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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

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Government Litigation and the Deliberative Process Privilege

Increasingly, courts in the Southern District of New York are confronting disputes between private parties and public agencies concerning discovery of documents related to the government's decision-making processes. Private litigants press for access to these internal documents as useful and relevant to their claims, while the government just as vigorously resists disclosure under the deliberative process privilege. This privilege, uniquely available to the government litigant, shields "documents reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated."¹ Sometimes referred to as a sub-species of the work-product privilege, the deliberative process privilege is intended to enhance the quality of agency decision-making based on the assumption "that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news."²

The two principal requirements for invoking the privilege are that the documents in question be both "predecisional" and "deliberative." The Freedom of Information Act, which incorporates the deliberative process privilege into one of its exemptions and under which much of the deliberative process litigation takes



place, imposes the additional requirement that the documents be either inter-agency or intra-agency communications.³ In many instances, it is immediately clear whether materials fit neatly within, or outside of these prerequisites. But because decision-making can be a fluid process which does not necessarily have a fixed beginning or end point, and because it is sometimes unclear what the nature of a document is, or the role it has played in a particular decision, it is not always evident whether a particular document is either predecisional or deliberative. Furthermore, the increasingly large role that non-governmental entities play in assisting with agency functions can raise questions about whether communications involving those parties qualify as inter- or intra-agency communications under the Freedom of Information Act.

Predecisional and Post-decisional

A document is predecisional if it was "prepared in order to assist an agency decisionmaker in arriving at his decision."⁴ For the government to establish that a particular document is pre-

cisional, it must both identify a specific agency decision to which it relates, and show that the document in some way assisted in reaching that decision.

To qualify for the privilege, a document must, at a minimum, have been created before the agency reached a final decision on a matter. The privilege offers no protection to documents which explain the reasons for a final agency decision or existing policy.⁵ By the same token, documents that have been expressly adopted or incorporated into a final agency decision do not fall within the deliberative process privilege, even if they would otherwise qualify as predecisional.⁶

Identifiable Agency Decision

Some courts require that the agency asserting the privilege identify the specific agency decision to which the document is related and verify that the document "precedes, in temporal sequence, the 'decision' to which it relates."⁷ But no actual decision need have been made for the privilege to apply. As the Supreme Court explained in *NLRB v. Sears, Roebuck & Co.*, "[a]gencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process."⁸ The fact that an ultimate decision is not a prerequisite to assertion of the privilege does not mean, however, that the privilege can attach to

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documents that are not moored to a particular decision. “[W]hile the agency need not show ex post that a decision was made, it must be able to demonstrate that, ex ante, the document for which ...privilege is claimed related to a specific decision facing the agency ...[rather than being] ‘merely part of a routine and ongoing process of agency self-evaluation.’”

One important distinction courts have drawn is that between broad agency plans, which are not self-executing, and the type of specific agency action that bears the finality of an agency decision. In *DiPace v. Goord*,¹⁰ the plaintiffs sought to overcome the state’s assertion of the deliberative process privilege for a letter from the commissioner of correctional services to the commissioner of mental health, addressing the issue of inpatient psychiatric care of inmates in the state system in the context of the suicide of an inmate. The letter also discussed a proposal relating to the number of inmate beds at a state psychiatric center. The plaintiffs argued that because the letter related to a policy initiative undertaken several years earlier concerning the delivery of psychiatric care to state prisoners, it was not predecisional. The court rejected that argument, finding that the policy initiative was only a plan rather than an agency decision, and that the letter was in fact predecisional because it related to a specific proposal regarding inmate beds.

The court also observed that the fact that the recommendation contained in the letter was never adopted, did not undermine the basis for asserting the privilege. It noted that the argument for protecting such material from disclosure was actually strengthened because “one of the underlying considerations favoring disclosure is not implicated when a proposal is not ultimately adopted: ‘The public is only marginally concerned with reasons supporting a policy which an agency has rejected.’”

