

## **Protecting Residency Programs' ACGME Compliance Documents from Disclosure Under State Public Records Acts**

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Recently, news organizations have requested documents from residency programs pertaining to internal evaluations of program compliance with ACGME accreditation standards, particularly with duty hour standards. These requests<sup>1</sup> have been made under state public records acts,<sup>2</sup> which are state statutes similar to the federal Freedom of Information Act (FOIA).<sup>3</sup> Residency programs routinely promise confidentiality to prospective program compliance evaluators in order to obtain the open and candid responses necessary to ensure effective internal quality assurance mechanisms. Residency programs do not want to jeopardize the effectiveness of their internal reviews by releasing such compliance evaluation documents to the public.

State public records acts<sup>4</sup> and the federal FOIA embody the general notion that citizens have a right to access documents created by their government. The right to access government documents, however, is not absolute. By including exemptions to state public records acts and to the FOIA, state and federal governments have signified that not all government documents should be public,<sup>5</sup> for various reasons, including the principle that some government functions will be harmed by disclosure. This Article examines whether documents relating to compliance with ACGME standards fall within public record disclosure exemptions.

Most requests for compliance documents are made to state health care institutions based on state public records acts. These acts are not uniform. However, most state public record acts, including the exemptions, are patterned after and are similar to the federal FOIA.<sup>6</sup> Because of the similarity to the FOIA, this Article will primarily examine the federal FOIA exemptions. This Article will also comment on some state public records act exemptions.

A different topic, but also related to protecting these compliance documents from public disclosure, is exempting the documents from discovery in litigation. Federal legislation protects health care quality assurance information (including accreditation compliance evaluations) of the Department of Veterans Affairs<sup>7</sup> and of the Department of Defense<sup>8</sup> from both public disclosure under the FOIA and from discovery in litigation. In addition, the courts interpret the FOIA exemptions to protect from public disclosure information that would be exempt from discovery.<sup>9</sup> All of these protections reflect a general federal policy that protects health care quality assurance information from disclosure. Although generally the states have the same protective policy, there is no uniform way in which it is reflected in state public records acts.

## **PUBLIC POLICY FAVORING PROTECTION FROM DISCLOSURE**

This Article examines whether the following categories of compliance documents fall within public record act exemptions:

Document Category A – documents created as a part of the internal residency program review process prescribed by ACGME standards, including the internal review report.

Document Category B – any other internal documents analyzing compliance with ACGME standards.

Document Category C – documents submitted to ACGME as part of the accreditation application or reapplication, or otherwise.

Document Category D – accreditation notification letters from ACGME, containing both the accreditation decision as well as a critical review of the residency program.

Document Categories A-D are generally referred to as self-critical or self-evaluative documents. Protecting Document Categories A-D from disclosure promotes and facilitates (1) the effectiveness of residency program self-analysis, which in turn improves the quality of resident physician education, (2) the quality of care rendered to patients by resident physicians, and (3) the quality of care rendered by resident physicians upon completion of the residency program. This rationale is premised on the assumptions that:

- a. compliance with accreditation standards results in improvements in the quality of resident physician education, as well as in the quality of patient care by residents;
- b. critical analysis by residency program personnel (physician educators, hospital administrators and resident physicians) is necessary to achieve and maintain compliance with accreditation standards;
- c. self-critical analysis is enhanced if program evaluations are candid;
- d. program personnel will participate candidly in program evaluations only if assured that their responses will not subject them to legal or other consequences; and
- e. program personnel will have little fear of consequences if they perceive that their evaluations will not be disclosed to third parties outside the normal program evaluation process.<sup>10</sup>

Many government entities rely upon ACGME accreditation decisions in lieu of more “hands on” government oversight of residency program quality. Private entities similarly rely upon ACGME accreditation decisions.<sup>11</sup> Therefore, it is in the interest of such government and private entities, and of the public generally, to promote compliance with ACGME accreditation standards by maintaining the confidentiality of self-critical evaluations.

## **PROTECTION FROM PUBLIC DISCLOSURE**

Four FOIA exemptions potentially protect Document Categories A-D from disclosure. These exemptions protect documents that are (1) protected by another statute; (2) trade secrets or commercial or financial information; (3) inter- or intra-agency memoranda; or (4) medical or

personnel files. Most state public records acts contain at least one if not all of these exemptions.<sup>12</sup>

First and foremost in determining whether a document must be disclosed, only the *government* is subject to public record requests. Therefore, the entity to which an FOIA request is made must be considered a government “agency.”<sup>13</sup> If the entity does not satisfy the definition of “agency,” documents created by the entity’s employees are not subject to public disclosure. However, even if an agency did not create a document, the document may be subject to disclosure requirements under the FOIA if the document is in an agency’s possession.<sup>14</sup>

### **FOIA Exemption 3 –Protection by Statute**

*[The Freedom of Information Act] does not apply to matters that are...(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld<sup>15</sup>*

Exemption 3 incorporates federal nondisclosure statutes into the FOIA. In order to protect documents from FOIA requests, the nondisclosure statutes must explicitly prohibit *public* disclosure.<sup>16</sup>

Department of Veterans Affairs Documents. A federal statute exempts the Department of Veterans Affairs’ (DVA) health care quality assurance records from disclosure.<sup>17</sup> The DVA health care quality assurance statute protects Document Categories A-D.<sup>18</sup> Information that is protected from disclosure under this statute remains protected regardless of who possesses the information (i.e., the statutory protection follows the information). The information remains exempt from disclosure even in the possession of a non-DVA residency program that uses a DVA sponsored facility as a clinical site.

Department of Defense Documents. A similar federal statute protects “medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program.”<sup>19</sup> These medical quality assurance documents are confidential, privileged and exempt from the FOIA requests.

