



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

MEMORANDUM

TO: The Under Secretary

FROM: The Secretary

SUBJECT: Delegation of Authority to Assert Deliberative Process Privilege

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, the authority to assert a deliberative process privilege that is the basis for withholding documents or testimony requested in litigation or in any other context in which the privilege may lawfully be asserted, whether or not the Department is a party to the matter at issue.

The assertion of the privilege is limited to documents and statements that were created, maintained, or relate to policies, programs, and activities of the Department concerning postsecondary education, vocational and adult education, and federal student aid, including those administered by the following offices:

Federal Student Aid,
Office of Vocational and Adult Education,
Office of Postsecondary Education,
White House Initiative on Historically Black Colleges and Universities,
White House Initiative on Tribal Colleges and Universities, and
White House Initiative on Asian Americans and Pacific Islanders.

To ensure consistency in its application, the privilege must be asserted in accordance with the following guidelines:

Personal Review

To assert the privilege, you must personally review the material (which can include both oral and written statements) for which the assertion of the privilege is being considered. Blanket assertions of the privilege cannot stand. However, if the documents are voluminous, you may rely on a detailed review of the documents prepared by a subordinate. For each document for which the

privilege is asserted, the review provided to you should include: 1) the statement's author; 2) the statement's recipients; 3) the date prepared; 4) a description of the statement, including how it is both predecisional and deliberative; and 5) why the statement's release would hinder open and frank communications among Department policymakers. After considering this review, you should review a representative sample of the statements. You must personally assert the privilege.

To assert the privilege for oral communications, you must review the proposed testimony under these same standards.

Predecisional and Deliberative

The privilege applies to statements that are both: 1) predecisional and 2) deliberative.

- 1) Predecisional—Material is predecisional if it was prepared to assist a Department decision maker in arriving at his or her decision. The decision can be to not act at the time.
- 2) Deliberative—Material is deliberative if it was created in the process of formulating agency policy and procedures. Deliberative material includes material that contains opinions, evaluations, or advice, as well as material that interprets the existing state of affairs with a view towards changing present policy. An example of deliberative material is a document or discussion from a junior to senior official that contains opinions that have no binding effect on the recipient.

The deliberative statement typically will include recommendations or express opinions on legal or policy matters.

Factual Material

The privilege does not apply to material or discussions that are solely factual. If portions of the material contain predecisional and deliberative discussions and portions do not (e.g., if part of the material contains facts), the deliberative process privilege should not be asserted for the portions of material that are purely factual. However, if the factual material is intertwined with recommendations or thought-processes, the entire communication may be protected. For example, facts that would reveal the nature of the deliberations are protected and analysis or evaluation of facts as part of deliberations are protected.

Post-Decisional

The privilege does not apply to the outcome of the deliberative process, i.e., the decision itself. Conversely, the fact that the decision maker adopted a proposed recommendation does not destroy the privilege that attaches to the earlier form of advice unless in the decision the decision maker expressly adopts that recommendation or incorporates it by reference.

The privilege may still apply to materials created 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, or a series of policy decisions on the same subject,

deliberative communications about that subject may still 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 re-evaluate existing policy.

Balancing Test

Even if the above criteria are met and you determine that the privilege could be properly invoked, you must balance the Department's and the public's interest in nondisclosure with the party's need for the information requested. To do so, consider: 1) the relevance to the litigation of the information sought to be protected; 2) the availability of other sources for the information; 3) the gravity of the issues involved in the litigation; and 4) 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. Here, it may be helpful to consider the age of the communication. If significant time has passed between the time of the communication and the policy action, disclosure may be less likely to curtail candid discussion. On the other hand, disclosure of communications while the policy action is still being considered would be expected to have a more harmful effect.

Provide Specific Reasons

If you decide to invoke 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.

/s/
Arne Duncan

OGC Clearance and Date: /s/ David Berthiaume, 3/15/2010
Certified Date: 3/23/2010
Departmental Delegations Control Officer: /s/ Naty G. Beetle
Control Number: EA/EE/41