
WHAT'S GOOD FOR THE GOOSE . . .

DIFFERENTIAL TREATMENT OF THE DELIBERATIVE PROCESS AND SELF- CRITICAL ANALYSIS PRIVILEGES

INTRODUCTION

Privileges¹ play an important role in discovery and subsequent litigation. The assertion of a privilege is the last mainstay of confidentiality before a party to a lawsuit is faced with public disclosure of confidential evidence. The Federal Rules of Civil Procedure contain references to the role that privileges play in civil litigation.² Congress has also acknowledged the need for continued development of privileges in the Federal Rules of Evidence.³ Accordingly, Congress has given federal courts flexibility to develop privilege rules on a case-by-case basis.⁴

The primary justification for privileges is that if confidential

1. A privilege is "[t]hat which releases one from the performance of a duty or obligation, or exempts one from a liability which he would otherwise be required to perform, or sustain in common with all other persons." BLACK'S LAW DICTIONARY 831 (6th ed. 1991). This Note will focus primarily on the privilege as applied to documents requested for production.

2. The Federal Rules of Civil Procedure state that "parties may obtain discovery regarding any matter, not privileged." FED. R. CIV. P. 26(b)(1).

3. The Federal Rules of Evidence state that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501

4. *Trammel v. United States*, 445 U.S. 40, 47 (1980) (noting that "Congress manifested an affirmative intention not to freeze the law of privilege").

communications or documents are subject to discovery in litigation, this lack of complete confidentiality will negatively affect numerous socially-useful functions and relationships.⁵ Some professional relationships that require complete candor and earnestness would suffer if disclosure was compelled during litigation.⁶ To protect such relationships that require confidentiality, courts recognize the doctor-patient, attorney-client, and work-product privileges.⁷

Privileges create a hierarchy of rights and protect certain confidential relationships over and above the public's evidentiary need or "right to every man's evidence."⁸ While these privileges center around individual and professional relationships, corporate and governmental entities also benefit from the application of privileges.⁹ Two similar privileges protect the thought processes inherent in internal investigations, reviews, or studies done by private businesses and government agencies. Government agencies may assert the deliberative process privilege, which originated in common law¹⁰ and was later codified by Congress in the Freedom of Information Act.¹¹ Private businesses may assert a similar privilege, the self-critical analysis privilege,¹² which is grounded solely in common law.¹³ Both

5. See, e.g., *id.* at 45 ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation . . ."). See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1471-74 (1985) [hereinafter *Developments*] (discussing the theories and justifications of privilege).

6. See *Developments*, *supra* note 5, at 1472.

7. See generally *id.* at 1501-1629 (analyzing the development of various privileges); 8 WIGMORE, EVIDENCE §§ 2192-2396 (1961). See also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (recognizing the attorney-client privilege); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (recognizing the work-product doctrine); *Hardy v. Riser*, 309 F. Supp. 1234, 1238 (N.D. Miss. 1970) (recognizing the physician-patient privilege).

8. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 WIGMORE, EVIDENCE § 2192 (1940)).

9. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (holding that the attorney-client privilege applies in the corporate context). See generally *Developments*, *supra* note 5, at 1592-1629 (discussing several privileges routinely asserted by various institutions).

10. See *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 945 (Ct. Cl. 1958).

11. 5 U.S.C. § 552 (1994). For further discussion of the Freedom of Information Act, see *infra* notes 60-66 and accompanying text.

12. The privilege is also known as the self-evaluation or the self-criticism privilege. See S.

the deliberative process privilege and the self-critical analysis privilege are qualified¹⁴ and protect disclosure of non-factual investigatory material of the deliberative process, including evaluations, opinions, recommendations, and comments.¹⁵ The privileges represent judicial acknowledgment of the importance and usefulness of free-flowing ideas and opinions in government agencies and private businesses.¹⁶

Although the so-called "twin privileges" serve similar purposes, courts have not applied the privileges with equal weight.¹⁷ Congress has supported the government's deliberative process privilege and federal courts have upheld the privilege against numerous attacks.¹⁸ However, many courts refuse to recognize the self-critical analysis privilege in a variety of contexts and the future of the privilege is in doubt.¹⁹

Kay McNab, Note, *Criticizing the Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675, 679 n.27 (1987) (citing cases that have used different names for the privilege).

13. See *infra* Part I.A.

14. "Qualified" privileges are not absolute. They may be disallowed upon a showing that the opposing party has a strong need for disclosure or is lacking other sources for the evidence. See, e.g., *Bredice v. Doctor's Hosp.*, 50 F.R.D. 249, 251 (D.D.C. 1970); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327 (D.D.C. 1966).

15. See, e.g., *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 285 (N.D. Ga. 1971) (holding that the self-critical analysis privilege applies to opinions, comments, and evaluations made in the development of affirmative action programs); *Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. at 943 (holding that the deliberative process privilege applied to staff opinions and recommendations of the General Services Administration).

16. See *infra* notes 28-32, 34, 54, 55, 69 and accompanying text.

17. See *infra* Parts II.A-B.

18. For cases that have upheld the government's deliberative process privilege, see *infra* note 50.

19. See, e.g., *University of Pennsylvania v. EEOC*, 493 U.S. 182, 195 (1990) (holding that privilege cannot be applied to peer review materials in the educational setting); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 427 (9th Cir. 1992) (holding that voluntary pre-accident safety reviews are not protected by the privilege); *Wei v. Bodner*, 127 F.R.D. 91, 101 (D. N.J. 1989) (rejecting privilege due to the weighty concerns of antitrust law); *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) (rejecting the privilege in cases where the government is seeking disclosure). For cases that have rejected the self-critical analysis privilege in employment discrimination, see *infra* notes 33, 39-43 and accompanying text. See generally James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551 (1983) (rejecting a general privilege of self-critical analysis in favor of a case-by-case review of the competing concerns); McNab, *supra* note 12 (asserting that the privilege does not further identifiable policy interests and should be abandoned).

This Note analyzes and compares the courts' differential treatment of the deliberative process and self-critical analysis privileges. Part I examines the origins and development of the privileges over the past decades.²⁰ Part II identifies current discrepancies in courts' treatment of the privileges by exploring the privileges as applied in several recent employment discrimination cases.²¹ Part III examines the underlying policy reasons for the differential treatment that the two privileges have received and the apparent contradictions in the courts' approaches. Part IV explores the need for uniformity in the application of both privileges.²² Finally, this Note proposes that courts should treat both privileges equally, allowing both private businesses and government agencies to accurately predict and plan their internal monitoring needs.

I. CREATION AND DEVELOPMENT OF THE PRIVILEGES

A. *The Self-Critical Analysis Privilege*

The self-critical analysis privilege protects non-factual deliberative material, including recommendations, opinions, and comments.²³ Businesses usually assert this privilege to prevent disclosure of documents created for internal investigations, reviews, or audits.²⁴ Purely factual material, such as information gathered in an

20. This Note examines how federal courts have construed both privileges under the common law. States are free to legislate their own additional set of privileges. *See, e.g.*, NEB. REV. STAT. § 71-2048 (1981) (creating a privilege for hospital staff meetings); N.Y. CIV. RIGHTS § 50-a (1985) (creating a privilege for police personnel records); WIS. STAT. ANN. § 146.38 (West Supp. 1982) (creating a privilege for health care evaluators).