### **State Public Record Acts – Protection by Statute<sup>20</sup>**

Many states provide similar protections to peer review and quality assurance documents.<sup>21</sup> Although the breadth of state peer review/quality assurance statutes varies, state statutes commonly provide for nondisclosure in litigation of documents within the scope of the statute.<sup>22</sup> States with statutes prohibiting disclosure of peer review or quality assurance documents in litigation may exempt, and should exempt, disclosure of such documents under state public records acts.<sup>23</sup> The illogical alternative would be that a state would bar disclosure and evidentiary use of documents to litigants while compelling disclosure of the same documents to non-litigant ordinary citizens.<sup>24</sup>

Although all state peer review statutes apply to reviews of physician activity, many such statutes are broad enough to cover more general quality assurance activities. In addition, although the most common setting for peer review is the hospital, many peer review/quality assurance statutes are broad enough to cover other peer review settings, including peer review by medical societies. In at least three reported cases, courts have interpreted peer review/quality assurance statutes to bar discovery in litigation of documents evidencing compliance with JCAHO accreditation standards<sup>25</sup> or quality assurance activities required by JCAHO accreditation standards.<sup>26</sup>

#### **FOIA Exemption 4 – Protection of Commercial Information**

*[The Freedom of Information Act] does not apply to matters that are... (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential*<sup>27</sup>

Exemption 4 exempts documents to protect the interests of both the government agency as well as those who submit information to the agency. Nondisclosure assures the government that it will receive reliable information, and it assures those who submit information to an agency that they will be protected when they reveal trade secrets, commercial information, or financial information to an agency.<sup>28</sup>

“Trade Secret” Category of Exemption 4. No documents in Document Categories A-D are likely to fit within the “trade secrets” category because courts narrowly define “trade secrets.”<sup>29</sup>

“Commercial” Category of Exemption 4. Document Category D should be eligible for exemption under the second category of Exemption 4, “commercial...information obtained from a person.” Assuming Document Categories A-C were created by an agency, they are not eligible for the Exemption 4. The courts do not include documents created by the agency itself as documents “obtained from a person.”<sup>30</sup>

First, Category D documents should be exempt because courts give “commercial” its ordinary meaning.<sup>31</sup> The accreditation notification letter will probably be considered commercial because ACGME created it pursuant to a commercial contract with the residency program. Therefore, the ACGME has a “commercial interest” in the accreditation.<sup>32</sup> In addition, Document Category D probably qualifies as commercial because the documents are similar to documents that have been categorized as commercial by the court in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.<sup>33</sup> In *Critical Mass*, the Institute for Nuclear Power Operations (INPO), a nonprofit corporation, submitted reports to the Nuclear Regulatory Commission (NRC) concerning the construction and operation of nuclear plants. The INPO relied on candid nuclear power plant employee comments to create its reports. The INPO voluntarily submitted these reports to the NRC based on the assumption that the reports would not be disclosed without the INPO’s approval. The court found the INPO reports to be “commercial.” Similarly, ACGME determines program compliance based on candid program personnel comments and evaluation. Therefore, a court should classify ACGME’s accreditation notification letter as “commercial.”<sup>34</sup>

Second, the accreditation notification letter was created by a “person.” The definition of person includes private organizations<sup>35</sup> such as ACGME.

Finally, the information contained within the accreditation notification letter should be considered “confidential or privileged” under Exemption 4 because it contains information that ACGME would not customarily release to the public. In fact, the ACGME has a confidentiality agreement with the residency programs, and state statute protects documents possessed by ACGME from disclosure.<sup>36</sup> Because the ACGME does not release the documents it obtains from the residency programs nor its analysis of compliance with its standards to anyone besides the residency program itself, the accreditation notification letter should be considered confidential.<sup>37</sup>

### State Public Record Acts – Protection of Commercial Information

States often exempt trade secrets or commercial or financial information from disclosure. States differ in what qualifies as exempt commercial information. For example, Colorado exempts all “Trade secrets, privileged information, and confidential commercial, financial, geological or geophysical data.”<sup>38</sup> The Texas Open Government law, on the other hand, exempts commercial information only when “it is demonstrated based on specific factual findings that disclosure would cause substantial competitive harm.”<sup>39</sup>

### **FOIA Exemption 5 – Protection of Information Exempt from Discovery**

*[The Freedom of Information Act] does not apply to matters that are... (5) inter-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*<sup>40</sup>

The courts interpreted Exemption 5 to “exempt those documents, and only those documents that are normally privileged in the civil discovery context.”<sup>41</sup> The Supreme Court has admonished against using the FOIA to circumvent discovery limitations.<sup>42</sup>

To fit within Exemption 5, two “prongs” must be satisfied (1) the source of the document must be a government agency and (2) the document must be protected from discovery in civil litigation.<sup>43</sup>

Document Categories A-D as “Inter- or Intra-Agency Memorandums.” Assuming that the entity that is the source of the documents is a government agency, documents in Document Categories A-C will satisfy “prong” one.

Document Category D, the accreditation notification letter, does not satisfy “prong” one as easily because a non-agency wrote it. The accreditation notification letter may be considered an “intra-agency” document only if the ACGME qualifies as an intra-agency consultant.<sup>44</sup> The Supreme Court has precluded self-advocates seeking a benefit inadequate to satisfy everyone from being intra-agency consultants.<sup>45</sup> The ACGME may qualify as an intra-agency consultant because accreditation is not a limited commodity and because the ACGME does not have an interest in the outcome of accreditation decisions.<sup>46</sup>

Document Categories A-D as Protected from Discovery in Civil Litigation. To satisfy “prong” two, the documents must “normally” be exempt from civil discovery.<sup>47</sup> The sources of

protections from discovery, generally called discovery privileges, include common law, statute, and the Constitution.<sup>48</sup> The documents in Document Categories A-D may fall within one of the following discovery privileges: statutory peer review/quality assurance privilege,<sup>49</sup> the common law privilege of self-critical analysis,<sup>50</sup> or the common law privilege for government deliberative process.<sup>51</sup> The courts can also protect documents from discovery if protection promotes a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.”<sup>52</sup>

Determining whether an inter- or intra-agency memorandum is “protected from discovery” in the FOIA context is different from determining whether the document is exempt from discovery in the litigation context.<sup>53</sup> Agencies, unlike courts, do not consider the particular interests of the requester when determining whether to allow disclosure.

