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The Deliberative Process Privilege in Kentucky

By Erin Hoffman*

I. INTRODUCTION

In Kentucky, administrative agencies struggle with the issue of whether records that may expose their decision-making process to scrutiny must be turned over to the public at large. Private citizens, parties to litigation, or the media may make requests for such information for a variety of reasons. A question exists as to whether state governmental agencies may assert a privilege known as the deliberative process privilege. This privilege has also been referred to as “governmental” or “executive” privilege.

The deliberative process privilege insulates certain government documents from disclosure to the general public and private parties in litigation with the government. The privilege, which protects documents generated within government agencies as part of the decision-making process, originated in common law. A federal right to the deliberative process privilege is recognized under the Freedom of Information Act (FOIA). Many states have recognized the privilege for state agencies under statutes similar to the Kentucky Open Records Act, which mirrors FOIA. However, Kentucky has not officially recognized a deliberative process privilege for state administrative agencies.

Part II of this note examines the history and purpose of the deliberative process privilege. Next, Part III analyzes the current, ambiguous status of the deliberative process privilege in Kentucky. Part IV of the note examines foreign state precedent recognizing the deliberative process privilege. Finally, Part V suggests Kentucky should use the persuasive authority of other states’ interpretation of similarly worded statutes as a model and officially recognize the deliberative process privilege. In Part VI, the note concludes by stressing that the privilege is necessary to maintain the free flow of
ideas and ongoing evaluation of policy among state agencies and Kentucky’s need to adopt it.

II. PURPOSE AND BACKGROUND OF THE DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege is a commonly recognized confidentiality privilege exclusive to government agencies. The privilege originates in common law, rules of evidence, and primarily from rules governing discovery in civil proceedings. Early American cases recognized an executive privilege protecting deliberations of the president derived from English “crown privilege” precedent. The case law involving the deliberative process privilege as we know it today began to emerge in the late 1930’s. The deliberative process privilege exempts government agencies from divulging documents reflecting recommendations, opinions or deliberations involved in creating governmental decisions and policies. The privilege is meant to protect an official’s ability to communicate openly without fear that each idea may be revealed through discovery or the media. Additionally, the deliberative process privilege shields the public from the confusion that results from exposure to a policy or idea before it is officially adopted. Further, because the public is ultimately affected by the final decisions of government agencies, not the process used to arrive at such decisions, they should not be hindered by this lack of access. Thus, the privilege improves “the quality of agency decisions” by shielding candid discussions among agency officials making those decisions.

With the introduction of disclosure statutes such as FOIA, the deliberative process privilege was incorporated into exemption

2. Stromberg Metal Works v. Univ. of Md., 844 A.2d 1220, 1227 (Md. 2004).
4. Id. at 286.
6. Id. at 8-9.
provisions. The deliberative process privilege is commonly discussed in reference to the FOIA, codified at 5 U.S.C. § 552. The FOIA requires disclosure of a government agency’s records. However, some documents are exempt under § 552(b). Exemption § 552(b)(5) is often cited as “the deliberative process privilege.” The exemption protects documents that are “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.” The exemption covers subjective documents reflecting the personal opinion of the writer rather than the policy of the agency, such as draft documents, recommendations, proposals, and suggestions.

In order to be exempt from discovery under the deliberative process privilege, a document must be both “predecisional” and “deliberative.” To be deemed predecisional, an agency must prove a document was created prior to a final decision on the subject matter discussed and facilitated arrival at that decision.

The deliberative process privilege serves to protect the government’s ongoing evaluation of policy. This process generates documents that may not result in a final agency decision. Therefore, a document need not be tied to a specific decision in order to be deemed predecisional. Regardless of whether specific action will be taken on a subordinate’s ideas, forcing disclosure of documents created in the deliberative process may prevent candid communication between subordinates and superiors.

