

MEMORANDUM

TO: Addressees

FROM: The Secretary

SUBJECT: Delegation of Authority to Assert Deliberative Process Privilege with Respect to Records or Testimony Requested in Judicial or Administrative Proceedings

I. DELEGATION

Under the authority vested in me by section 412 of the Department of Education Organization Act, 20 U.S.C. §3472, I hereby delegate to you, your successor in function, and anyone acting for you or delegated the authority to perform the functions and duties of your position, the authority to assert the Federal Government's deliberative process privilege with respect to records or testimony requested in judicial or administrative proceedings when an order of a court or an administrative authority is, or may be, issued for such records or testimony, whether or not the Department is a party to the matter at issue. The assertion of the privilege is limited to records or testimony created, maintained, or related to program operations within the scope of the responsibilities of your position or otherwise related to Departmental functions for which you have been delegated authority. To ensure consistency in its application, the privilege must be asserted in accordance with the following guidelines:

Consultation with the Office of the General Counsel

You must consult with the Office of the General Counsel before you decide whether to assert the privilege, except that the Office of Inspector General is not required to consult with the Office of the General Counsel regarding a decision whether to assert the privilege in a judicial or administrative proceeding (1) that arises from a personnel matter exclusively within the purview of the Inspector General under the Inspector General Act of 1978, and (2) that does not concern materials implicating the policy deliberations of the Department.

Personal Review

To assert the privilege, you must personally review the requested records or testimony for which assertion of the privilege is being considered. Blanket assertions of the

privilege are not permitted. However, if voluminous records are at issue, you may rely on a detailed review of such records prepared by a subordinate. For each record for which assertion of the privilege is contemplated, the review provided to you should include: 1) the record's author, 2) the record's recipients, 3) the date prepared, 4) a description of the record, including how it is both pre-decisional and deliberative, and 5) a statement of how the record's release would harm the Department's deliberative process. After considering this review, you should also review a representative sample of the records themselves. You must personally assert the privilege.

Criteria for Asserting the Privilege

Pre-decisional and Deliberative

The privilege may be asserted with respect to records that are both: 1) pre-decisional and 2) deliberative in nature, or with respect to requested testimony that would disclose pre-decisional deliberations.

- 1) Pre-decisional—Material is pre-decisional if it was prepared to assist a Department decision maker in arriving at his or her decision on a legal or policy matter, regardless of whether a decision was issued.
- 2) Deliberative—Material is deliberative if it was created in the process of formulating agency policy. Deliberative material includes material that contains opinions, evaluations, or advice, as well as material that interprets the existing state of affairs with a view toward changing existing policy. An example of deliberative material is a document or discussion from a junior to a senior official that contains opinions or recommendations that have no binding effect on the recipient.

Records or testimony that are deliberative typically will include recommendations or express opinions on legal or policy matters.

Factual Material

The privilege does not apply to records or testimony, or portions thereof, that are purely factual. If portions of a record or requested testimony concern pre-decisional deliberations and other portions do not, the deliberative process privilege should not be asserted for the portions of the material that are purely factual or that do not otherwise qualify for the privilege. However, if the factual material is inextricably intertwined with recommendations or thought processes, the entire communication may be protected. For example, facts that would reveal the nature of the deliberations and analysis or evaluation of facts as part of deliberations is protected.

Post-Decisional

The privilege also may not be asserted with respect to the outcome of the deliberative process, i.e., a policy decision itself. Conversely, once the privilege attaches to a policy recommendation, that privilege is not destroyed by a decision maker's subsequent decision adopting recommendation.

The privilege may still apply to records or testimony created or provided after a final decision has been reached, although more caution should be exercised in this case. If the Department is engaged in a continuing process of examining policy recommendations, these deliberations may all be privileged. The privilege does not extend to explanations, interpretations, or applications of an existing policy unless the materials were generated as part of the development of the final explanations, interpretations, or applications, or as part of a new deliberative process to reevaluate existing policy.

Balancing Test

Even if records or requested testimony meet the above criteria for protection and you determine that the privilege could properly be asserted, you must balance the Department's interest in nondisclosure with the requesting party's need for the information in the records or testimony. To do so, consider: 1) the relevance of the information for which you are considering asserting the privilege to the litigation in which it is sought; 2) the availability of the information from sources other than the Department; 3) the gravity of the issues involved in the litigation; and 4) the harm to the Department's deliberative process likely to result from release of the information (e.g., you might consider the impact that disclosure would have on government employees' candor in providing opinions if they realized that disclosure of their opinions could be compelled in litigation). It may be helpful, in considering the potential harm from disclosure, to consider the age of the record. If significant time has passed between the time of a recommendation and a resulting policy decision, disclosure may be less likely to have a chilling effect on candid discussion. On the other hand, disclosure of communications while a policy action is still being considered could be expected to have a more harmful effect.

Provide Specific Reasons

If you decide to assert the privilege, you must provide specific reasons for preserving the confidentiality of the requested information.

II. RESERVATIONS

None.

III. REDELEGATION

This authority may not be redelegated.

IV. CERTIFICATION AND EFFECTIVE DATE

This delegation is effective upon certification by the Department's Principal Delegations Control Officer and supersedes all previous delegations of this authority.

-s-

Arne Duncan

OGC Clearance and Date: Tracey Sasser, 10/5/12

Certified Date: October 12, 2012

Departmental Delegations Control Officer: Bruce Monblatt

Control Number: EA/GEN/16

Addressees:

Deputy Secretary
Under Secretary
Assistant Secretary for Civil Rights
Assistant Secretary for Planning, Evaluation and Policy Development
Inspector General
General Counsel
Assistant Secretary for Special Education and Rehabilitative Services
Chief Information Officer
Assistant Secretary for Legislation and Congressional Affairs
Chief Financial Officer
Assistant Secretary for Management
Chief Operating Officer for Federal Student Aid
Assistant Secretary for Communications and Outreach
Assistant Secretary for Postsecondary Education
Director, Institute of Education Sciences
Assistant Secretary for Elementary and Secondary Education
Assistant Deputy Secretary and Director, Office of English Language Acquisition
Assistant Deputy Secretary for Innovation and Improvement
Assistant Secretary for Vocational and Adult Education