

# GOVERNMENTAL PRIVILEGES

U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION  
OFFICE OF IMMIGRATION LITIGATION-DCS  
OCTOBER 27, 2021



# AGENDA

- Overview and Foundational Principles
- Law Enforcement Privilege
- Deliberative Process Privilege
- Presidential Communications
- State Secrets Privilege
- Attorney Client Privilege
- Closing Considerations



# I. FOUNDATIONAL PRINCIPLES

# SOURCE

## Common Law

- Generally, federal common law governs privileges in federal court.

## Judicious Use

- Derogation of the common law precept of public access to all information.

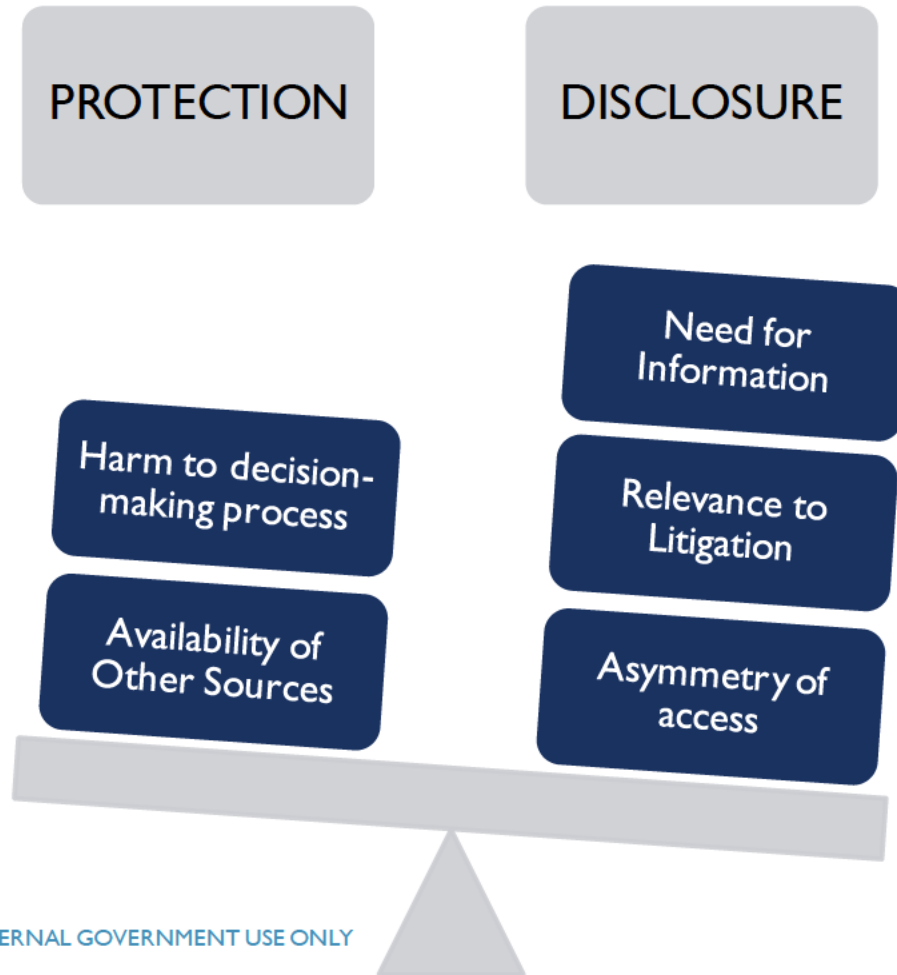
## Some Privileges are Unique to the Government

- Successful invocation requires educating the court on public policy underpinnings.