In the context of FOIA requests, agencies can withhold information that qualifies for a discovery privilege regardless of whether the privilege is absolute or qualified.<sup>54</sup> In the context of civil discovery, qualified privileges require the court to consider the need of the particular litigant in order to determine whether or not to observe the privilege. In the context of FOIA requests:

It makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure.<sup>55</sup>

For example, the attorney work-product privilege is a qualified privilege under Rule 26 of the Federal Rules of Civil Procedure. Work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with the litigation. Because work-product materials are not “routinely” or “normally” available in litigation, Exemption 5 applies and agencies do not have to release work product materials.<sup>56</sup>

Once the document satisfies the privilege requirements, the agency does not need to consider the requester’s interests to determine whether to recognize the privilege.<sup>57</sup> “No requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which he is a party.”<sup>58</sup> Therefore, even if any of the privileges discussed below are qualified privileges, requiring the courts to consider the needs of the litigant, that should make little difference in the context of denying an FOIA request. If the document satisfies the particular privilege’s requirements, the agency should have sufficient grounds for denying an FOIA request.

Statutory Peer Review/Quality Assurance Protection. Peer review and quality assurance documents are specific types of self-critical analysis documents that are often statutorily protected from discovery. Many of the statutes discussed under Exemption 3 that exempt peer review and quality assurance documents from public disclosure also provide protection from civil discovery.

Most of the entities that produce Document Categories A-D are state or private entities, as opposed to federal government entities. Federal legislation protects two federal organizations

that produce Document Categories A-D – the Department of Veterans Affairs<sup>59</sup> and the Department of the Defense.<sup>60</sup> The statutory protection afforded to these federal organizations explains why there are not many cases concerning federal FOIA requests for health care quality assurance documents.<sup>61</sup>

Self-Critical Analysis Privilege. The self-critical analysis privilege was first recognized for medical peer review in 1973 in a malpractice action, *Bredice v. Doctors Hospital, Inc.*<sup>62</sup> Now, the privilege is claimed in a variety of contexts, including: medical peer reviews evaluating a physician or a particular hospital policy,<sup>63</sup> reviews conducted after allegations of employment discrimination,<sup>64</sup> reviews performed post-event/accident,<sup>65</sup> evaluations of compliance with securities and tax laws,<sup>66</sup> evaluations of compliance with environmental standards,<sup>67</sup> and general internal company reviews.<sup>68</sup>

There are three requirements for the common law self-critical analysis privilege: (1) “the information must result from a critical self-analysis undertaken by the party seeking protection”; (2) “the public must have a strong interest in preserving the free flow of information sought”; and (3) “the information must be of the type whose flow would be curtailed if discovery were allowed.”<sup>69</sup> In addition to these requirements, only documents that were prepared with the expectation of confidentiality and that were kept confidential will be considered for this privilege.<sup>70</sup> Essentially, the courts, in determining whether to grant the self-critical analysis privilege,<sup>71</sup> balance the need for confidentiality against the strong policy favoring disclosure.<sup>72</sup>

According to one commentator, courts “typically concede... its possible application in some situations but then proceed to find a reason why the documents in question do not fall within its scope,” generally because the litigant demonstrates a particularly compelling need for the documents.<sup>73</sup> In *University of Pennsylvania v. EEOC*,<sup>74</sup> the Supreme Court chose not to recognize the self-critical analysis privilege under Rule 501 in the context of faculty tenure peer review.

Many federal courts read *University of Pennsylvania* narrowly and continue to recognize the self-critical analysis privilege for *medical* peer review material under Rule 501.<sup>75</sup> “Although of questionable necessity in many applications, the self critical analysis privilege is particularly pertinent in the medical context as it promotes frank and honest discussions which protect lives and improve patient care.”<sup>76</sup> Therefore, even though, the self-critical analysis is a qualified privilege it is probably recognized to such an extent for *medical* peer reviews that agencies can describe that material as not “routinely” disclosed. Agencies should be able to assert the self-critical analysis privilege to deny FOIA requests despite the courts’ preference for broad discovery<sup>77</sup> in civil litigation.<sup>78</sup>

Government Deliberative Process Privilege. Documents are considered exempt from FOIA disclosure if they are (1) pre-decisional, made before the adoption of an agency policy; and (2) part of the agency’s deliberative or decision making process. The agency has the burden of proving that both requirements are satisfied.<sup>79</sup> Three policy reasons support exempting deliberative process documents from the FOIA: (1) encouraging frank discussion of policy issues among government officials; (2) protecting against premature disclosure of agency policies; and (3) protecting against public confusion that might result from disclosing rationales that were not

ultimately the basis for an agency decision.<sup>80</sup>

Document Categories A-D should fall within the deliberative process privilege. The documents were created to assist in the creation and implementation of policy and are not the residency program's actual policy guidelines.<sup>81</sup> Furthermore, protecting these documents from disclosure encourages frank discussion of policy issues. Residency program personnel staff will be far more likely to discuss potential changes in a residency program's policy if their comments will not be disclosed to the public. Additionally, the residency program does not have to be able to point to the specific decision for which the pre-decisional documents were created.<sup>82</sup>

#### State Public Record Acts – Protection of Information Exempt from Discovery

For state public record requests, the vast majority of states protect medical peer review or quality assurance documents to some extent.<sup>83</sup> Just as the courts do not permit using the FOIA to circumvent discovery limitations, individuals should not be permitted to use state public records acts to circumvent state discovery limitations.<sup>84</sup> In state court actions and in federal court actions under state substantive law, state statutory peer review/quality assurance privilege is applicable.<sup>85</sup> In federal court actions under federal substantive law, the state statutory privilege would not be binding, but it would be relevant in determining common law privilege under Rule 501, Federal Rules of Evidence,<sup>86</sup> which in turn would trump the litigants' use of the privileged materials in the action.<sup>87</sup>

#### **FOIA Exemption 6 – Protection of Personnel and Medical Information**

*[The Freedom of Information Act] does not apply to matters that are...(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy<sup>88</sup>*

Exemption 6, while applicable for each Document Category, probably does not protect the documents as a whole but does protect the contents of the documents.<sup>89</sup> The agency could redact all personnel and personal medical information from Document Categories A-D.<sup>90</sup>

#### State Public Record Acts – Protection of Personnel and Medical Information.

Most state public records acts provide similar protection for personnel and medical information to some extent. The California Public Record Act<sup>91</sup> borrows the language of FOIA exemption 6 to exempt such information. The New York Freedom of Information Law<sup>92</sup> exempts disclosure of information that would constitute “an unwarranted invasion of personal privacy”<sup>93</sup> and includes in its definition of an unwarranted invasion of personal privacy the “disclosure of employment, medical or credit histories.”<sup>94</sup>

#### **CONCLUSION**

Despite a strong public policy favoring open government, a stronger policy favors keeping residency programs' compliance documents confidential. Each state public record act probably provides for one or more of the mentioned FOIA exemptions. Therefore, when requests are made



for these documents, state agencies should consider protecting the Document Categories A-D as a whole from disclosure. If protection as a whole is not a possibility, the state agency should consider what information should be redacted from the documents to protect personnel or medical information.