21. To illustrate the marked contrast in the courts' treatment of the two privileges, the employment discrimination context will be focused on in order to simplify the analysis. Employment discrimination presents uniform policy concerns that may not exist in other contexts.

22. In particular, the self-critical analysis privilege is in need of structured guidelines to aid courts in its application. The deliberative process privilege, however, has extensive factors and guidelines and probably does not need to be further clarified. *See infra* Part II.B.

23. *See infra* note 34.

24. For an additional analysis of the roles of the attorney-client and work product privileges in corporate internal investigations, see generally Marvin Schwartz, *Preserving the Confidentiality of Investigative Files*, in THE INTERNAL CORPORATE INVESTIGATION 85 (Dennis

internal investigation, is not protected.²⁵

The privilege of self-critical analysis has its common law origins in a 1970 medical malpractice case. In *Bredice v. Doctor's Hospital*,²⁶ the court held that minutes and reports of the hospital's staff meetings were privileged and not subject to discovery by the plaintiff.²⁷ The court found that the hospital's purpose in holding staff meetings was to self-evaluate and make recommendations for hospital improvements.²⁸ The court found that a free exchange of ideas was necessary to improve health care for patients, and that confidentiality was required in order to promote this free exchange.²⁹ The court was concerned that a doctor might fear making suggestions or recommendations if there was a possibility that the discussion might be discoverable in a subsequent malpractice suit.³⁰ The court stated that doctors' fear of legal liability would inhibit their candor during hospital self-evaluations, limiting the value of the discussions and impairing hospitals' abilities to improve patient care.³¹ Accordingly, the court concluded that because of the strong public interest in improving the quality of hospital care, the hospital's need for confidential meetings outweighed the plaintiff's need for discovery.³² The court did note, however, that the privilege was qualified and that it could be overcome by an evidentiary showing of need by the party

J. Block et al. eds., 1980).

25. See *infra* notes 78-81 and accompanying text.

26. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

27. See *id.* at 249-50.

28. "The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable." *Id.* at 250.

29. The court stated that "these meetings are essential to the continued improvement in the care and treatment of patients." *Id.* at 250. Furthermore, the court noted that "[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Id.* at 251.

30. "Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." *Id.* at 250.

31. See 50 F.R.D. at 250.

32. "These committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of [the] overwhelming public interest." *Id.* at 251.

seeking disclosure.³³

After *Bredice*, other courts applied the self-critical analysis privilege in a variety of business contexts, including employment discrimination,³⁴ internal police investigations,³⁵ safety procedure audits,³⁶ securities regulations,³⁷ products liability,³⁸ and environmental violations.³⁹

Not all courts agree that the privilege applies in each of these

33. *See id.* Many courts balance the public interest in frank, open discussions against the individual's evidentiary need. *See, e.g., Hardy v. New York News, Inc.*, 114 F.R.D. 633, 641 (S.D.N.Y. 1987) (balancing of plaintiff's need for evidence outweighs defendant's need for confidentiality); *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 217 (D. Mass. 1980) (noting that balancing may be necessary to weigh the interests of disclosure against the need for confidential self-evaluation); *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978) (noting that "courts have been sensitive to the need of the plaintiffs for such materials, and have denied discovery only where the policy favoring exclusion of the materials clearly outweighed plaintiff's need").

34. Approximately one year after *Bredice*, the newly formed self-critical analysis privilege was examined in the employment discrimination context. In *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 284 (N.D. Ga. 1971), the plaintiff requested production of documents relating to Lockheed's internal investigation of equal employment opportunity programs. *See id.* While not specifically applying the privilege, the court addressed the public policy reasons to prevent disclosure of the reports of the internal investigation committee. *See id.* at 285. Following the lead of *Bredice*, the court concluded that the privilege applies to the company's internal reports evaluating affirmative action programs. *See id.* Subjecting the written opinions, recommendations, and conclusions of the internal study to disclosure would discourage companies from conducting the studies in the first place. *See id.* Because the self-evaluation was aimed at improving the company's affirmative action plans, it was in the public's best interest to encourage this activity by protecting the confidentiality of the investigation. *See id.*

35. *See, e.g., Brown v. Thompson*, 430 F.2d 1214 (5th Cir. 1970).

36. *See, e.g., Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992). The *Dowling* court held that the privilege did not apply to pre-accident reports. *See id.* at 427. The court did not decide whether the privilege applied to post-accident reports. *See id.* The court also stated that it was significant that the reviews were performed voluntarily, without the expectation of confidentiality. *See id.* at 426-427. *But see Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987) (holding the self-critical analysis privilege applicable to protect portions of Amtrak accident investigations due to strong public interest in safe railroads).

37. *See, e.g., In re Crazy Eddie Securities Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992) (holding that an internal report of accounting firm named as a defendant in securities fraud litigation is protected by the privilege).

38. *See, e.g., Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992); *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977).

39. *See, e.g., Ohio v. CECOS Int'l, Inc.*, 583 N.E.2d 1118 (Ohio Ct. App. 1990); *Reichold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994).

contexts. In *University of Pennsylvania v. EEOC*,⁴⁰ the Supreme Court refused to expand the self-critical analysis privilege to protect tenure peer-review files in an employment discrimination case. The Court did not accept the university's argument that confidential peer reviews were privileged and refused to apply a balancing test to weigh the societal need for frank and candid peer reviews against the plaintiff's evidentiary need for the review file.⁴¹ In holding that a privilege did not exist, the Court considered the history of Title VII of the 1964 Civil Rights Act (Title VII),⁴² as it applies to educational institutions.⁴³ Although educational institutions were originally exempted from Title VII, and the Court reasoned that by eventually removing the exemption, Congress did not intend a university's tenure review processes to be privileged.⁴⁴

After *University of Pennsylvania v. EEOC*, courts disagreed on the application of the self-critical analysis privilege. While most courts recognize the existence of the privilege, many courts limited its application, relying on the Supreme Court's decision in *University of Pennsylvania*.⁴⁵ In many cases, courts simply perform a policy balancing test to determine whether the need for confidentiality outweighs the other party's need for evidence.⁴⁶ This discretionary

40 493 U.S. 182 (1990). In *University of Pennsylvania v. EEOC*, the University denied tenure to an associate professor. See *id.* at 185. The professor then filed a complaint with the EEOC alleging discrimination on the basis of race, sex, and national origin. See *id.*

41. The University wanted the Commission to "adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process." *Id.* at 187.

42. 42 U.S.C. § 2000e (1994).

43. The petitioner argued that universities and colleges, as higher learning institutions, played an important role in American society and ought to be afforded a higher level of confidentiality in employment discrimination cases than in the case of an average employer. See 493 U.S. at 189.