Courts may consider the history of a memorandum when deciding whether or not a document is predecisional. Documents

9. Stromberg, 854 A.2d at 1227.
11. Id.
12. 5 U.S.C. 552(b)(5).
17. Id.
18. Schell, 843 F.2d 933 at 941.
19. Id.
20. Id. at 942.
sent from subordinates to superiors are likely to be predecisional, whereas a document sent from a superior to a subordinate will more often instruct staff on policies already adopted.\textsuperscript{21}

In order to be deliberative, documents must be part of a consultative process, providing recommendations or opinions on policy or legal matters.\textsuperscript{22} Purely factual, investigative matters that could be excised without revealing the remainder of a document are not protected.\textsuperscript{23}

Lastly, the deliberative process privilege is not absolute.\textsuperscript{24} Agencies cannot use the process to create laws kept secret from the public at their whim.\textsuperscript{25} Those subject to an agency’s regulations deserve fair notice of the agency’s requirements.\textsuperscript{26} Agencies may not protect documents in order to avoid public scrutiny.\textsuperscript{27} In addition, a deliberative document may be disclosed if the party seeking that information proves its need for discovery outweighs the government’s need for nondisclosure.\textsuperscript{28} Factors to be balanced include the relevance of the information sought, the accessibility of other evidence, and the gravity of the litigation or issues involved.\textsuperscript{29} However, the most important question in applying the deliberative process privilege is whether turning over documents would reveal an agency’s deliberative process in a manner that could stifle the exchange of ideas and weaken the agency’s ability to fulfill its role.\textsuperscript{30}

Litigants and the public at large may pursue deliberative process materials for many reasons.\textsuperscript{31} Some believe access to deliberative

\textsuperscript{21} Id.
\textsuperscript{22} Spinner, 2004 U.S. Dist. LEXIS 2541, at *4.
\textsuperscript{23} Norwood v. Fed. Aviation Admin., 993 F.2d 570, 576-77 (6th Cir. 1993).
\textsuperscript{24} Elkem Metals Co. v. United States, 126 F. Supp. 2d 567, 574 (Ct. Int’l Trade 2000).
\textsuperscript{25} Weaver, supra note 3, at 291.
\textsuperscript{26} Id.
\textsuperscript{27} Elkem Metals Co., 126 F. Supp. 2d at 574.
\textsuperscript{28} Id.
\textsuperscript{30} Dudman Commc’ns v. Dep’t of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).
\textsuperscript{31} Jones, supra note 3, at 280.
statements will provide a better understanding of the agency itself.\textsuperscript{32} Others believe they can overturn an agency action using deliberative process materials as proof of contemporaneous construction.\textsuperscript{33} Also, some want access to facts contained in predecisional materials that could not easily be redacted and cannot be obtained outside the government.\textsuperscript{34}

III. KENTUCKY LAW REGARDING THE DELIBERATIVE PROCESS PRIVILEGE REMAINS UNCLEAR

The Kentucky Open Records Act (KORA) provides exemptions similar to \textsection 552(b)(5) of FOIA, often called the deliberative process privilege. Kentucky’s Open Records Act\textsuperscript{35} provides exceptions for certain governmental communications. Excluded under the Act are “preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency” and “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies are formulated or recommended.”\textsuperscript{36}

Based on the KORA, some Kentucky precedent suggests a deliberative process privilege is available to state administrative agencies. A disclosure request under KORA was at issue in \textit{Beckham v. Board of Education}.\textsuperscript{37} The Courier-Journal requested records related to grievances filed and discipline taken against present and past school board employees, as well as files outlining decisions not to take action based on complaints.\textsuperscript{38} Board employees sought to have certain records excluded on the basis that the records did not represent final action on the part of the Board.\textsuperscript{39} When the trial court and court of appeals ordered the Board to disclose the documents, appellant employees sought discretionary review with the Kentucky

