

DELIBERATIVE PROCESS PRIVILEGE

- When asserted, it covers more than just a document - it covers the integrity of the deliberative process itself when the exposure of the process would result in harm. National Wildlife Federation v. Forest Service 862 F.2d 1114. In this instance, disclosure of the information requested would cause significant harm to all subsequent CG interdiction efforts, as it lays out proposed methods and operations of units tasked with future interdiction assignments.

- To assert the privilege, two requirements must be met:

- communication must be predecisional (antecedent to adoption of agency policy). Jordan v. Department of Justice, 591 F.2d. at 774.
- communication must be deliberative - making a recommendation or expressing opinion on legal or policy matters. Vaughn v. Rosen 523 F.2d 1136

Both requirements are satisfied in this case. While the direction of the communication from superior to subordinate might on the face indicate that the document was post-decisional, under certain circumstances recommendations can flow downward from a superior to a subordinate. National Wildlife Federation v. Forest Service 862 F.2d 1114. The document in question clearly states that it is a policy recommendation to the cutter commanding officer, the individual charged with making the final decision regarding repatriation of refugees.

The subject matter of the document is likewise covered by this privilege. Documents commonly covered within this privilege include "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated," NLRB v. Sears, Roebuck & Co. 421 U.S. at 150. The document in question contains recommendations on how to proceed and lays out agency policy considerations as a guideline. "Recommendations on how to best deal with a particular issue are themselves the essence of the deliberative process." Jowett, Inc v. Department of the Navy 729 F Supp. 871 (emphasis in original). Losing the freedom to put recommendations down in print for fear of later disclosure in litigation will severely inhibit future decision makers from providing assistance to subordinates during critical operations where that very assistance is most needed.

Prepared by: CDR [REDACTED] (6-LMI: 3 DEC 91)

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