44. It should be noted, however, that the Court's narrow analysis focused strictly on Title VII and educational institutions in disallowing a tenure peer review privilege. "The costs associated with racial and sexual discrimination in institutions of higher learning are very substantial." *Id.* at 193. This holding is only a narrow precedent, and is not a bar on the use of the privilege in all employment discrimination cases. See, e.g., *Flynn v. Goldman, Sachs & Co.*, No. 91 CIV. 0035, 1993 WL 362380 (S.D.N.Y. Sept. 16, 1993) (upholding the privilege in the employment discrimination context).

45. See *supra* note 19 and accompanying text.

46. See *supra* note 32 and accompanying text.

application of the self-critical analysis privilege leaves private businesses unable to predict with certainty the applicability of the privilege in various situations.⁴⁷

B. *The Deliberative Process Privilege*

The deliberative process privilege⁴⁸ is the government's version of private enterprise's self-critical analysis privilege.⁴⁹ Federal agencies and departments routinely assert the deliberate process privilege to protect information regarding internal and external investigations.⁵⁰ This privilege protects the deliberative process of government officials, including non-factual recommendations, comments, and opinions, from disclosure.⁵¹

Courts first recognized the deliberative process privilege as a matter of common law. In *Kaiser Aluminum & Chemical Corp. v.*

47. Accordingly, a company may be hesitant to conduct voluntary investigations because if sued there is a strong possibility that the investigations will not be protected. *See, e.g.,* John C. Conway, *Self-Evaluative Privilege and Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 658 (1995) (noting that because companies view the privilege as "unreliable" they attempt to utilize the attorney-client and work-product privileges to protect internal compliance audits).

48. The privilege is also classified under the executive privilege, which is commonly thought of as applying to officials of the executive branch. *See Developments, supra* note 5, at 1619-21; *but see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.17 (1975) (differentiating between the deliberative process privilege and the executive privilege). The executive privilege, however, can also apply to protect military, diplomatic or national secrets. Many courts treat these secrets as matters of executive concern. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 710-11 (1974). *See generally* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) (criticizing the executive privilege).

49. "The self-evaluative privilege looks like a private version of the [governmental] deliberative privilege." John C. Conway, Note, *Self-Evaluative Privilege and Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 634 n.57 (1995). Some seeking protection have even attempted to claim both privileges. *See* Mergentime Corp. v. Washington Metropolitan Area Transp. Auth., No. CIV.A.89-1055, 1991 WL 167005 (D.D.C. Aug. 6, 1991).

50. *See, e.g.,* Paisley v. CIA, 712 F.2d 686, 698 (D.C. Cir. 1983) (holding that agency documents must be deliberative and pre-decisional to be protected by the privilege); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (holding that the department promotion process was privileged); Mobil Oil Corp. v. Department of Energy, 520 F. Supp. 414 (N.D.N.Y. 1981) (holding that a random memo making recommendations based on agency study is privileged); Exxon Corp. v. FTC, 476 F. Supp. 713 (D.D.C. 1979) (holding that an internal memoranda of commission is protected by the privilege).

51. *See, e.g., Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. at 943.

United States,⁵² the court held that an internal report produced by the Government Services Administration containing staff opinions and recommendations regarding a departmental action was privileged and protected from discovery.⁵³ The court noted that written advice from a variety of individuals is an important element of the government's decisionmaking process and that the interchange of advice could be stifled if courts forced the government to disclose those recommendations.⁵⁴

After the *Kaiser* decision, several courts set out guidelines for applying the deliberative process privilege.⁵⁵ Application of the privilege involves a two step analysis: (1) to determine whether the documents in question are in fact deliberative and (2) to perform a balancing of the party's interests.⁵⁶ The courts held that because the privilege was qualified, a balancing test weighing the need for confidentiality against the opposing party's evidentiary need for disclosure was appropriate.⁵⁷ Courts noted that an *in camera*

52. 157 F. Supp. 939 (Ct. Cl. 1958).

53. *See id.* at 942.

54. *See id.* at 945-46. The court continued further:

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.

Id.

55. *See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966) (holding that protecting decisionmaking and policy-making processes of government officials was in the public's best interest). The *Stiftung* court drew an interesting analogy between the attorney-client and deliberative process privileges:

Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. And while no clear separation can be made between the United States as a client-litigant and the Department [of Justice] as its legal representative, government, no less than the citizen, needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.

Id. at 325.

56. *See, e.g., Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 854 (3d Cir. 1995).

57. *See Stiftung*, 40 F.R.D. at 327.

inspection of the materials could aid in applying the balancing test, although the requesting party's need must be demonstrable.⁵⁸ Courts also recognized the options of partial disclosure or protected disclosure as possible compromises to the conflicting concerns.⁵⁹

Congress agreed with the courts and specifically recognized the privilege in the Freedom of Information Act (FOIA).⁶⁰ The FOIA in essence codified the deliberative process privilege.⁶¹ Congress enacted the FOIA to give the public access to government information that was previously shielded from public view.⁶²

58. An *in camera* inspection occurs when "under certain circumstances, a trial judge may inspect a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use." BLACK'S LAW DICTIONARY 760 (6th ed. 1990). "[I]t may be that the balance between competing needs for confidentiality and disclosure cannot be made without analysis of the disputed data. Here the [*in camera*] inspection enables the weighing to be done in the privacy of the judge's chambers." *Stiftung*, 40 F.R.D. at 331-32. The court, however, noted that for an inspection to be appropriate, there must be a "definite showing of 'facts indicating reasonable cause for requiring such a submission.'" *Id.* at 331 (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 948 (Ct. Cl. 1958)).

59. *See id.* at 332.

60. 5 U.S.C. § 552 (1994). The Freedom of Information Act (FOIA) supports a policy of open disclosure of information previously kept confidential by government agencies. Congress also included a list of exemptions in subsection (b). *See* § 552(b).

61. *See* 5 U.S.C. § 552(b)(5).

62. The Freedom of Information Act "attempts to create a judicially enforceable right to secure such [official] information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). For example, section 552(a) of the FOIA states:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy of interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Congress did create nine exemptions to the FOIA, however, and thereby protected certain materials from compelled disclosure.⁶³ One of the exemptions specifically protects deliberative memorandums and letters,⁶⁴ but courts have experienced difficulty in interpreting the statutory provisions.⁶⁵

Eventually, the Supreme Court affirmed that Congress intended to codify the deliberative process privilege when drafting the exemptions to the FOIA.⁶⁶ The Court also noted that the deliberative

5 U.S.C. § 552(a).

63. See 5 U.S.C. § 552(b). For example, national secrets, § 522(b)(1); trade secrets, § 552(b)(4); personnel and medical files, § 552(b)(6); records for law enforcement purposes, § 552(b)(7); and geological and geophysical information and data concerning wells, § 552(b)(9), are all exempted from FOIA.

64. Exemption (5) states that “[i]nter-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,” do not apply to FOIA. § 552(b)(5).