## BURDEN OF PROOF CONSIDERATIONS

- The party **asserting the privilege** bears the burden of establishing its applicability. *E.E.O.C. v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (“party asserting the privilege bears the burden of proof”); *Foster v. Hill*, 188 F.3d 1259, 1264 (10th Cir. 1999). A party asserting a claim of privilege in lieu of a discovery response must raise that claim expressly by stating the ground of the claim of privilege, and by describing the withheld materials so that the validity of the claim may be judged. Fed. R. Civ. P. 26(b)(5)(A); *Meade v. Gen. Motors, LLC*, 250 F. Supp. 3d 1387, 1393 (N.D. Ga. 2017) (“**Blanket and general assertions of a claim of privilege do not provide sufficient detail about the documents**”); party must produce detailed privilege log stating basis of claimed privilege for each document); *Equal Rights Ctr. v. Post Props., Inc.*, 247 F.R.D. 208, 213 (D.D.C. 2008) (nature of claim must be sufficiently described without revealing the privileged information).



# QUALIFIED PRIVILEGE



## INTERPLAY WITH FOIA

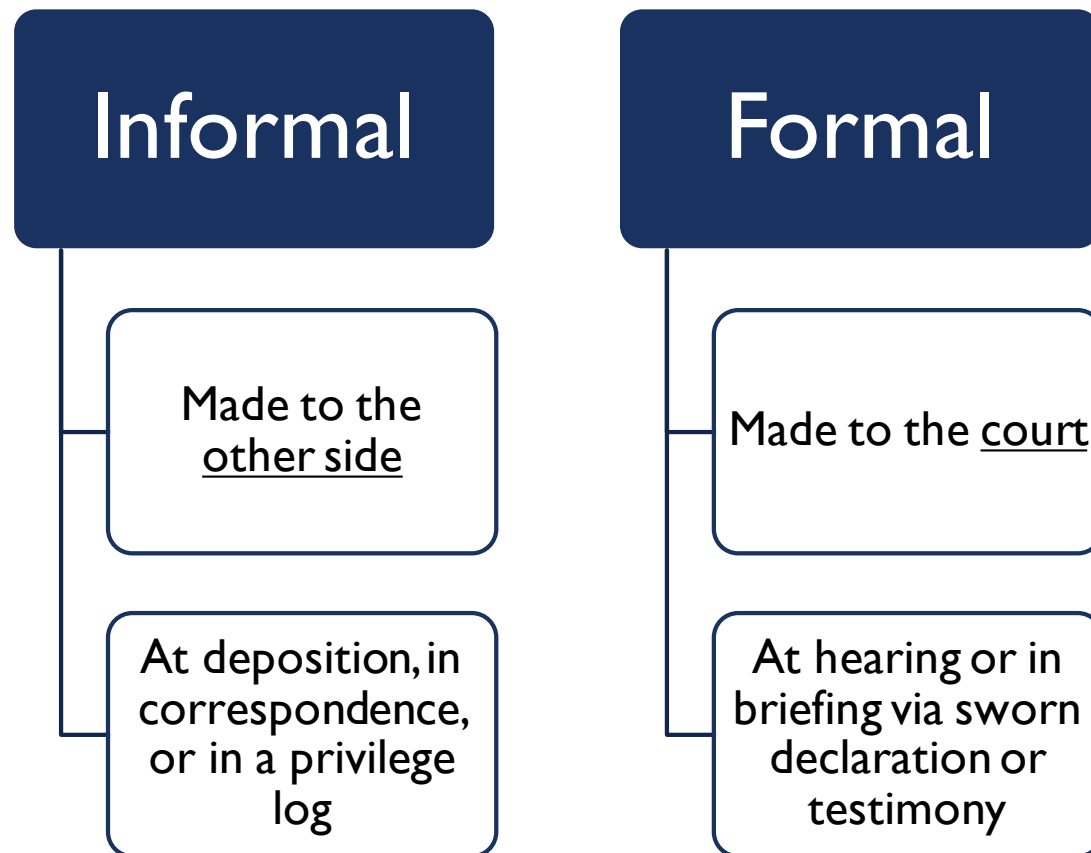
- The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides generally that all documents should be available to the public, but provides numerous exceptions, including the following:
  - State secrets;
  - Personnel rules of agencies, or inter-and intra-agency communications;
  - Matters exempted by statute;
  - Trade secrets;
  - Personnel, medical, or other files when disclosure would constitute an invasion of privacy;
  - Investigatory files; or
  - Reports on financial institutions.