In addition, each state has two possible avenues for creating more certain and definite protection of Document Categories A-D from public record requests. First, a state could create a nondisclosure statute, similar to the Department of Veterans Affairs or the Department of Defense medical quality assurance statutes. These statutes protect medical quality assurance documents from both discovery and public record requests.<sup>95</sup> Or, a state could create an additional exemption to their public record act that protects medical quality assurance documents such as those in Document Categories A-D.

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<sup>1</sup> The documents may be in the possession of a state entity, and thus subject to the state public records acts under one of the following scenarios: (1) the state entity is the program sponsor; (2) the state entity is a member of a consortium that is the sponsor of a residency program; (3) the state entity is a clinical site for a residency program that is not operated by a state entity.

<sup>2</sup> Many state attorney general websites contain links to information regarding their state's public record act. For example, see the Attorney General of Texas website at <http://www.oag.state.tx.us>, the Florida Attorney General website at <http://myfloridalegal.com>, and the Illinois Attorney General website <http://www.ag.state.il.us>. New York provides information regarding its Freedom of Information Law on its Department of State website <http://www.dos.state.ny.us> (go to its Committee on Open Government link). For a comprehensive collection of state public record acts see 2 JUSTIN D. FRANKLIN & ROBERT E. BOUCHARD, *GUIDEBOOK TO FREEDOM OF INFORMATION AND PRIVACY ACTS* (2003).

<sup>3</sup> Freedom of Information Act, 5 U.S.C. § 552 (2004).

<sup>4</sup> After the FOIA's enactment in 1966, most states followed suit by enacting similar codifications of the public's right to access records. CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 3.40 (2d ed. 1997).

<sup>5</sup> It should be noted that the courts read the exemptions narrowly given the strong public policy favoring disclosure. *See Anderson v. Health & Human Servs.*, 907 F.2d 936, 941 (10th Cir. 1990) (holding that "[t]he FOIA is to be broadly construed in favor of disclosure and its exemptions are to be narrowly construed"). "The federal agency resisting disclosure bears the burden of justifying nondisclosure." *Id.*

<sup>6</sup> Most states based their public record act on the federal FOIA. *See KOCH, supra* note 4, at § 3.40. In fact, the state public record statutes contain most of the same exemptions as the federal FOIA and many states have more exemptions than the FOIA. *Id.* (citing *Taylor v. Worrell Enterprises Inc.*, 409 S.E.2d 136 (1991) (noting 44 exemptions under Virginia's FOIA) and Burt Braverman & Wesley Hepler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 740-46 (1981)). Note that the California Supreme Court held that the California

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public records act and the FOIA "should receive a parallel construction," *Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 451, 651 P.2d 822 (Cal. 1982). However, the state act must not be construed to read into it FOIA language which the state act itself does not contain. *Williams v. Superior Court*, 5 Cal. 4th 337, 351-52, 852 P.2d 377 (Cal. 1993).

<sup>7</sup> Confidentiality of medical quality-assurance records

(a) Records and documents created by the Department as part of a medical quality-assurance program (other than reports submitted pursuant to section 7311(g) of this title) are confidential and privileged and may not be disclosed to any person or entity except as provided in subsection (b) of this section.

(c) For the purpose of this section, the term "medical quality-assurance program" means--

(1) with respect to any activity carried out before October 7, 1980, a Department systematic health-care review activity carried out by or for the Department for the purpose of improving the quality of medical care or improving the utilization of health-care resources in Department health-care facilities; and

(2) with respect to any activity carried out on or after October 7, 1980, a Department systematic health-care review activity designated by the Secretary to be carried out by or for the Department for either such purpose.

38 U.S.C. § 5705 (2004) (portions of the statute not included); *see also* Confidentiality of Healthcare Quality Assurance Review Records, 38 C.F.R. § 17.502; VHA Directive 2002-043, *Quality Management (QM) and Patient Safety Activities that Can Generate Confidential Documents*, July 18, 2002.

<sup>8</sup> Confidentiality of medical quality assurance records: qualified immunity for participants

(a) Confidentiality of records. Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).

(b) Prohibition on disclosure and testimony.

(1) No part of any medical quality assurance record described in subsection (a) may be subject to discovery or admitted into evidence in any judicial or administrative proceeding, except as provided in subsection (c).

(f) Exemption from Freedom of Information Act. Medical quality assurance records described in subsection (a) may not be made available to any person under section 552 of title 5.

(j) Definitions. In this section:

(1) The term "medical quality assurance program" means any activity carried

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out before, on, or after November 14, 1986, by or for the Department of Defense to assess the quality of medical care, including activities conducted by individuals, military medical or dental treatment facility committees, or other review bodies responsible for quality assurance, credentials, infection control, patient care assessment (including treatment procedures, blood, drugs, and therapeutics), medical records, health resources management review and identification and prevention of medical or dental incidents and risks.

(2) The term "medical quality assurance record" means the proceedings, records, minutes, and reports that emanate from quality assurance program activities described in paragraph (1) and are produced or compiled by the Department of Defense as part of a medical quality assurance program.

(3) The term "health care provider" means any military or civilian health care professional who, under regulations of a military department, is granted clinical practice privileges to provide health care services in a military medical or dental treatment facility or who is licensed or certified to perform health care services by a governmental board or agency or professional health care society or organization.