65. For example, the ending clause, “available by law to a party other than an agency in litigation with the agency,” § 552(b)(5), has forced courts to look back at the rules of discovery to see whether in requesting a document from the government, that document would be available to the party in litigation. See *EPA v. Mink*, 410 U.S. at 85-86. The problem was whether Congress intended the common law privilege of deliberative process to be classified as one of those rules that an agency would have available in litigation with a private individual. See *id.* at 86. An examination of some of the legislative history, however, clearly indicates that Congress had the same concerns with protecting the deliberative processes of the executive agencies as many of the courts:

[I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’ The committee is convinced of the merits of this general proposition

S. REP. NO. 89-813, at 9 (1965).

Interpretive questions caused courts to wonder whether Congress intended to protect the same deliberative material under the exemption as was protected under the common law privilege. For example, while the common law deliberative process privilege provided for a balancing of each litigant’s interests, FOIA does not permit inquiry into the particularized needs of an individual seeking information. See *EPA v. Mink*, 410 U.S. at 86. See generally Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 HARV. L. REV. 1047 (1973) (examining judicial interpretations of Exemption 5).

66. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The Court relied on the *EPA v. Mink* decision. See *id.* at 149. In *Mink*, the Supreme Court clarified the deliberative process privilege’s relationship with exemption (5) of the FOIA and laid down guidelines for applying the privilege. See *EPA v. Mink*, 410 U.S. at 87-89. After comparing the deliberative process privilege as set forth in *Kaiser*, and the legislative history of exemption (5), the Court concluded

process privilege only applied to pre-decisional communications and not to post-decisional material designed to explain the ultimate decision.⁶⁷ The Court's decision solidified the deliberative process privilege by giving government agencies further guidelines regarding its application.⁶⁸

Subsequent cases further defined the scope and application of the privilege. One court articulated a three-part test to determine whether a particular document fell within the limits of the privilege:⁶⁹ (1)

that Congress had similar policy concerns in mind when it drafted exemption (5). *See id.* at 86-87. In effect, exemption (5) was Congress's implicit acceptance of the deliberative process privilege. *See id.*

67. Communications are pre-decisional if they were made in attempt to reach a final conclusion. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 151. Any communications pertaining to a decision that has already been made are not covered by the privilege. *See id.* at 152. The court reasoned:

The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached . . . as long as prior communications and the ingredients of the decisionmaking process are not disclosed.

Sears, 421 U.S. at 151. The court also gave additional policy reasons for only protecting pre-decisional communications:

The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.

421 U.S. at 152.

68. The court held that documents prepared by the regional counsel for the NLRB which directed the dismissal of a complaint were in effect the final disposition of the case and not "pre-decisional," and therefore not protected by the privilege. *See id.* at 155.

69. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). The court also discussed three major purposes of the deliberative process privilege: (1) to assure that pre-decisional opinions and recommendations will flow freely from subordinates to decisionmakers, without fear of public ridicule or criticism; (2) to protect prematurely disclosed policies or opinions before they are officially adopted as agency policy; and (3) to protect from misleading the public with opinions and recommendations that may have played a minor role in the policy decision, but were not actually the ultimate deciding factor. *See id.* at 866. The three purposes helped the court identify the policy concerns of confidentiality and facilitated application of the balancing test. *See id.*

whether the document is pre-decisional;⁷⁰ (2) whether the document was made before the adoption of the agency policy it pertained to;⁷¹ and (3) whether the document is “deliberative,” reflecting the exchange of ideas inherent in the formulation of policy.⁷² Another court identified four factors for courts to consider when balancing the deliberative process privilege against the evidentiary need of the party seeking disclosure:⁷³ (1) the relevance of the evidence to the lawsuit; (2) the availability of alternative sources for the evidence or alternative evidence altogether; (3) the government’s role in the litigation; and, most importantly, (4) the extent which disclosure would harm open and frank communication within the agency.⁷⁴ Because Congress codified the deliberative process privilege in the FOIA and courts clearly articulate factors considered in application of the privilege, government agencies making policy decisions or conducting investigations that require opinions and recommendations are able to confidently predict what materials courts will protect from compelled disclosure.

II. COMPARISON OF THE TREATMENT OF THE PRIVILEGES IN EMPLOYMENT DISCRIMINATION

Because application of the self-critical analysis privilege and the deliberative process privilege is dependent on the context of the litigation and is often fact-specific, it is important to compare the two

70. The court, however, made an important qualification to the “pre-decisional” criteria: “[E]ven if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public.” *Id.*

71. The distinction between the first and second factors is somewhat ambiguous. The court seems to be concerned with those documents “which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Id.* at 866.

72. *See id.*

73. *See* *FTC v. Warner Communications*, 742 F.2d 1156 (9th Cir. 1984).

74. *See id.* at 1161. Applying the four criteria, the court concluded that although the evidence in question was relevant, it was available from other sources. *See id.* at 1161-62. Because the evidence was otherwise available and the fact that “compelled disclosure of the memoranda almost certainly injures the quality of agency decisions,” the court upheld the privilege. *Id.*

privileges as applied in similar types of cases. For example, a court might weigh the public's policy interest in environmental regulation differently than its interest in securities regulation. Employment discrimination provides an ideal context for comparing the two privileges because it is an area of law which affects the public and private sectors equally and because the public policy against biased treatment in the workplace is the same for government and private employers.⁷⁵

A. *Self-Critical Analysis Privilege*

One of the earliest cases to recognize the self-critical analysis privilege was in the employment discrimination context.⁷⁶ The court weighed the strong policy concerns supporting the privilege and asserted that allowing compelled disclosure of self-critical material would hinder compliance with Title VII and affirmative action plans.⁷⁷ Several years later, courts began to waver on this view of self-critical analysis and employment discrimination. Courts began to weigh plaintiffs' evidentiary need for confidential reports more heavily than businesses' need for protected self-evaluation.⁷⁸ One court established three criteria for application of the privilege in employment discrimination cases.⁷⁹ The court stated that in order to

75. Employment discrimination cases include, but are not limited to violations of Title VII of the 1964 Civil Rights Act (Title VII), 42 U.S.C. § 2000e (1994); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994); and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994). For instance, if an employee believes that he has been discriminated against in violation of Title VII, he files a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC will then make an investigation for "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If reasonable cause is found, the EEOC may bring suit or negotiate a settlement with the employer. *See id.* If probable cause is not found, the individual may proceed with a lawsuit on his own without the EEOC. *See* § 2000e-5(1).

76. *See* *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

77. *See id.* at 285. The court found that allowing disclosure "would discourage companies such as Lockheed from making investigations which are calculated to have a positive effect on equalizing employment opportunities." *Id.*

78. *See, e.g., Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 432-33 (E.D. Pa. 1978) (holding that the plaintiff's need for equal employer opportunity reports outweighed the company's need for confidentiality).