See 5 U.S.C. § 552(b).

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- FOIA exemptions and litigation privileges are **not** the same thing.
  - Key differences:
    - FOIA exemptions are absolute.
    - Relevance and the requestor's need are not considerations in FOIA.
    - Claim of exemption in FOIA is more easily delegated.



# INFORMAL V. FORMAL ASSERTION



# “DANIEL MEMO” ON GOVERNMENTAL PRIVILEGES

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: All Civil Division Attorneys

FROM: *ad* Alice Daniel  
Assistant Attorney General

SUBJECT: Asserting Claims of Official  
Governmental Privilege in Litigation

Attached is a memorandum pertaining to the assertion of official governmental privileges in litigation.

Because of the uniqueness of these privileges and the potentially sensitive nature of many of the privilege claims that the Division handles, it is important that you review carefully any potential claim of governmental privilege. In this regard, I would like to call to your attention Parts II and III of the memorandum, which describe in detail the procedures to be followed in asserting official governmental privileges in litigation handled or monitored by the Division.

III. Review of Governmental Privilege Claims by  
the Deputies, the United States Attorneys,  
and the Privilege Committee

Before claims of governmental privilege are formally asserted <sup>31/</sup>  
in litigation, they must be reviewed, depending on the nature of  
the privilege involved, either by a Deputy Assistant Attorney General  
or United States Attorney, or by the Privilege Committee. <sup>32/</sup>



## **II. CATEGORIES OF PRIVILEGES**

## A. DELIBERATIVE PROCESS PRIVILEGE

- The deliberative process privilege allows the government to withhold documents or prevent testimony that reflects advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated. See, e.g., Tigue v. United States DOJ, 312 F.3d 70, 76 (2d Cir. 2002) (setting forth the parameters of the privilege); FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (same).
- “... predicated on the recognition ‘that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.’” Dow Jones & Co. v. DOJ, 917 F.2d 571, 573 (D.C. Cir. 1990) (quoting Wolfe v. HHS, 839 F.2d 768, 773 (D.C. Cir. 1988) (*en banc*)).

# PRE-DECISIONAL & DELIBERATIVE

- **Pre-decisional-** generated prior to formulation of a prospective decision or policy.
- **Deliberative-** prepared for the purpose of assisting an agency decisionmaker in arriving at a decision or otherwise reflects the give-and-take of the consultative process.
  - Typically, documents expressing personal ideas, staff opinions, recommendations or advice are deliberative, as are options papers, issue papers, management briefing documents, edits or comments on draft documents, draft decision and supporting documents.

Deliberative  
Process  
Privilege



FOIA exemption  
(b)(5)

## SUBJECTIVE MOTIVATION AT ISSUE

- Beware of DC Cir. law holding that the deliberative process privilege does not apply where the case turns on the government's intent or "subjective motivation."
- Government should argue the balancing test applies even where the government's subjective intent is at issue.



# OTHER CONSIDERATIONS

- Facts?
- Press releases?

# FORMAL INVOCATION REQUIREMENTS


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## B. LAW ENFORCEMENT PRIVILEGE

- Goes beyond investigatory files and informants.
- May include investigative leads, law enforcement methods and techniques, internal investigative memoranda, and identifying information relating to witnesses and law enforcement personnel, including undercover operatives. *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 63 (1st Cir. 2007).
- Qualified and multifaceted, and the courts retain the right to develop the scope of the common law privilege on a case-by-case basis.

# JURISDICTION SPECIFIC RULES

- Most courts have adopted the “per se rule,” concluding that all records compiled by law enforcement agencies qualify as records compiled for law enforcement purposes. See, e.g., *Jones v. FBI*, 41 F.3d 238, 245-46 (6th Cir. 1994).
- Others have adopted a “two-prong rational nexus” test. *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982); accord *Davin v. United States Dep’t of Justice*, 60 F.3d 1043, 1056 (3d Cir. 1995).
- Rational nexus test requirements:
  - (1) Identification of a person or incident as object of the investigation;
  - (2) establishment of connection between object of the investigation and possible security risk or violation of law; and
  - (3) that connection is based on information sufficient to support a colorable claim of its rationality.