10 U.S.C. § 1102 (2004). (sections omitted).

<sup>9</sup> See *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-02 (1984) (admonishing against using the FOIA to circumvent discovery limitations); *Washington Post Co., v. Dep't of Justice*, 1987 U.S. Dist. LEXIS 14936 (D.D.C. 1987) *rev'd* on other grounds, 863 F.2d 96 (D.C. Cir. 1988) (protecting information exempt from discovery under the self-critical analysis privilege under FOIA Exemption 4); George K. Chamberlin, Annotation, *Use of Freedom of Information Act as Substitute for, or as Means of, Supplementing Discovery Procedures Available to Litigants in Federal Civil, Criminal, or Administrative Proceedings*, 57 A.L.R. FED. 903, \*3b (2001).

<sup>10</sup> The Institute of Medicine's 2000 report, *To Err is Human: Building a Safer Health System*, broadly examined health care quality and error issues. The Institute recommended that reporting systems for quality of care and health care errors should be privileged. In Recommendation 6.1, the Institute states: "Congress should pass legislation to extend peer review protections to data related to patient safety and quality improvement that are collected and analyzed by health care organizations for internal use or shared with others solely for purposes of improving safety and quality." See COMMISSION ON QUALITY OF HEALTH CARE IN AMERICA, INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (Linda T. Kohn et al. eds., 2000); see also Jason M. Healy et al., *Confidentiality of Health Care Provider Quality of Care Information*, 40 BRANDEIS L.J. 595 (Spring 2002).

<sup>11</sup> Licensure of Residency Programs. Some states approve or license residency programs. Of these states, most, if not all, by statute or regulation, designate residency programs that are ACGME accredited as "approved" or "licensed." The nature and importance of such reliance on ACGME was discussed by the Supreme Court of Pennsylvania in addressing the state medical board's interrelationship with ACGME process in the context of the board's having relied upon

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ACGME standards and decisions for the purpose of licensure of residency programs.

The benefits of using private accrediting organizations are well recognized, and we have held that the determination of factual matters by them is permissible. (Citation omitted) Here, the legislature expressly provided that the board could use private accrediting bodies to determine the qualifications of medical training facilities. Had it intended that those determinations would be subject to the board's review, it surely would have so provided. The obvious intent of the legislature was to make the task of the board a manageable one by relieving it of the need to delve, on its own and without expert assistance, into the merits of each institution's medical training programs. The use of accrediting bodies was authorized in recognition of the fact that such bodies are better equipped to study the quality of medical training programs.

*McKeesport Hosp. v. Pennsylvania State Bd. of Med.*, 539 Pa. 384, 389, 652 A.2d 827 (Pa. 1995).

Licensure of Physicians. Almost every state requires completion of at least one year in an ACGME accredited residency program as a condition of full physician licensure. In order for beginning residents to avoid charges of practicing medicine without a license, states grant training licenses to residents in ACGME accredited residency programs.

Certification, Staff Privileges and Employment. All medical certifying boards, most hospital medical staffs, and most prospective employers require physician applicants to complete an ACGME accredited residency program.

Medicare Reimbursement. By law, the Centers for Medicare & Medicaid Services makes Medicare graduate medical education payments to institutions sponsoring residency programs that are accredited by ACGME. 42 C.F.R. §§ 413.86(a)(1), 413.86(b)(3), 415.152(1).

<sup>12</sup> See KOCH, *supra* note 4, at § 3.40.

<sup>13</sup> 5 U.S.C. § 551 (1) (2000) (defining agency under the federal Administrative Procedures Act).

<sup>14</sup> To qualify as an agency record, and thus subject to disclosure under the FOIA, the agency must be in “control” of the document. See 1 RICHARD R. PIERCE, ADMINISTRATIVE LAW TREATISE § 5.6 (4th ed. 2002) (discussing the requirements for agency “control” of documents).

<sup>15</sup> 5 U.S.C. § 552 (b)(3) (2004).

<sup>16</sup> See 1 JUSTIN D. FRANKLIN & ROBERT E. BOUCHARD, GUIDEBOOK TO FREEDOM OF INFORMATION AND PRIVACY ACTS §1:26 (2003) (stating that reference to public disclosure in the legislative history is not sufficient) [hereinafter GUIDEBOOK TO FOIA].

<sup>17</sup> 38 U.S.C. § 5705 (2004); see also Confidentiality of Healthcare Quality Assurance Review Records, 38 C.F.R. § 17.502; VHA Directive 2002-043, *Quality Management (QM) and Patient Safety Activities that Can Generate Confidential Documents*, July 18, 2002.

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<sup>18</sup> Document Category A – See *Utterback v. United States*, 121 F.R.D. 297, 300 (W.D. Ky. 1987) (denying a motion to compel the defendant to produce documents which would show whether or not the VHA [now the DVA] has complied with JCAHO standards).

Document Category B – See *id.*

Document Category C – See *id.*

Document Category D - See VHA Directive 2002-043, 4.a.(5); see also *Utterback*, 121 F.R.D. at 299.

<sup>19</sup> 10 U.S.C. § 1102. (2004); see The Army Freedom of Information Act Program, Exemptions, 32 C.F.R. § 518.37 (2004); *Dayton Newspapers, Inc. v. Dep't of the Air Force*, 107 F. Supp. 2d 912, 916 (D. Ohio 1999) (discussing the scope of § 1102 protections for quality assurance documents and databases); *Justice Department Guide to the Freedom of Information Act, Exemption 3*, (May 2004), at <http://www.usdoj.gov/oip/exemption3.htm>.

<sup>20</sup> For example, Illinois exempts from its Freedom of Information Act, “information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or state law.” 5 ILL. COMP. STAT. 140/7-1a (2004).

<sup>21</sup> Forty-six states place statutory limitations on disclosure and use of peer review materials. See *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 361 Pa. Super. 491, 495 n3 (Pa. Super. Ct. 1987) (listing the forty-six state statutes that have enacted some type of statutory limitation on the disclosure and use of peer review materials). For lists of citations to state peer review/quality assurance statutes, see, AMERICAN MEDICAL ASSOCIATION, UPDATE: COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS (Feb. 1994); AMERICAN MEDICAL ASSOCIATION, COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS (1988); Gordon Simonds, *Confidentiality of Peer Review Records in a Changing Delivery System* (NHLA’s Health Law on CD-ROM, Nov. 1994); see also, Charles David Creech, *The Medical Review Committee Privilege, a Jurisdictional Survey*, 67 N.C. L. REV. 179 (1988).