79. *See id.*

be protected, material had to be prepared for mandatory equal employment reports required by federal regulation, be non-factual, subjective material, and that public policy must clearly outweigh the plaintiff's need for information.⁸⁰ These criteria severely limited the scope of the self-critical analysis privilege by protecting only mandatorily prepared documents and insisting that the plaintiff's need be clearly outweighed by the defendant's interests.⁸¹

Some courts no longer recognize the self-critical analysis privilege in the employment discrimination context.⁸² In *Tharp v. Sivyer Steel Corp.*,⁸³ the court held that documents produced under federal mandate were not protected by the privilege.⁸⁴ The court gave little weight to businesses' need for frank and open communications regarding affirmative action plans or equal employment compliance.⁸⁵ The court reasoned that because documentation of these matters was required by federal regulations, such records could not carry an expectation of confidentiality and disclosure would not stifle their creation.⁸⁶

The *Tharp* court also considered the importance of private civil

80. *See id.* at 434. The court noted, "[t]he major justification for excluding such material from discovery is that, in view of the fact that the filing of such reports is mandatory, the policy favoring equal opportunity in employment requires that employers be encouraged to be candid and complete in preparing such reports." *Id.* The court continued, "The quality of these documents depends to a great extent on the good faith of employers in evaluating their progress and establishing affirmative action goals." *Id.* (quoting *Dickerson v. United States Steel Corp.*, 1976 WL 596 (D. Pa. 1976)).

81. *See id.* This decision began an apparent shift in burden for the policy balancing test. To assert the privilege, the party seeking disclosure must show that its need clearly outweighs the policy favoring exclusion of the materials. *See id.* *Cf.* *Bredice v. Doctors Hosp.*, 50 F.R.D. 249, 251 (D.D.C. 1970) (noting that to overcome the privilege of self-critical analysis, the party seeking disclosure must show "extraordinary circumstances").

82. *See, e.g.,* *Etienne v. Mitre Corp.*, 146 F.R.D. 145 (E.D. Va. 1993); *Siskonen v. Stanadyne, Inc.*, 124 F.R.D. 610 (W.D. Mich. 1989); *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987); *Witten v. A.H. Smith & Co.*, 100 F.R.D. 446 (D. Md. 1984), *aff'd without opinion*, 785 F.2d 306 (4th Cir. 1986).

83. 149 F.R.D. 177 (S.D. Iowa 1993).

84. *See id.* at 178.

85. *See id.* at 182.

86. "[D]isclosure in employment discrimination cases will not result in diminished equal employment evaluations because employers are mandated to file them." *Id.* at 182. *But see Westinghouse*, 81 F.R.D. at 434 (noting that the self-critical analysis privilege ought to be applied to encourage employers to increase the quality of equal employment evaluations).

litigation in promoting social change and ending employment discrimination.⁸⁷ The court stated that exercise of the privilege could prevent a plaintiff with a cognizable claim from accessing relevant evidentiary material.⁸⁸ The court reasoned that allowing the privilege to protect relevant evidence from disclosure would frustrate socially-beneficial litigation and impede progress toward eradicating employment discrimination.⁸⁹

The *Tharp* decision did not mark the end of the self-critical analysis privilege in the context of employment discrimination. A few courts continue to allow businesses to use the privilege to protect internal reports regarding equal employment and affirmative action policies.⁹⁰ However, most courts severely limit use of the privilege in these types of cases.⁹¹

87. See *Sivyer Steel*, 149 F.R.D. at 183-184.

88. "In the context of employment cases, courts must remain cognizant of the possible resulting perils when disclosure is prevented of those documents which may yield crucial evidence regarding an employers' intent and motivation." *Id.* at 184. See also *Wood v. Brier*, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972) (stating that plaintiffs should act as "private attorneys general" in enforcing employment regulations).

89. "Indeed, it is doubtful that the progress made toward equal employment opportunities in this country over the past 30 years would have been possible without the engine of private civil litigation driving enforcement of this nations [sic] civil rights laws." *Sivyer Steel*, 149 F.R.D. at 183. The court concluded that unlike the deliberative process privilege, there had been no statutory or congressional move to codify the common law privilege. See *id.* at 184. The court held that not only did the privilege not apply under the facts of the case, but that no self-critical analysis privilege existed in the employment discrimination context. See *id.* at 182.

90. See, e.g., *Flynn v. Goldman, Sachs & Co.*, No. 91 Civ. 0035, 1993 WL 362380 (S.D.N.Y. Sep. 16, 1993). In *Flynn* the court upheld the use of the privilege in employment discrimination litigation. See *id.* The plaintiff brought a gender-discrimination suit against her employer and sought disclosure of a study conducted by a third party. See *id.* at *1. The court applied the policy balancing test and found in favor of the third party and the defendant after an *in camera* review of the requested documents. See *id.* at *3. The court noted that the employee interviews and the reports contained in the study were prepared with the assumption the information would be kept confidential. See *id.* at *2. The court concluded that policy weighed in favor of non-disclosure because confidentiality was essential in the preparation of the reports, and disclosure would have a "chilling" effect on the candor of future studies and impair their value. See *id.*

91. One of the more recent cases that rejected the privilege is *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995). In *Aramburu* the plaintiff filed discrimination claims based on Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). See *id.* at 1435. The defendant asserted the self-critical analysis privilege to protect portions of documents related to its affirmative action plans. See *id.* at 1435-36. The court based

B. The Deliberative Process Privilege

Unlike application of the self-critical analysis privilege, judicial application of the deliberative process privilege in employment discrimination cases has consistently favored protecting documents created by the government. These cases arise most frequently when parties to a private employment discrimination action attempt to discover documents created by the Equal Employment Opportunity Commission (EEOC) during the agency's investigation of the employer.⁹² Courts have repeatedly held that the EEOC need not disclose documents to parties involved in a discrimination lawsuit concerning the employer investigated by the agency.⁹³ Courts have

its decision to disallow the privilege in discrimination cases on five reasons. First, the court attacked the *Bredice* holding and asserted that the privilege did not have a "historical, constitutional, or statutory foundation." *Id.* at 1440. Second, the court chose not to follow the *Banks* rationale, disagreeing with the contention that employers would be discouraged from making investigations into their affirmative action plans if the investigations were later subject to disclosure. The court believed that where the plans are mandated by law, employers would have no choice but to comply with the affirmative action requirements. *See id.* Third, neither Congress nor the EEOC had made a provision for the privilege in the thirty years since Congress enacted the Civil Rights Act. *See id.* Fourth, denying the employee access to all relevant information would limit the strong policy of allowing private actions for violating Title VII and the ADA in order to deter future discrimination. *See id.* Finally, the court denied the privilege in reliance on *University of Pennsylvania v. EEOC*. *See id.*

92. Before a plaintiff may file an individual discrimination suit against her employer, she must file a complaint with the EEOC and wait to receive a right-to-sue letter from the EEOC before filing her lawsuit. *See* 42 U.S.C. § 2000e-5(b) (1994). The EEOC generally conducts an independent investigation before issuing the letter, in order to determine whether the agency will pursue legal action against the employer. *See* 42 U.S.C. §§ 2000e-5(b), -8.