In some cases, the court’s “predecisional” analysis turns on the purpose for which the document was created. Documents that are peripheral to the

decision-making process are not protected. Similarly, documents that were prepared for a purpose other than to assist in making a decision on a specific issue, even if they were relied on by the agency in reaching a decision, do not qualify as predecisional. Thus, where documents were created as part of a legally mandated compliance review following an inmate suicide, the state psychiatric facility could not shield them under the deliberative process privilege, despite the fact that they may have been considered as part of the determination concerning whether to forcibly medicate certain inmates. The court in *Tortorici v.*

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*Goord*¹¹ held that regardless of the role these documents may have played in an agency decision regarding medication policy, because they were not prepared for the purpose of assisting the agency decisionmaker in arriving at that decision, they were not protected under the deliberative process privilege.

Deliberative

The second requirement a document must meet to qualify for the deliberative process privilege is that it be deliberative. A document is deliberative if it is “‘actually ...related to the process by which policies are formulated.’”¹² This requirement seeks to protect documents that reflect advisory opinions, recommendations and deliberations that go into agency decision-making and policy formulation, while permitting discovery of material that is factual in nature. Courts have examined whether a document formed an essential link in the consultative process on a specific decision; whether the document reflects the personal opinion of the writer rather

than the official agency position; and whether, if the document were released, it would inaccurately reflect or prematurely disclose the position of the agency.

The critical question is whether the document itself reflects deliberation, rather than whether it was relied on in an agency’s deliberations. In *Allocco Recycling, Ltd. v. Doherty*,¹³ Magistrate Judge Gabriel W. Gorenstein rejected the New York City Department of Sanitation’s deliberative process privilege claim for documents generated by a consulting firm hired by the Department to collect and analyze information relating to waste disposal in New York City. The Sanitation Commissioner argued that the documents were deliberative because they were prepared to assist the department in making policy decisions about waste management. Stressing that “[i]t is of no consequence that documents may ‘assist,’ ‘lead to,’ or ‘form the basis for’ some governmental policy,” Magistrate Judge Gorenstein held that the deliberative process privilege applies only to documents which themselves reflect the opinions, recommendations or deliberations of the agency. Because the consultant’s role was limited to obtaining, recording and analyzing factual material, the documents generated by the consultant did not reflect the agency’s decision-making process, and were not protected under the deliberative process privilege.

Documents that record factual material in a manner that reflects the deliberation of the government agency, however, may qualify as deliberative. In *New York Public Interest Research Group v. United States Environmental Protection Agency*,¹⁴ U.S. Southern District Judge Alvin K. Hellerstein sustained the Environmental Protection Agency’s assertion of the privilege for a series of handwritten notes that summarized statements made by representatives of General Electric in meetings with the agency leading up to the agency’s formulation of a plan to clean up PCBs discharged into the Hudson River by General Electric. Because those notes were not a verbatim record of the meetings, but instead reflected the

priorities and interests of the agency official taking the notes, Judge Hellerstein concluded that disclosure of the notes would "expose [the] agency's decision-making process in such a way as to discourage candid discussion within the agency," and undermine the agency's ability to perform its functions.¹⁵

Inter- or Intra-Agency

Much of the deliberative process jurisprudence arises in the context of litigation under the Freedom of Information Act, which incorporates the deliberative process privilege in Exemption 5, protecting from disclosure "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." This exemption imposes the additional requirement that documents be either inter- or intra-agency communications when the federal government seeks to invoke the deliberative process privilege for documents sought in the Freedom of Information Act litigation.

Not all inter-governmental communication qualifies for protection under Exemption 5, because not all government entities are agencies as that term is defined in the Freedom of Information Act. The act pertains almost exclusively to federal and not state agencies, so that most communication between a state and federal agency will not fall within the Exemption.¹⁶ Furthermore, not all federal government entities are agencies: Congress is not an agency of the United States,¹⁷ nor is a Presidential task force.¹⁸ However, the U.S. Court of Appeals for the Second Circuit recently held that a task force established by the IRS to evaluate the IRS Criminal Investigation Division's effectiveness and assist the IRS in reforming its criminal investigative functions (the Webster Commission), was acting as a consultant to the IRS, bringing its communications with the IRS, as well as with other agencies of the federal government, within the purview of Exemption 5. In *Tigue v. United States Department of Justice*, the court held that a report