<sup>22</sup> The rationale underlying state peer review statutes is to ensure the effectiveness of professional and institutional self-evaluation in the interest of improving the quality of health care. Legislatures create these statutes on the assumption that, absent statutory protection from disclosure (and, in some cases, protection from liability as well), physicians would be reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.

<sup>23</sup> If the statute limits what documents are discoverable in civil litigation rather than public disclosure, look to see if Exemption 5 is satisfied. See *infra* text accompanying notes 40-82.

<sup>24</sup> See Chamberlin, *supra* note 9, at \*3b (finding that civil litigants cannot obtain through the FOIA material that would not be available through discovery); see also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-02 (1984).

<sup>25</sup> *Utterback v. United States*, 121 F.R.D. 297 (W.D. Ky. 1987) (denying, in a personal injury action, a motion to compel defendant to produce documents which would show whether or not

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VHA [now the DVA] complied with JCAHO standards); *Niven v. Siqueira*, 487 N.E.2d 937 (Ill. 1985) (construing, in a personal injury action, the Illinois statute barring discovery of peer review/quality assurance materials to include hospital accreditation documents in possession of the JCAHO).

<sup>26</sup> *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (denying, in a personal injury action, a motion to compel the defendant to produce records of quality assurance activities conducted in compliance with JCAHO standards).

<sup>27</sup> 5 U.S.C. § 552 (b)(4) (2004).

<sup>28</sup> See GUIDEBOOK TO FOIA, *supra* note 16, at § 1:31.

<sup>29</sup> See *Anderson v. Dep't of Health and Human Servs.*, 907 F.2d 936, 943-44 (10th Cir. 1990) (rejecting the broad Restatement of Torts § 757 definition of trade secret in favor of a narrow definition – “a secret commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort”). Even under the broad Restatement definition, proving the documents are trade secrets would be difficult because the Restatement requires proof that competitive harm would result from disclosure. See RESTATEMENT OF TORTS, § 757 cmt. b (1939).

<sup>30</sup> See *Nadler v. Fed. Deposit Ins. Corp.*, 92 F.3d 93, 95 (2d Cir. 1996) (holding that agency created documents are not eligible for Exemption 4); *Allnet Communication Servs., Inc. v. Federal Communications Comm'n*, 800 F.Supp. 984, 988 (D.D.C. 1992).

<sup>31</sup> The Second Circuit defined commercial as anything “pertaining or relating to or dealing with commerce.” *Am. Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978).

<sup>32</sup> See *Pub. Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1992) (holding that commercial information is not limited to “records that actually reveal basic commercial operations such as sale” but includes information relating to commercial interests as well). The commercial interest of the ACGME will be discussed further in the discussion of Document Category D documents under Exemption 5. See *infra* text accompanying notes 43-45. The ACGME only has a commercial interest in the creation of an accreditation notification; the ACGME has no commercial interest in whether the residency program receives accreditation or not. See *infra* text accompanying notes 43-45.

<sup>33</sup> *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992).

<sup>34</sup> Note, the analogy is not exact but it should be close enough. The relationship between the private organization and the agency is not the same. The INPO voluntarily submitted information to the NRC voluntarily. The ACGME submitted Document Category D based on a contractual agreement.

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<sup>35</sup> See *Nadler*, 92 F.3d at 95 (defining “person” broadly as “an individual, partnership, corporation,...or public or private organization other than an agency”).

<sup>36</sup> The ACGME is located in Illinois. Therefore, Illinois’s peer review statute protects Document Categories A-D in the possession of ACGME from discovery. See 225 ILL. COMP. STAT. 60/5. The Illinois statute deems those materials that “were used as part of a study or program designed to improve quality control or patient care, or reduce morbidity or mortality” privileged and undiscoverable. See *Niven v. Siqueira*, 109 Ill.2d 357, 366 (1985).

<sup>37</sup> This test is applicable if the accreditation notification letter is considered voluntarily supplied by the ACGME. *Critical Mass*, 975 F.2d at 879. If the accreditation notification letter was involuntarily supplied, the more stringent *National Parks* test applies – requiring that confidential only pertains to (1) information that would substantially impair the agency’s ability to obtain information; (2) information that would result in substantial harm to the competitive position of the supplier of the information; or (3) information that if disclosed would harm government interests such as compliance or program effectiveness. *Id.* at 880. Supplying Document Category D based on a contractual agreement would seem to fall within the *Critical Mass* test because the ACGME does not have a law-imposed obligation to enter into such an agreement. However, if the *National Parks* test applies, its elements are also satisfied.

<sup>38</sup> COLO. REV. STAT. § 24-72-204 (2003).

<sup>39</sup> Exception: Trade Secrets; Certain Commercial or Financial Information, TEX GOV’T CODE ANN. § 552.110 (Vernon 2004).

<sup>40</sup> 5 U.S.C. § 552 (b)(5) (2004).

<sup>41</sup> *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975).

<sup>42</sup> See *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-02 (1984). In *Weber*, the records of an Air Force safety investigation, including statements of non-subpoenaed witnesses who were assured confidentiality, were held to be within Exemption 5.

<sup>43</sup> *Dep’t of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

<sup>44</sup> See *Klamath*, 532 U.S. at 12.

<sup>45</sup> In *Klamath*, the Court did not consider Indian Tribes who submitted documents to the Department of the Interior consultants because the Tribes sought water rights at the expense of others; they sought a benefit inadequate to satisfy everyone. See *id.*

<sup>46</sup> See *id.*; see also *Justice Department Guide to the Freedom of Information Act, Exemption 5*, (May 2004), at <http://www.usdoj.gov/oip/exemption5.htm> (stating that the Supreme Court’s holding in *Klamath* rested on narrow grounds, “the Court pointedly refrained from adopting a

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rule any broader than the facts required”).

<sup>47</sup> See *Justice Department Guide to the Freedom of Information Act, Exemption 5*, *supra* note 46.