93. A typical case is *Scott v. PPG Industries, Inc.*, 142 F.R.D. 291 (N.D. W. Va. 1992) in which the plaintiffs filed a complaint with the EEOC charging sex discrimination by the defendant. *See id.* at 292. The EEOC conducted an investigation and determined there was probable cause the employer had violated Title VII and the Equal Pay Act. *See id.* The EEOC opted not to file the lawsuit, however, and the plaintiffs filed a private action. *See id.* The defendant requested documents created during the probable cause investigation by the EEOC, and the EEOC asserted the deliberative process privilege. *See id.* at 292-93.

The court found that the documents requested were indeed deliberative material and applied the four factor *Warner* test to decide the issue. *See id.* While the court found that the evidence was relevant to the lawsuit and that PPG had no other source for the information, *see id.*, the court still upheld the privilege and denied disclosure to PPG. In making its determination, the court held that the policy of protecting open and frank communications within the agency, tipped the balance in favor of the EEOC. *See id.* at 294. The court asserted that subjecting the personal notes and observations to disclosure would inhibit communication

found that the policy need for keeping agency investigations confidential outweighs both plaintiffs' and defendants' needs for evidence, even when the evidence is relevant and there is no other source.⁹⁴

Even cases not involving EEOC investigations have supported the deliberative process privilege. For example, one court has held that the confidentiality of a government agency's hearings officer's notes taken during a dismissal proceeding was sufficient to invoke the privilege.⁹⁵ Because the notes were protected, the employee was unable to discover them for use in her discrimination suit against the agency.⁹⁶

within the agency. *See id.*

94. In *Walker v. NCNB National Bank of Florida*, 810 F. Supp. 11 (D.D.C. 1993), the defendant sought production of the notes and comments that formed the basis of the EEOC's determination letter that there was reasonable cause to find discrimination. *See id.* at 12. The court concluded that the deliberative process privilege protected the EEOC documents. *See id.* at 14. It found that there was a policy need for the EEOC to keep its investigations confidential and that this need outweighed the defendant's need for disclosure. *See id.* Notably, the court placed the burden of proving the benefits of disclosure outweighed the EEOC's interest in confidentiality on the party seeking disclosure. *See id.* On similar reasoning as *Scott*, the court noted that a candid investigation was essential for the agency to properly conduct its job. *See id.* The court concluded, "the often sensitive nature of allegations of discrimination requires a certain measure of confidentiality of EEOC investigations so that the agency may effectively perform its function." *See id.* at 14 (quoting Report of the Special Master). The court, however, does not explore the reasons that a lack of confidentiality will inhibit the EEOC's function. Presumably, even if the deliberative material of reasonable cause investigations were subject to disclosure, this does not indicate why the EEOC would investigate any less effectively.

95. The deliberative process privilege was upheld in *Zinker v. Doty*, 637 F. Supp. 138 (D. Conn. 1986). The plaintiff was contesting her discharge from the Department of Income Maintenance and sought production of notes taken by a hearing officer of the Department of Administrative Services during her dismissal hearing. *See id.* at 139. After an *in camera* inspection, the court found that the notes were indeed deliberative and performed the policy balancing test using similar factors as the court noted in *Warner*. *See id.*

The *Zinker* court decided that the policy factors strongly supported the government's need for confidentiality. *See id.* at 141. The court further found that the notes were not particularly relevant to the plaintiff's case and that there were alternative sources for the information. *See id.* The court noted that the factor that tipped the scales in the government's favor was the potential chilling effect on future noting taking by hearings officers. *See id.* at 142. The court barred disclosure because without written notes the officers would not be able to perform their duties. *See id.*

96. *See id.* at 141.

III. COMPARATIVE ANALYSIS

Regardless of whether potentially privileged material was produced by a private employer's internal investigation or by the EEOC, the comments, opinions, reports, and other material could be substantively identical. Comments and conclusions reported by EEOC investigators could reflect the exact same thought-process and decisionmaking as internal investigators at a private company.⁹⁷ Therefore, the differential treatment of the self-critical analysis and deliberative process privileges should look beyond the substantive nature of the materials at issue. Instead, courts should explain their differential treatment by offering policy reasons for giving greater deference to a government agency's decisionmaking processes, an arguably public concern, than to private businesses' decisionmaking processes.⁹⁸

An important distinction between the application of the two privileges is that courts have applied the self-critical analysis privilege only in certain types of cases, while they have not restricted the application of the deliberative process privilege.⁹⁹ In self-critical analysis cases, the context of employment discrimination raises a weighty policy concern: protecting certain documents from discovery may hinder socially-useful litigation designed to end employment discrimination. Courts consider this policy when deciding whether or

97. For example, comments, suggestions, and conclusions expressed in the process of interviewing employees may be substantively similar regardless if the interview was performed by the EEOC or by the company itself.

98. Ironically, whereas the government has made attempts to open itself up to the people through the passage of the FOIA, private business remains just that—private. It would seem logical that as an institution for the people, the government should not be able to protect from disclosure what a private institution, like a corporation, could not protect.

99. The deliberative process privilege may be asserted by any government agency or department. It apparently may be applied in any situation where an agency is requested to produce deliberative documents. See *supra* Parts I.B, II.B (discussing cases where courts have applied the deliberative process privilege). See also *Vaughan v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (noting that the privilege is available whenever the document in question is deliberative); *Nelson v. Production Credit Ass'n of the Midlands*, 131 F.R.D. 161, 164 (D. Neb. 1989) (questioning the applicability of the privilege due to the defendant's uncertain status as a government agency).

not to apply the privilege.¹⁰⁰ However, courts ignore the inherent public policy issues when applying the deliberative process privilege in employment discrimination cases.¹⁰¹ Instead, courts only focus on the individual needs of the party seeking disclosure versus the party seeking protection.¹⁰² This discrepancy in treatment becomes troublesome if important policy concerns are inherent in the context that the privilege is asserted.¹⁰³

Another difference between courts' application of the two privileges is how courts analyze the "chilling" effect of compelled disclosure. Recent cases applying the self-critical analysis privilege argued that affirmative action plans and equal employment opportunity compliance would not be hindered or "chilled" by forcing disclosure of confidential materials.¹⁰⁴ The courts reasoned that because government regulations require employers to produce the reports, employers will continue to do so whether or not they are privileged.¹⁰⁵ However, courts could apply this same reasoning to EEOC investigations. Whenever a charge is filed by an aggrieved

100. See *supra* text accompanying notes 85-87.

101. In the employment discrimination cases where the deliberative process privilege was asserted, the policy issue of hindering socially useful litigation was never factored into the balancing test. See *supra* Part II.B. For example, the *Zinker* court did not recognize the policy concerns of employment discrimination. Unlike the court in *Tharp* and *Aramburu*, both self-critical analysis cases, the *Zinker* court never addressed the important role of employment discrimination lawsuits in bringing about social change.

102. In applying the deliberative process privilege, the courts simply perform the qualified balancing test. See cases cited *supra* Parts I.B, II.B.