The 9th Cir. applies a hybrid of the *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa. 1973) balancing test, and its own benefits analysis test from *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir. 1990), to determine whether the law enforcement privilege—once asserted—should yield.

## EXAMPLE OF CONCERNS

A Summary of Findings (“SOF”) is the method of communicating factual information resulting from an administrative or criminal investigation by a USCIS Fraud Detection and National Security (“FDNS”) officer to USCIS adjudicators.

### **A tale of 3 Cases:**

*Assadi v. U.S. Citizenship & Immigration Servs.*, No. 12-cv-1374, 2013 WL 230126, at \*3-5 (S.D.N.Y. Jan. 22, 2013).

*United States v. Malik*, No. 15-cv-9092, 2016 WL 3167307, at \*5-6 (D. Kan. June 7, 2016).

*Pitman v. USCIS*, No. 17-cv-166, 2018 WL 6725535, at \*3 (D. Utah Dec. 21, 2018).

# SHOULD EMPLOYEE NAMES BE REDACTED AS LEP?

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# PROTECTIVE ORDERS

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# FORMAL INVOCATION REQUIREMENTS

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## C. STATE SECRET

- Classified is not the same as a state secret.
- State secrets must meet the following criteria:
  - Harm defense capabilities
  - Reveal intelligence methods
  - Disrupt diplomatic relations

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- In light of that “compelling interest,” *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam), even if a litigant has made a “strong showing of necessity” for the discovery or use of such information, the state-secrets privilege will apply where “there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged.” *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953).
  - Doctrinal anchor is deference.



**Only ABSOLUTE privilege**

*Totten v. United States*, 92 U.S. 105 (1875)

## STATE SECRETS: NATURE OF PROTECTION



*United States v. Reynolds*, 345 U.S. 1 (1953)

**REPORT OF SPECIAL INVESTIGATION OF  
AIRCRAFT ACCIDENT INVOLVING  
TB-29-100XX NO. 45-21866**

1. DATE AND TIME OF ACCIDENT: 6 October 1948,  
approximately 1408 EST
2. LOCATION OF ACCIDENT: Approximately 2 miles  
south of Waycross, Georgia
3. AIRCRAFT TYPE, MODEL, SERIES AND SERIAL  
NUMBER: TB-29-100XX No. 45-21866
4. AIRCRAFT HOME STATION AND ORGANIZATION:  
3150th Electronics Squadron  
Robins Air Force Base  
Robins Field, Ca, AMC
5. RESULTS TO AIRCRAFT: Demolished
6. HISTORY OF AIRCRAFT AND ENGINES:  
Aircraft: Date of Manufacture - 19 September  
**19XX**  
Total Hours - 305:00  
Date of last overhaul - New

[\* The following stamps and marginalia are found on  
page 1 of the original document:]

CLASSIFICATION CANCELLED OR CHANGED

TO RESTRICTED

BY AUTHORITY OF AFR 205 -1

BY RTM DATE 14 SEP. 50

CLASSIFICATION CANCELLED OR CHANGED

TO SECRET

BY AUTHORITY OF CS/USAF

BY [illegible] DATE 3 JAN. 49

0000760-52

# STATE SECRETS: OVERVIEW



Office of the Attorney General  
Washington, D. C. 20530

September 23, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES  
MEMORANDUM FOR THE HEADS OF DEPARTMENT COMPONENTS

FROM:  THE ATTORNEY GENERAL

SUBJECT: Policies and Procedures Governing Invocation of the State Secrets Privilege

I am issuing today new Department of Justice policies and administrative procedures that will provide greater accountability and reliability in the invocation of the state secrets privilege in



## 1. Standards for Determination

**A. Legal Standard.** The Department will defend an assertion of the state secrets privilege (“privilege”) in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations (“national security”) of the United States. With respect to classified information, the Department will defend invocation of the privilege to protect information properly classified pursuant to Executive Order 12958, as amended, or any successor order, at any level of classification, so long as the unauthorized disclosure of such information reasonably could be expected to cause significant harm to the national security of the United States. With respect to information that is nonpublic but not classified, the Department will also defend invocation of the privilege so long as the disclosure of such information reasonably could be expected to cause significant harm to the national security of the United States.