<sup>48</sup> See FED. R. EVID. 501. For federal causes of action this means that “Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” *Id.*

<sup>49</sup> See *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 361 Pa. Super. 491, 495 n3 (Pa. Super. Ct. 1987) (citing forty-six peer review statutes limiting the disclosure and use of peer review materials); *Reichhold Chems. v. Textron*, 157 F.R.D. 522, 525 (D. Fla. 1994) (noting that “the self-critical analysis privilege recognized in *Bredice* has been widely adopted in the medical peer review context, and most of the 50 states have statutorily protected medical peer reviews of patient care from discovery”).

<sup>50</sup> For general information regarding the rationale and application of the self-critical analysis privilege see Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983) and Brad Bacon, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 KAN. J.L & PUB. POL’Y 221 (1999).

<sup>51</sup> *Casad v. Dep’t of Health and Human Servs.*, 301 F.3d 1247, 1248 (10th Cir. 2002).

<sup>52</sup> *Jaffee, v. Redmond*, 518 U.S. 1, 9 (1996) (recongizing the “psychotherapist privilege” under Fed. R. Evid. 501).

<sup>53</sup> See GUIDEBOOK TO FOIA, *supra* note 16, at §1:45 n.11.

<sup>54</sup> See *Federal Trade Comm’n v. Grolier, Inc.*, 462 U.S. 19, 27 (1983).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See GUIDEBOOK TO FOIA, *supra* note 16, at §1:45 n.11 (citing *Bilbrey v. U.S. Dep’t of Air Force*, 20 Fed. Appx 597 (8th Cir. 2001) (“[o]nce a government agency makes a prima facie showing of privilege, the analysis under FOIA Exemption 5 ceases, and does not proceed to the balancing of interests”).

<sup>58</sup> GUIDEBOOK TO FOIA, *supra* note 16, at §1:43 (citing *Federal Trade Comm’n v. Grolier, Inc.*, 462 U.S. 19, 28 (1983) and *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975)).

<sup>59</sup> 38 U.S.C. § 5705 (2004).



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<sup>60</sup> 10 U.S.C. § 1102 (2004).

<sup>61</sup> *Dayton Newspapers, Inc. v. Dep't of the Air Force*, 107 F. Supp. 2d 912, 916 (D. Ohio 1999) (denying a FOIA request for particular databases because they were quality assurance databases and within the scope of 10 U.S.C § 1102 protections).

<sup>62</sup> 50 F.R.D. 249 (D.D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973).

<sup>63</sup> For federal cases recognizing privilege in the medical peer review setting see: *Weekoty v. United States*, 30 F. Supp. 2d 1343, 1344 (D.N.M., 1998); *Reichhold Chems. v. Textron*, 157 F.R.D. 522, 525 (D. Fla. 1994); *Cohn v. Wilkes General Hosp.*, 127 F.R.D. 117 (W.D.N.C. 1989); *Laws v. Georgetown Univ. Hosp.*, 656 F. Supp. 824 (D.D.C. 1987); *Doe v. St. Joseph's Hosp.*, 113 F.R.D. 677 (N.D. Ind. 1987); *Mewborn v. Heckler*, 101 F.R.D. 691, 692 (D.D.C. 1984); *Morse v. Gerity*, 520 F. Supp. 470 (D. Conn. 1981); *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *Gillman v. United States*, 53 F.R.D. 316, 318 (S.D.N.Y. 1971).

For federal cases recognizing the self-critical analysis privilege but not applying privilege due to particular factual considerations see: *Virmani v. Novant Health, Inc.*, 259 F.3d 284, 289 (4th Cir., 2001) (holding that “[t]he interest in facilitating the eradication of discrimination by providing perhaps the only evidence that can establish its occurrence outweighs the interest in promoting candor in the medical peer review process”) The court in *Virmani*, in an employment discrimination cases, allowed discovery of medical peer review documents, where the doctor alleged discrimination in the peer review process itself. *Id.* The court allowed discovery because, in contrast to medical malpractice and defamation, if a “plaintiff succeeds in a discrimination case, he advances important public interests in addition to his personal interest.” *Id.* at 291. *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (holding “the public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the Hospital’s privilege”); *Pagano v. Oroville Hosp.*, 145 F.R.D. 683, 690 (D. Cal. 1993) (holding that “this court will not recognize [the privilege of peer review or self-critical analysis] in the federal common law, at least in settings where the peer review or self-analysis themselves are under attack”).

For federal cases not recognizing the self-critical analysis privilege in the medical peer review setting see: *Nilavar v. Mercy Health Sys.*, 210 F.R.D. 597, 601 (D. Ohio 2002); *Syposs v. United States*, 63 F. Supp. 2d 301 (W.D.N.Y. 1999).

<sup>64</sup> *See Tharp v. Sivyver Steel Corp.*, 149 F.R.D. 177, 182 (D. Ia. 1993) (listing the cases that considered the privilege of self-critical analysis in the employment context); Donald P. Vandergrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 180-184 (1996).

<sup>65</sup> *See generally* Charles S. McCowan, Jr. & L. Victor Gregoire, *The Discoverability of the Accident Investigation Committee’s Report*, 31 GONZ. L. REV. 115 (1995).

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<sup>66</sup> See generally *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (D.N.Y. 1992) (recognizing self-critical analysis privilege in a securities case); Vandergrift, *supra* note 64, at 184-187.

<sup>67</sup> See generally *Reichhold Chems. v. Textron*, 157 F.R.D. 522 (D. Fla. 1994); Phillip Leahy, *The Privilege for Self-Critical Analysis in Statutory and Common Law*, 7 DICK. J. ENVTL. L. & POL'Y 49 (Winter 1998).

<sup>68</sup> See generally Benedict P. Kuehne, *Protecting the Privilege in the Corporate Setting: Conducting and Defending Internal Corporate Investigations*, 9 ST. THOMAS L. REV. 651 (Spring 1997).

<sup>69</sup> *Dowling v. Am. Hawaii Cruises Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992).

<sup>70</sup> *Id.*

<sup>71</sup> For state causes of action in state courts, state law determines which privileges to recognize. State law also determines privilege for state diversity cases in federal courts. *Virmani v. Novant Health Inc.*, 259 F.3d 284, 287 (4th 2001). Federal law determines privilege for cases involving both federal and state law claims. *Id.* Rule 501 governs privileges in cases where federal law applies. FED. R. EVID. 501.