103. Another factor that may play a significantly smaller role in the differential treatment of the privileges is the identity of the party seeking production. In the self-critical analysis cases reviewed, for example, the discriminated against employee sought disclosure, and disclosure was granted. See *supra* Part II.A. In two of the deliberative process cases, *Scott* and *Walker*, the discriminating company sought disclosure and disclosure was denied. See *Scott*, 142 F.R.D. 291 (N.D. W. Va. 1992); *Walker*, 810 F. Supp. 11 (D.D.C. 1993). There may be, to some extent, an undercurrent of sympathy for the employee-plaintiff in each of these cases. Although never explicitly weighed in the final balancing test, it is apparent that the courts would rather err on the side of the victim than the alleged discriminator. *But see Zinker v. Doty*, 637 F. Supp. 138, 141 (D. Conn. 1986) (denying disclosure to employee-plaintiff). Allowing disclosure for a discrimination victim increases the chances the victim will succeed in litigation. Conversely, if employers are allowed to protect some damaging piece of evidence, the victim-plaintiff will find it difficult to prevail.

104. See *supra* notes 85-87 and accompanying text.

105. See *infra* notes 86 and accompanying text.

employee, the EEOC is required by law to investigate discrimination in the work place.¹⁰⁶ Because EEOC investigations are mandatory,¹⁰⁷ the EEOC will continue to produce documents incident to those investigations whether or not the documents are privileged.¹⁰⁸ However, courts applying the deliberative process privilege have not adopted this argument.

Furthermore, courts have interpreted the self-critical analysis privilege too narrowly by focusing attacks on the privilege as it pertains to mandatory reports.¹⁰⁹ The conclusion that businesses will continue to prepare such reports and documents because they are required by law is sound.¹¹⁰ However, when courts use that conclusion to justify rejecting the privilege in all employment discrimination cases, they discourage employers from initiating socially desirable, voluntary self-regulation.¹¹¹ In today's litigious

106. See 42 U.S.C. § 2000e-5(b).

107. See *id.*

108. Moreover, it seems anomalous for the courts to be concerned with compromising the EEOC's deliberative process in applying the privilege. The EEOC performs investigations on the behalf of specific plaintiffs under specific circumstances, and does not make general policy rulings. As well, the EEOC, as an independent party, has no fear of either frivolous litigation or legal retribution by any of the parties involved. As noted by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, one of the policy justifications for the deliberative process privilege was to prevent public confusion. See *supra* note 69 and accompanying text. But an EEOC investigation will not cause public confusion because only *after* the EEOC's investigation is completed and reasonable cause determination has been made, does the possibility of litigation arise. See *supra* note 75 and accompanying text. Therefore, by the time the EEOC or the plaintiff ends up in court with the employer, the EEOC investigation is necessarily post-decisional and does not fall under the *Sears* rationale.

109. See *Sivyer Steel*, 149 F.R.D. at 182 (“[I]t must first be noted that affirmative action plans . . . are not voluntary, but mandated by law.”); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1439 (D. Kan. 1995) (“[E]mployers are generally likely to comply with legal requirements and will prepare affirmative action plans.”).

110. See, e.g., *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 217 (D. Mass. 1980). In that case the court noted that subjecting conclusions contained in affirmative action plans to discovery would not necessarily deter future self-evaluations because “the evaluations . . . were not entirely voluntary, they will occur even if the threat of discovery is present.” *Id.* However, the court's first criteria for applying the privilege was whether the material was prepared for *mandatory* governmental reports. See *id.* This seems to be a form of rationale bootstrapping to limit the application of the privilege.

111. See, e.g., *Mazzella v. RCA Global Communications, Inc.*, No. 83 CIV. 3716, 1984 WL 55541, at *4 (S.D.N.Y. March 28, 1984) (“In furtherance of voluntary compliance, employers must be encouraged to be candid and forthright in assessing their employment

society, courts should encourage private institutions to seek alternate methods of settling disputes,¹¹² and voluntary investigations are both preventative and remedial.¹¹³

Another policy distortion articulated by courts applying the self-critical analysis privilege asserts that application of the privilege will limit socially-useful litigation intended to eradicate employment discrimination.¹¹⁴ Those courts contend that plaintiffs will be less able to prove intentional discrimination at trial if they are not allowed to discover self-evaluative reports and documents.¹¹⁵ However, this analysis fails to recognize that Congress and the courts have reduced plaintiffs' evidentiary burden in employment discrimination cases. For example, congressional adoption of the "disparate impact" theory of discrimination allows a plaintiff to prove intentional discrimination with only statistical evidence.¹¹⁶ Because the evidentiary burden on the plaintiff is lessened, many subjective self-evaluative documents

practices and setting goals and timetables for eradicating policies deemed to be discriminatory in operation or effect." See generally Michael P. Kenny & William R. Mitchelson, Jr., *Corporate Benefits of Properly Conducted Internal Investigations*, 11 GA. ST. U. L. REV. 657, 661 (1995) (noting the advantages of corporate internal investigations); Conway, *supra* note 47, at 629 (noting that confidentiality may encourage corporate legal compliance).

Typically, when discrimination occurs, the employer is often complained to first, and thus is in the best position to correct the problem quickly and efficiently.

112. Recently there has been a growing trend in favor of alternative dispute resolution (ADR) which has partially lifted the burden off of inundated courts. See generally R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: LAW, POLICY & PRACTICE* ch. 15 (2d ed. 1996) (discussing different forms of ADR and the policies for promoting them).

113. See generally DAN K. WEBB ET AL., *CORPORATE INTERNAL INVESTIGATIONS* § 11.08 (1995); BRAD D. BRIAN & BARRY F. MCNEIL, *INTERNAL CORPORATE INVESTIGATIONS: CONDUCTING THEM PROTECTING THEM* (1992); Kenny & Mitchelson, *supra* note 111, at 661.

114. See, e.g., *Sivyer Steel*, 149 F.R.D. at 83.

115. See *id.* at 182; *Aramburu*, 885 F. Supp. at 1440.

116. Disparate impact, recognized in Title VII cases, requires no showing of motive. A plaintiff must only show that he or she was a member of a protected class that was disproportionately adversely affected by the employer's actions. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing the theory of disparate impact). See also 42 U.S.C. § 2000e-2(k) (1994) (codification of disparate impact). Section 2(k)(B)(i) of Title VII states in part, "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact." Normally, statistical information will suffice to show the protected class was substantially disproportionately impacted. See 42 U.S.C. § 2000e-2(k) (approving the use of statistics to prove disparate impact). Statistical information is objective, and thus is not protected by the self-critical analysis privilege.

prepared by the employer may not be necessary to prove the plaintiff's case. Therefore, a privilege protecting self-evaluative documents may not have a large impact on the outcome of some employment discrimination litigation.¹¹⁷

Another discrepancy in the application of the two privileges is who possesses the burden of proof in the policy interest balancing test. In many self-critical analysis cases, courts place the burden of proof on the party asserting the privilege to show that disclosure would chill future self-evaluations.¹¹⁸ On the other hand, in many deliberative process privilege cases, courts place the burden on the party seeking disclosure to show that their need for the evidence outweighs the government's need to keep the deliberations confidential.¹¹⁹ In fact, very few deliberative process privilege cases

117. Another reason employment discrimination litigation will not be stifled is that the privilege is qualified. In all applications of the privilege, the policy concerns of keeping candid investigations confidential must be weighed against the plaintiff's need for discovery. In instances where the plaintiff is entirely without evidence to prove his case, the court can easily perform a balancing test via *in camera* inspection of the requested documents. In cases where the defendant is attempting to protect a document crucial to the plaintiff's success, the policy concerns will fall on the side of disallowing the privilege. The application of the privilege will not inhibit employment discrimination litigation once commenced, but it may curtail it in favor of dispute resolving internal investigations performed by employers. Encouraging the self-policing function will further the social goals of Title VII and other employment discrimination acts, without burdening the courts with excess litigation.