## EXHAUST OTHER OPTIONS FIRST

- DOJ invokes the state secrets privilege “only to the extent necessary to protect against the risk of significant harm to national security” and will not defend an invocation of the privilege to conceal violations of the law, prevent embarrassment to any person, organization, or agency of the United States government, restrain competition, or prevent or delay the release of information that would not reasonably be expected to cause significant harm to national security. Mem. from the Attorney General (Sept. 23, 2009) (available at [www.justice.gov/opa/documents/state-secrets-privileges.pdf](http://www.justice.gov/opa/documents/state-secrets-privileges.pdf)) ¶ 1(B)-(C). *Roule v. Petraeus*, 2012 WL 2367873 (N.D.Cal.)

- Cert granted in *United States v. Husayn*, 141 S. Ct. 2564 (2021)
- 12 dissenting judges concluded that the panel majority’s decision rests on “grave legal errors, conflicts with governing precedent, and poses a serious risk to our national security” by “treat[ing] information that is core state secrets material as fair game in discovery.”
- Ninth Cir. failed to give “any apparent deference” to “the CIA Director on matters uniquely within his national security expertise.” The judges stated that the decision further erred in deeming classified information “basically public knowledge,” *id.* at 98a (citation omitted), even though “[t]he privilege belongs to the Government” and cannot be “waived by a private party,” *ibid.* (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953)) (brackets in original); see *id.* at 100a-101a.

# WAIVER

- Because national security interests are at issue with respect to the state secrets privilege, the government's failure to properly invoke the privilege is unlikely to result in waiver. See, e.g., United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 392–394 (C.D. Cal. 2002) (court granted government additional time to raise state secrets privilege despite failure to do so in response to earlier subpoena).

# FORMAL INVOCATION REQUIREMENTS

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## D. PRESIDENTIAL COMMUNICATIONS



- Communications
- To/from President and advisers
- In performance of office
- Made in policy/decision making

*Judicial Watch, Inc. v. U.S. Dep't of Defense*, 913 F.3d 1106 (D.C. Cir. 2019)

- Unlike the deliberative process privilege, the presidential communications privilege “covers final and post-decisional materials as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.
- Accordingly, the Court finds that the relevant inquiry is not whether the withheld material post-dates the President's decision but whether or not the withheld information was “‘solicited and received’ by the President or his immediate White House advisers who have ‘broad and significant responsibility for investigating and formulating the advice to be given the President.’” *Ctr. for Pub. Integrity v. United States Dep't of Def.*, 486 F. Supp. 3d 317, 345–46 (D.D.C. 2020) (internal citations omitted).

## WHICH OF THE FOLLOWING ARE COVERED?

- A draft Presidential speech given to senior advisor?
- Comments on accuracy of draft?
- Speechwriter's background materials?

# FORMAL INVOCATION REQUIREMENTS

(b) (5)



## E. ATTORNEY CLIENT PRIVILEGE

- The attorney-client privilege is recognized as part of federal common law. Swidler & Berlin v. United States, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (“[T]he interpretation of the privilege’s scope is guided by ‘the principles of the common law ... as interpreted by the courts ... in the light of reason and experience.’”).
- The attorney-client privilege applies if the following elements are established:
  - The asserted holder of the privilege is or sought to become a client;
  - The person to whom the communication was made: (a) is a member of the bar or the member’s agent; and (b) in connection with the communication is acting as a lawyer.
  - The communication relates to a fact of which the attorney was informed: (a) by the client; (b) in confidence; and (c) for the purpose of securing primarily an opinion of law, or legal services or assistance in some legal proceeding.
  - The communication is not for the purpose of committing a crime or tort.
  - The privilege has been: (a) claimed by the client; and (b) not waived by the client.