<sup>72</sup> *Id.* at 426.

<sup>73</sup> *LeClere v. Mutual Trust Life Ins.*, 2000 U.S. Dis. Lexis 22098, \*6 (N.D. Ia. 2000).

<sup>74</sup> 493 U.S. 182 (1990).

<sup>75</sup> See *Weekoty v. United States*, 30 F. Supp. 2d 1343, 1344 (D.N.M., 1998); *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 102 (D. Md. 1995) (“the public interest in promoting quality health care outweighs the defendants' purported need for the information”); *Reichhold Chems. v. Textron*, 157 F.R.D. 522, 525 (D. Fla. 1994) (recognizing the privilege “widely adopted in the medical peer review context”); *Pagano v. Oroville Hosp.*, 145 F.R.D. 683, 690 (D. Cal. 1993) (choosing not to apply the privilege given the particular facts of the case but recognizing the existence of such a privilege). Nevertheless, other federal courts chose not to recognize the self-critical analysis privilege after *University of Pennsylvania*. See *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, (S.D.N.Y. 1996).

<sup>76</sup> *Weekoty*, 30 F. Supp.2d at 1345. Additionally, another court noted the factual setting where the self-critical analysis privilege may be most necessary is for “peer review done in a medical setting.” *LeClere v. Mutual Trust Life Ins.*, 2000 U.S. Dis. Lexis 22098, \*6 (N.D. Ia. 2000) (deciding not to apply the self-critical analysis privilege to the facts of the case but noting that peer review in a medical setting may necessitate recognition of the privilege); see also Healy, *supra* note 6; Bacon, *supra* note 50.

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<sup>77</sup> See *United States v. Bryan*, 339 U.S. 323, 321 (1950). Courts are reluctant to recognize new privileges given the Supreme Court's pronouncement in *Bryan* that the law prefers broad discovery; the public "has a right to every man's evidence." *Id.*

<sup>78</sup> In *Washington Post Co., v. Dep't of Justice*, the court recognized the self-critical analysis privilege as grounds for denying a FOIA request. 1987 U.S. Dist. LEXIS 14936 (D.D.C. 1987) *rev'd* on other grounds, 863 F.2d 96 (D.C. Cir. 1988). However it was recognized under Exemption 4. *Id.* In *Sangre de Cristo Animal Protection, Inc. v. Dep't of Energy*, the Department of Energy (DOE) refused to produce a document requested under the FOIA by claiming self-critical analysis privilege. 1998 U.S. Dist. LEXIS 23505 (D.N.M 1998). The court declined to recognize the self-critical analysis privilege because the privilege had never been extended to animal research and because the public interest outweighed the DOE's interest in confidentiality. However, the court acknowledged that such a privilege exists. *Id.*

<sup>79</sup> See GUIDEBOOK TO FOIA, *supra* note 16, at §1:45.

<sup>80</sup> *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

<sup>81</sup> Assuming "prong" one of Exemption 5 is satisfied, documents created by non-agency personnel can qualify for this exemption when the document is used by the agency as part of the deliberative process. "It is textually possible and...in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency – e.g. in the capacity as an employee or consultant to the agency...." *Judicial Watch v. U.S. Dep't of Energy*, 2004 WL 631580 (D.D.C. 2004) (quoting *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9-10 (2001)).

<sup>82</sup> The Supreme Court recognizes that agencies "are and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears Roebuck & Co.*, 421 U.S. at 151 n. 18.

<sup>83</sup> See *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 361 Pa. Super. 491, 495 n3 (Pa. Super. Ct. 1987) (citing forty-six peer review statutes limiting the disclosure and use of peer review materials); AMERICAN MEDICAL ASSOCIATION, *supra* note 21; Simonds, *supra* note 21; *see also* Creech, *supra* note 21.

<sup>84</sup> In Texas, all state discovery privileges are exempt from public disclosure under the state public records act. See ATTORNEY GENERAL OF TEXAS, PUBLIC INFORMATION HANDBOOK 2004 58, available at [http://www.oag.state.tx.us/AG\\_Publications/pdfs/2004publicinfohb.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/2004publicinfohb.pdf).

<sup>85</sup> See *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); FED. R. EVID. 501.

<sup>86</sup> FED. R. EVID. 501.

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<sup>87</sup> See e.g., Healy, *supra* note 10; Bacon, *supra* note 50; Vandergrift, *supra* note 64, at 180-184; *The Privilege of Self-Critical Analysis*, *supra* note 50.

<sup>88</sup> 5 U.S.C. § 552 (b)(6) (2004).

<sup>89</sup> Ordinarily, deleting personal identifying information is sufficient to protect privacy interests. See GUIDEBOOK TO FOIA, *supra* note 16, at § 1:54. However, redaction may not be sufficient when the individual's identity would be revealed by specific details in the document. *See id.*

<sup>90</sup> Exemption 6 excludes from disclosure all information that (1) "applies to a particular person"; and (2) invades personal privacy." *See id.* at §§ 1:49-50. Performance evaluations, even favorable performance evaluations, medical records, and information regarding medical conditions do not have to be disclosed. *See id.* at § 1:54.

<sup>91</sup> California Public Records Act, CAL. GOV'T CODE § 6250-6277 (Deering 2004).

<sup>92</sup> New York Freedom of Information Law, N.Y. PUB. OFF. § 84-90 (Consol. 2004).

<sup>93</sup> N.Y. PUB. OFF. § 87 2(b) (Consol. 2004).

<sup>94</sup> N.Y. PUB. OFF. § 89 2(b)(i) (Consol. 2004).

<sup>95</sup> The Department of Defense statute explicitly protects Document Categories A-D by prohibiting discovery in litigation and disclosure under the FOIA. 10 U.S.C. § 1102 (2004). The Department of Veterans Affairs' statute also protects Documents A-D but does so by listing all of the permissible uses of such quality assurance documents and not including on the list of permissible uses discovery or FOIA requests. 38 U.S.C. § 5705 (2004).