provided to the Webster Commission from the U.S. Attorney for the Southern District of New York, which was never shown directly to the IRS, but which was relied upon by the Webster Commission in making its own recommendations to the IRS, constituted an inter-agency communication. The court reasoned that "[t]o conclude that the deliberative process privilege does not apply when an outside consultant to a n agency receives information from another agency effectively would condition the use of consultants on both agencies' willingness to disclose any information the consultant reviews in the process of its work and would unreasonably hamper agencies in their decision-making process."¹⁹

Although the deliberative process privilege can extend to documents prepared by outside consultants, courts will scrutinize the role of the non-agency entity before permitting the government to claim that communications related to that entity are "intra-agency" and thus entitled to confidentiality. In *Tigue*, the Second Circuit stressed that the Webster Commission was acting purely on behalf of the IRS in soliciting the report from the Southern District prosecutor's office. By contrast, in *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*,²⁰ the Supreme Court found that documents prepared by Indian tribes working in conjunction with the Department of Interior in connection with proceedings concerning water rights allocation, did not qualify as intra-agency communications because the tribes had a direct interest in the outcome of those proceedings and thus could not be considered consultants.

The deliberative process privilege provides meaningful protection for documents reflecting internal agency deliberations that as a matter of policy the courts have found worthy of shielding from public exposure. Although the privilege protects a broad range of material from discovery, its reach is not boundless, and it does not extend to "any document the Government would find it valuable to keep confidential."

On occasion, government litigants have sought to stretch the privilege beyond its intended scope. Counsel should scrutinize each assertion of the privilege to ensure that the withheld documents fall within its carefully drawn parameters.



1. *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 US 1, 8 (2001), quoting *NLRB v. Sears, Roebuck & Co.*, 421 US 132, 150 (1975).

2. *Id.*

3. 5 USC §552(b)(5) Some courts have read the inter- or intra-agency communication requirement into non-Freedom of Information Act cases as well. See, e.g., *Galvin v. Hoblock*, 2003 WL 22208370 (SDNY Sept. 24, 2003) (Dolinger, M.J.).

4. *Hopkins v. United States Dep't of Housing & Urban Dev.*, 929 F2d 81, 84 (2d Cir. 1991), quoting *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 US 168, 184 (1975).

5. *DiPace v. Goord*, 218 FRD 399 (SDNY 2003) (Gorenstein, M.J.).

6. *Sears, Roebuck & Co.*, 421 US 132

7. See *Grand Central Partnership, Inc. v. Cuomo*, 166 F3d 473, 482 (2d Cir 1999).

8. 421 US at 151 n.18.

9. *Tigue v. United States Department of Justice*, 312 F3d 70, 80 (2d Cir 2002), cert denied, 538 US 1056 (2003) (citations omitted). The author's firm as well as one of the author's partners were the plaintiffs in this action.

10. 218 FRD 399.

11. 16 FRD 256 (SDNY 2003) (Pauley, J.). See also *Powell v. New York City Health and Hospitals Corp.*, 2003 WL 22871908 (SDNY Dec. 4, 2003) (Freeman, M.J.).

12. *Grand Central Partnership*, 166 F3d at 482, quoting *Hopkins v. United States Dep't of Housing & Urban Development*, 929 F2d at 84.

13. 220 FRD 407 (SDNY 2004).

14. 249 FSupp 2d 327 (SDNY 2003).

15. *Id.* at 338, quoting *Quarles v. Dep't of Navy*, 893 F2d 390, 392 (DC Cir. 1990).

16. *Grand Central Partnership*, 166 F3d at 484.

17. *Dow Jones & Co. v. Dep't of Justice*, 917 F2d 571 (DC Cir 1990).

18. *Meyer v. Bush*, 981 F2d 1288 (DC Cir 1993).

19. 312 F3d at 79.

20. 532 US 1.

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