## WHAT IT IS NOT

- *Alpha Painting & Constr. Co., Inc. v. Delaware River Port Auth.*, 208 F. Supp. 3d 607, 623–624 (D.N.J. 2016) (attorney-client privilege protects only those disclosures necessary to **obtain legal advice**; agency cannot delegate executive functions to lawyers, have those lawyers dictate actions of non-lawyers who communicate with the public, and thereby push communications under umbrella of attorney-client privilege).
- *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759–760 (D.C. Cir. 2014) (court should not try to find “the one primary purpose in cases where a given communication plainly has multiple purposes”).

## “CC” RECIPIENT

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## F. ATTORNEY WORK PRODUCT DOCTRINE

- Different from the attorney client privilege.
- The attorney work-product doctrine protects “documents and tangible things that are prepared in anticipation of litigation or for trial” by an attorney. Fed. R. Civ. P. 26(b)(3); see also *Tax Analysts*, 117 F.3d at 620.
- The District of Columbia Circuit has distinguished between “neutral, objective analyses of agency regulations” and “more pointed documents” that “**advise** the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome” in determining whether a document is prepared in anticipation of litigation. *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987).



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# III. FINAL CONSIDERATIONS

# DOCUMENT REVIEW PLANNING

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# DOCUMENTS BELONGING TO ANOTHER AGENCY

- Absent an explicit delegation, please consult with 3d party agency concerning review and assertion of any privilege.
- Beware of jurisdictional custody or control issues.



# PRIVILEGE LOGS

- District courts have called for various elements to be included in the log, such as:
  - The date the document was prepared;
  - The identity of the person or persons who prepared the document;
  - The identity of any person or persons to whom the document was disseminated;
  - A brief description or summary of the contents of the document;
  - The specific privilege or protection allegedly applicable to the document; and
  - A description of how each element of the privilege or protection is met as to the document.
- See, e.g., *Aurora Loan Servs., Inc. v. Posner*, 499 F. Supp. 2d 475, 479 (S.D.N.Y. 2007) (party **waived** privilege for documents identified in privilege log because log failed to identify which privilege was being asserted for particular documents and often failed to identify parties to each communication); *Petrovic v. City of Chicago*, 2007 U.S. Dist. LEXIS 61245, at \*5 (N.D. Ill. 2007) (listing elements for privilege log); *Cont'l Coal, Inc. v. Cunningham*, 2007 U.S. Dist. LEXIS 81718, at \*2–\*3 (D. Kan. 2007) (same).

# DECLARATIONS

- Declarations will be needed to support any formal invocation (in support of motion practice).
- Declarations must establish the affiant's credentials, describe documents, affirm documents were personally reviewed, and provide a statement of the government interest at risk and how disclosure would result in substantial risk of harm.

# WAIVER ISSUES

- Express waiver.
- Implied waiver by placing privileged matter in controversy.
- Involuntary or inadvertent disclosure.

## EFFECT OF RULE OF EVIDENCE 502

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# PROTECTION FROM INADVERTENT DISCLOSURE

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## IN CAMERA INSPECTION

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As in state secrets cases, however, attorneys ordinarily should not volunteer to produce the documents but should instead make all relevant objections and await a motion to compel to address the appropriateness of in camera review.

0 cont'd/

In camera inspection is not an end in itself, but only a method that may in given instances be indispensable to decision of that question. The Court may be able to satisfy itself, without conducting an examination, that the privilege is sufficiently well founded, and if it does, divulgence even in camera is both unnecessary and improper. [40 F.R.D. at 332]

# THANK YOU!

**Yamileth G. Davila**

Assistant Director

U.S. Department of Justice

Office of Immigration Litigation

Civil Division

OIL-DCS

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