118. See *supra* note 81 and accompanying text (noting the *Webb* court's placement of burden in the balancing test). This burden has changed over time. Originally, the party seeking production had to show "extraordinary circumstances" to overcome the opponent's need for confidentiality. *Bredice*, 50 F.R.D. at 251. See also *Flynn v. Goldman, Sachs & Co.*, No. 91 CIV. 0035, 1993 WL 362380, at *3 (S.D.N.Y. Sept. 16, 1993) (noting that plaintiff must make a "compelling showing" of need to overcome the privilege). Due to more recent decisions like *Aramburu*, it is doubtful that *Flynn* indicates a permanent shift in the burden of proof back to the party opposing the privilege.

119. See, e.g., *Redland Soccer Club, Inc. v. Department of the Army of the United States*, 55 F.3d 827, 854 (3d Cir. 1995) ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest."); *FTC v. Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984) ("A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact finding override the government's interest in non-disclosure."). *Walker v. NCNB Nat'l Bank of Florida*, 810 F. Supp. at 13 ("In order to overcome the privilege, the party seeking disclosure must show that the interests in disclosure outweigh the interests in non-disclosure."); *Scott v. PPG Indus., Inc.*, 142 F.R.D. at 294 ("PPG has failed to demonstrate sufficient need. . ."); *Zinker v. Doty*, 637 F. Supp. at 141 (noting the plaintiff failed to show lack of an alternative source for the evidence);

disallow the privilege based on policy grounds.¹²⁰

IV. PROPOSAL

In the absence of legislative enactment, the courts should make a concerted effort to clarify the self-critical analysis privilege.¹²¹ As with any rule of law, the easier it is for parties to predict how a privilege applies, the more likely it is those parties will be able to comply with the law, and less likely that discovery disputes will arise. Because the self-critical analysis privilege is qualified, subject to a policy interest balancing test, the privilege should potentially be applicable in any context. Courts would then have the freedom to weigh competing concerns on a case-by-case basis. As a result, private enterprise would be encouraged to self-regulate through internal investigations. Courts must be careful to only apply the privilege in cases where the threat of disclosure may hinder the creation or execution of voluntary internal investigations.¹²² Courts should define specific guidelines similar to those proposed in deliberative process cases.¹²³ Courts should also utilize *in camera* inspections in cases where there is a question as to the nature of the documents for which the privilege is sought.

Futhermore, courts should take special care to hold the two privileges to similar standards. An analysis of policy concerns dictates that both privileges should be applied consistently and

cf. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) ("It is also clear that the agency has the burden of establishing what deliberative *process* is involved . . .") (emphasis added).

120. *See supra* Parts I.B, II.B. The cases that disallowed the deliberative process privilege did so on the basis that the documents in question were either not "deliberative" or were not pre-decisional. *See Sears*, 421 U.S. at 153-54; *Coastal States*, 617 F.2d at 868. Even when the courts have found that the party seeking disclosure has demonstrated substantial need, they have upheld the deliberative process privilege. *See, e.g., Scott*, 142 F.R.D. at 294 ("There is no indication that PPG can obtain evidence equivalent to that sought . . . from any other source.").

121. For example, the courts should make an effort to place the burden of proof required in the policy interest balancing test on the same party in each instance, and set a uniform standard.

122. The policy that disclosure would deter socially beneficial regulation does not apply for mandatory investigations. *See supra* notes 86-89 accompanying text (discussing the mandatory/voluntary distinction).

123. *See supra* note 73 and accompanying text (discussing the *Warner* guidelines).

uniformly. The policy reasons supporting the application of the privileges are nearly identical. Self-monitoring and self-regulation are socially valuable activities that courts should encourage.¹²⁴ Courts should encourage private enterprise to engage in self-regulating activity by granting businesses the same freedom of candor as government agencies. Just as courts presently protect the thought processes of government officials from the "chilling" effect of disclosure, so should courts protect private businesses that conduct internal investigations or audits. The objective of self-improvement and regulation is socially desirable, and can only be fostered when companies can adequately protect open and frank recommendations and opinions created during self-investigations.¹²⁵

In the employment discrimination context, the need for similar standards is clear. The EEOC investigations protected in many cases may contain similar material as a defendant company's investigative reports in the self-critical analysis cases. Important steps towards the eradication of the employment discrimination are made by litigation, but companies should be given the incentive to remedy the situations themselves before courts force them to disclose confidential documents regarding internal investigations.¹²⁶ If internal investigations of discrimination claims are chilled by the threat of disclosure, society will lose an important tool instrumental to the objective of ending employment discrimination.

CONCLUSION

Upon close examination, both the self-critical analysis privilege

124. Some of the advantages of corporate internal investigations are: (1) assessment of internal controls and loss prevention measures; (2) identification of areas where additional corporate policies or measures may avoid future loss or civil or criminal exposure; and (3) avoidance of formal legal proceedings and expenses pursuant to an informal demand by a potential private litigant. See Kenny & Mitchelson, *supra* note 111, at 661.

125. There has been growing support for legislative enactment of a self-critical analysis privilege. See, e.g., Karen Donovan, *Fears of Liability Spawn New Focus on Audit Privilege*, NAT'L L.J., Apr. 27, 1992, at 19; Daniel L. Goelzer & Clifford E. Kirsch, *Penalizing Companies for Fighting Crime*, N.Y. TIMES, July 12, 1992, at 13.

126. See generally Kenny & Mitchelson, *supra* note 111, at 661.

and the deliberative process privilege are supported by the policy concerns of promoting self-monitoring and self-regulation. The differential treatment of the two privileges may simply boil down to an institutional bias in favor of the government. While this bias for holding governmental matters in greater regard than private concerns may be justifiable in many respects, it is questionable in the instance of deliberative matters. As noted by the passage of the Freedom of Information Act and similar legislation, there is an on-going public concern for an open government that is accessible to the people. In light of this desire for openness, it is important to re-evaluate the bias for government in the application of the self-critical analysis and deliberative process privileges and consider a more uniform standard of application for both. Clearly, a uniform and consistent application of the privileges makes policy sense, and would allow private enterprise some of the deference that has previously favored the government. In turn, these companies would be encouraged to conduct socially beneficial self-regulation.

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