higher-level officials within an agency, but rather the lower-level officials who were the authors of the documents containing the information in question.

The reasonable government official test would correct these deficiencies and direct a court's attention to the proper factors for analysis. In applying the test, courts should assume that a determination of risk of chilling future communications is an element of the prima facie assertion of the privilege. Additionally, the reasonable government official test would properly focus on the lower-level officials who were the authors of the information in question, rather than on the agency heads. By so doing, the test would concentrate on the individual whose communications would be potentially chilled—the author of the documents containing the information.[234] Moreover, this test would eliminate the potential injustice resulting from allowing a higher-level official to bring factual information within the scope of the privilege simply by considering or reviewing that information.

The reasonable government official test, by concentrating on the actual dangers sought to be prevented by the deliberative process

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233. *See* IMWINKELRIED, *supra* note 55, at 197-98; *see also supra* notes 100-02 and accompanying text.

234. Alternatively, if a higher-level official submits a request for specific facts, that official may properly be deemed the source of the information. In such a case, the higher-level official should be selected in step one of the reasonable government official test. *Cf.* Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971) (arguing that factual materials prepared in response to specific questions by a government official may be protected since they would expose the official's deliberative processes to unnecessary public scrutiny).

privilege, more closely adheres to the principle that privileges should not be "expansively construed."[235] Focusing on the position of the government official reporting the factual information, as well as determining whether a reasonable government official in such a position would likely be discouraged from free and open communication by the disclosure of the factual information, establishes the boundaries of the privilege within appropriate parameters. By so limiting the privilege, the risk of unjustified expansion of the privilege to protect factual information is minimized. Decreasing this unjustified expansion protects against the principal dangers of expansively construed governmental privileges: depriving litigants from accessing information relevant to litigation with the federal government and compromising the integrity of the judicial system by allowing bureaucrats to shield unjustifiably factual information from the judicial process.[236]

B. The Reasonable Government Official Test and FOIA Exemption 5

Since analysis of disclosure requests under Exemption 5 is similar to the prima facie analysis under the deliberative process privilege,[237] the reasonable government official test would substantially affect disclosure requests under FOIA, as well as under the common law privilege. However, the underlying rationale of FOIA and Exemption 5 differs from that of the deliberative process privilege. The purpose of FOIA is to encourage disclosure,[238] although this is limited by exemptions such as Exemption 5.[239] Courts have concluded that "Congress intended to confine exemption (b)(5) as narrowly 'as [is] consistent with efficient Government operation.'"[240] In accordance with this concept of efficient government operation, the courts have identified two additional purposes of Exemption 5 beyond the purposes of the common law privilege: (1) "protect[ing] the public from

235. United States v. Nixon, 418 U.S. 683, 710 (1974); *see also supra* notes 45-46 (citing cases stating that the deliberative process privilege is to be narrowly construed).

236. *See supra* notes 12-13 and accompanying text.

237. *See supra* notes 127-40 and accompanying text.

238. *See* Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

239. There are nine exemptions in all. *See* 5 U.S.C. § 552(b)(1)-(9).

240. Senate of P.R. v. Department of Justice, 823 F.2d 574, 584 (D.C. Cir. 1987) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980)); *accord* Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997); Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994); Wolfe v. Department of Health and Human Servs., 839 F.2d 768, 774-75 (D.C. Cir. 1988).

the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon,"[241] and (2) "protect[ing] the integrity of the decision-making process itself by confirming that 'officials should be judged by what they decided[,] not for matters they considered before making up their minds.'"[242]

The reasonable government official test is designed to advance the purposes of the deliberative process privilege, not Exemption 5. However, since Exemption 5 analysis focuses on whether materials are available to a party in litigation with a government agency,[243] any test established under the deliberative process privilege should still be the beginning of the analysis of deliberative materials requested under FOIA. The reasonable government official test can then be brought into accordance with the underlying rationale of Exemption 5 by adding two elements to the test: (1) whether the disclosure of the information requested under FOIA results in public confusion from premature exposure to deliberative materials predating final policy adoption,[244] and (2) whether the disclosure would compromise the integrity of the deliberative process by allowing officials to be judged by what they considered rather than by what they decided.[245] These additional elements will bring this expanded reasonable government official test into accordance with the underlying rationale of FOIA Exemption 5 by focusing on the rationale of the exemption itself. This analysis, properly applied, will also decrease the risk that Exemption 5 will be construed in an overly broad manner.

CONCLUSION

The deliberative process privilege is a common law privilege designed to protect information that, if released, would diminish the

241. Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

242. *Id*. (quoting *Jordan,* 591 F.2d at 773).

243. *See* 5 U.S.C. § 552(b)(5).

244. This prong, however, would generally be applicable only to pending decisions and would "seldom be applicable to a disclosure in litigation." 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131.

245. One court, in a different context, has already applied a test that focuses on the effect of disclosure in light of these underlying purposes. *See* Chemical Weapons Working Group v. United States Envtl. Protection Agency, 185 F.R.D. 1, 3 (D.D.C. 1999) (mem.) (focusing on the underlying purposes of the deliberative process privilege in determining whether the privilege was applicable to allegedly factual information).

candor within government agency deliberations. Generally, factual information is not protected from disclosure by this privilege. However, in cases in which the distinction between fact and opinion becomes obscured, three circuits have adopted different tests to determine whether the deliberative process privilege applies. By not focusing on the theoretical underpinnings of the privilege, these tests create the risk that factual material will be unjustifiably exempted from disclosure to litigants. Expansively construing the privilege in this manner compromises the judicial process by denying relevant information to participants in the adversarial process, decreasing public confidence in judicial fora, and contravening governmental interests in enforcing federal law.

The "reasonable government official" test corrects some of these deficiencies and ensures that the privilege will be construed in conformity with its underlying rationale of protecting against the chilling of deliberative communications. The test accomplishes this goal by directing the focus of the analysis to the position within the deliberative hierarchy of the government official preparing the information in question. It then determines whether a reasonable person in that position would be discouraged from free and open communication by the disclosure of the information. The test thereby strikes the proper balance between the government's interest in open and efficient communications, the opposing litigant's interest in acquiring access to relevant information, the judiciary's interest in maintaining the integrity of the judicial process and serving justice, and the federal government's interest in securing compliance with federal law.