

# The Freedom of Information Act

## Exemption 5

# Purpose of Exemption 5

This exemption protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

5 U.S.C. § 552(b)(5)

# Two Part Threshold

- ❖ **Part 1** – Inter–agency or Intra–agency documents
- ❖ **Part 2** –applicable discovery privilege must apply
  - ✓ Deliberative Process Privilege
  - ✓ Attorney–Client Privilege
  - ✓ Attorney Work Product Privilege

# Deliberative Process Privilege

- ❖ Allows agencies to withhold documents which reflect **predecisional** and **deliberative** communication.
- ❖ 3 Rationales for using this privilege
  - ✓ Encourage open and frank discussions in decision-making process
  - ✓ Protect against premature disclosure of proposed policies
  - ✓ Protect against public confusion from release of reasons and rationales that were not ultimately the basis for the agency decision

# Predecisional Communication

Predecisional: prior to the adoption of an agency policy or decision

# Predecisional Communication (Con't)

## Protect

- ❖ No final decision
- ❖ Documents not considered in the final decision

## Releasable

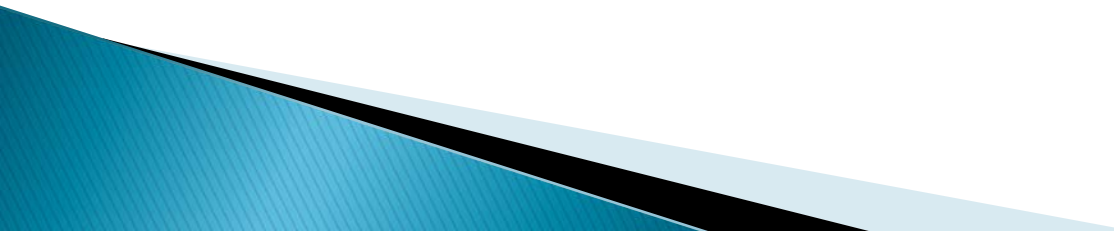
- ❖ final agency decision
- ❖ Post decisional documents
- ❖ Documents incorporated in the final decision/policy

# Deliberative Communication

**Deliberative communication is typically recommendations, advice, evaluations, analysis, and opinions offered in support of the agency adopting an Agency policy/decision**

# Deliberative Communication (Con't)

## Examples:

- ❖ Panel/interview notes
  - ❖ Drafts
  - ❖ Briefing materials
  - ❖ Supervisor's recommendation on administrative actions
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# Deliberative Communication (Con't)

## Examples:

- ▶ Statements such as:
  - ❖ “I recommend...”
  - ❖ “I believe that ...”
  - ❖ “In my opinion...”

# Attorney Work-Product Privilege

This privilege protects documents prepared by or at the direction of an attorney in reasonable anticipation of litigation

# Attorney Work-Product Privilege (Con't)

- ❖ Anticipation of litigation
  - ✓ Civil litigation
  - ✓ Criminal litigation
  - ✓ Administrative proceeding
- ❖ Settle claims
- ❖ Recommendations to close a case or decline prosecution
- ❖ Factual and deliberative information

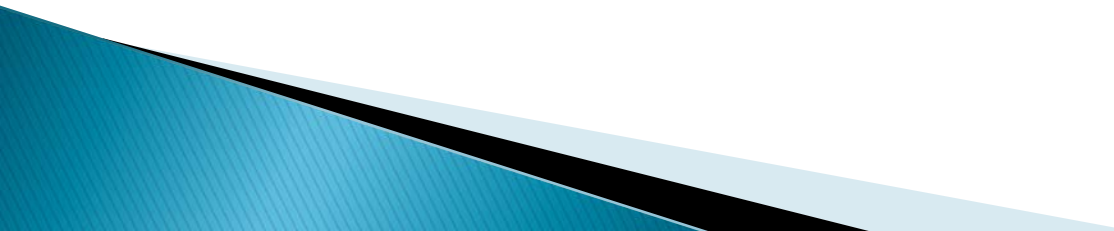
# Attorney – Client Privilege

This privilege protects confidential information supplied from client to attorney, as well as from the attorney to the client.

# Exemption 5 Conclusion:

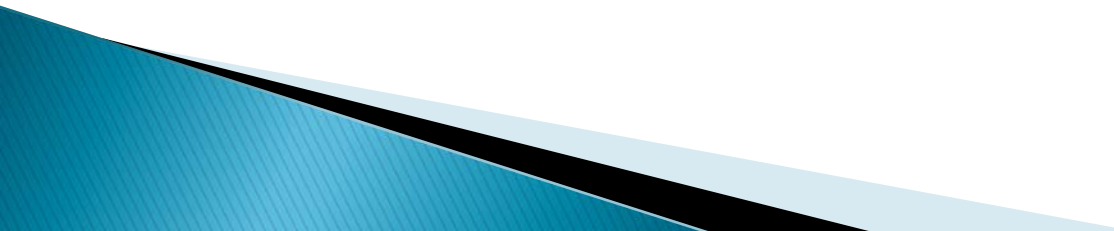
- ❖ To summarize, always remember that Exemption 5 has 2 parts (threshold and privileges): the agency must satisfy both parts of the exemption in order to withhold a document
- ❖ Also, each of the three main privileges has 2 parts:
  - ✓ **Deliberative Process** – predecisional and deliberative
  - ✓ **Attorney Work -Product** – prepared by or at the direction of an attorney in reasonable anticipation of litigation
  - ✓ **Attorney-Client Privilege** – protects confidential facts and advice given based on confidential information

# Foreseeable Harm

- ❖ New era of open government
  - ❖ 5 key points
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# Foreseeable Harm

## ❖ First Point

- ✓ Altering current mind set
  - ✓ View all FOIA decisions with prism of openness
  - ✓ The purpose of the FOIA is to keep the citizens informed of what their Government is up to
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# Foreseeable Harm

## ❖ Second Point

- ✓ View records and decision-making differently
- ✓ Ask, can this be released? Instead of, how can this be withheld?



# Foreseeable Harm

## ❖ Third Point

- ✓ Don't withhold for sake of withholding
- ✓ In the face of doubt, release

# Foreseeable Harm

## ❖ Fourth Point

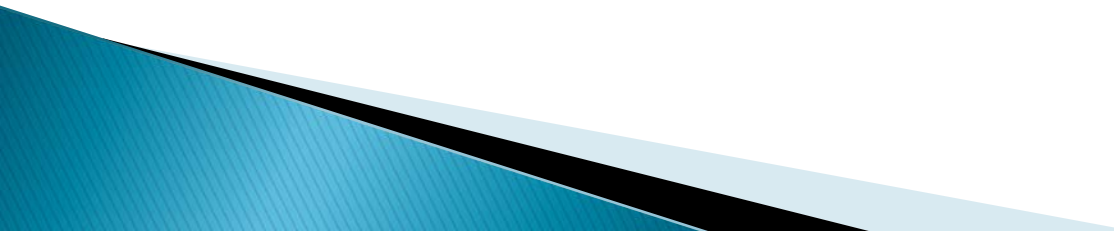
- ✓ Make partial disclosures

# Foreseeable Harm

## ❖ Fifth point

- ✓ Information can only be withheld if protected by an exemption and/or when prohibited by law
- ✓ Mandatory disclosure protections
  - National security
  - Personal privacy
  - Law enforcement interests

# Foreseeable Harm

- ❖ Look for the foreseeable harm in release of information
  - ❖ Examine record/document for content and impact disclosure would have
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# Discretionary Releases

- ❖ Consider releasing documents/information even if there is an exemption to protect it
- ❖ Applicable to Exemptions 2, 5, 7, 8, 9

# Discretionary Releases

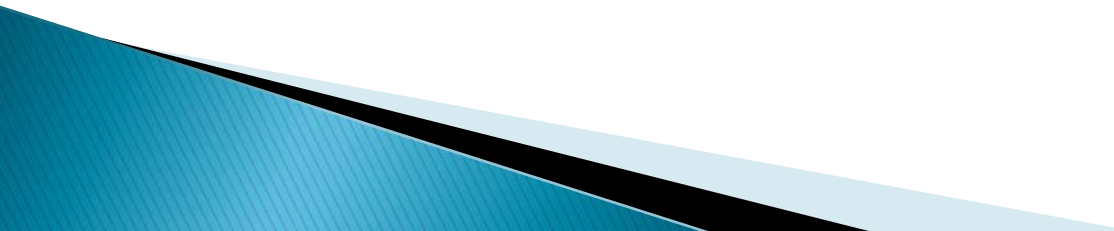
## ❖ Factors to consider

- ✓ Withholding(s) considered must meet all requirements of proposed exemptions
- ✓ Age and sensitivity of document content

# Discretionary Releases

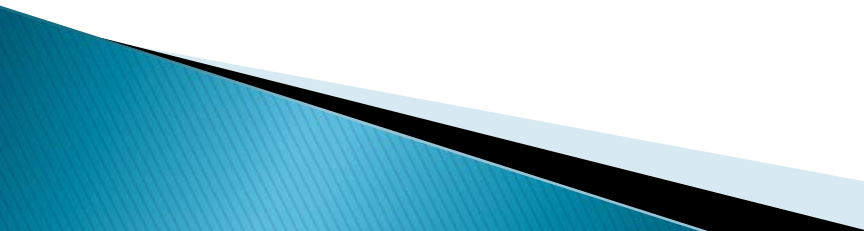
- ❖ Program Offices need to provide justifications whenever we propose to use any of the discretionary exemptions (2, 5, 7)

# CONSIDERATIONS BEFORE YOU WITHHOLD

- ❖ The nature of the decision involved (is the decision highly sensitive and/or controversial?);
  - ❖ The nature of the decision making process (did the decision making process require total candor and confidentiality?);
  - ❖ The status of the decision (if the decision is not yet made, there is a far greater likelihood of harm from disclosure);
  - ❖ The status of personnel involved (will agency employees be affected by the disclosure?);
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# CONSIDERATIONS BEFORE YOU WITHHOLD

- ❖ The potential for process impairment;
  - ❖ The significance of any process impairment (does the “chilling effect” factor of agency’s decision making process apply?);
  - ❖ The age of the information; and
  - ❖ The sensitivity of individual record portions (FOIA officers must focus on the individual sensitivity of each item of information).
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**Q & A**

**Questions?**