\begin{itemize}
\item 32. \textit{id.}
\item 33. \textit{id.}
\item 34. \textit{id.}
\item 35. \textit{KY. REV. STAT. ANN. §§ 61.870 - 61.884 (West 2005).}
\item 36. \textit{id. § 61.878 (1)(i)-(j).}
\item 37. \textit{Beckham v. Bd. of Educ. 873 S.W.2d 575 (Ky. 1994).}
\item 38. \textit{id. at 575.}
\item 39. \textit{id. at 576.}
\end{itemize}
Supreme Court. The supreme court sought to give effect to the intent of the General Assembly in enacting KORA. The Courier-Journal argued the act must be interpreted only as a remedy for denial of access, not to protect agencies. Despite the General Assembly’s evident intent to enact a disclosure statute, the supreme court concluded that certain records would be exempt from disclosure. Therefore, the court of appeals decision was reversed. Kentucky Supreme Court Justice Lambert’s interpretation of sections 61.878(1)(i)-(j) in Beckham implies the deliberative process privilege is available to state agencies:

From the exclusions we must conclude that with respect to certain records, the General Assembly has determined that the public’s right to know is subservient to statutory rights of personal privacy and the need for government confidentiality. A cursory examination of KRS 61.878 reveals an extensive list of matters excluded from public access, and this also suggests an absence of legislative intent to create unrestricted access to records.

Additionally, the Kentucky Court of Appeals later cited Lambert’s argument in Courier-Journal v. Jones. In Jones, appellant newspaper requested access to Governor Brereton C. Jones’s appointment ledgers for various time periods. The appellate court noted that it was unclear what information the media sought or for what purpose, leading them to conclude their efforts were a “fishing expedition upon which to base some speculative publication.” Thus, the appellate court held that the concept of

40. Id. at 577.
41. Id.
42. Id. at 578.
43. Id. at 577.
44. Id. at 579.
45. Id. at 578.
47. Id. at 7.
48. Id.
Government confidentiality was not completely diluted by the Open Records Act.\(^4^9\) Kentucky Revised Statute section 61.870 (1) (h), now (i), was the crux of Jones’s argument.\(^5^0\) In denying the request for Jones’s schedule, the supreme court quoted the California Supreme Court’s treatment of a factually similar case in *Times Mirror Co v. Superior Court of Sacramento*:

> If the law required disclosure of a private meeting between the Governor and a politically unpopular or controversial group, that meeting might never occur. Compelled disclosure could thus devalue or eliminate altogether a particular viewpoint from the Governor’s consideration. Even routine meetings between the Governor and other lawmakers, lobbyists, or citizen’s groups might be inhibited if the meetings were regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press.\(^5^1\)

Moreover, the *Jones* Court cited an opinion of the attorney general regarding a media request for the mayor of Louisville’s appointment calendar:

> Not every paper in the office of a public agency is a public record subject to public inspection. Many papers are simply work papers which are exempted because they are preliminary drafts and notes. KRS 61.878 (1)(g) . . . Such preliminary drafts and notes and preliminary memoranda are part of the tools which a public employee uses in hammering out official action within the function of his office. They are expressly exempted by the Open Records Law and may be destroyed or kept at will and are not subject to public inspection.\(^5^2\)

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49. *Id.* at 7-8.
50. *Id.*
51. *Id.* at 7 (quoting *Times Mirror Co. v. Superior Court*, 813 P.2d 240, 251 (Cal. 1991)).
52. *Jones*, 895 S.W.2d at 8 (citations omitted).
The court of appeals ruled the appointment schedule was a notation for inter or intra office use, ensuring order in the affairs of the Governor.\textsuperscript{53} It represented a draft of what may or may not occur, rather than a final decision.\textsuperscript{54} Further, it was in the public’s interest to withhold the Governor’s schedule.\textsuperscript{55}

The appellate court’s decision in \textit{Jones} evinces intent to construe the exception clause in the KORA as allowing the deliberative process privilege for government agencies. The \textit{Jones} court was clearly persuaded by the opinion of the California Supreme Court, which expressly recognized a deliberative process privilege for state government. The appellate court noted that Kentucky and California’s open records acts were not identical.\textsuperscript{56} Nonetheless, they found the logic of the California Supreme Court to be useful. The court also construed the exception clause in a manner consistent with federal and state courts that recognize the deliberative process privilege. In addition, the court stressed the importance of withholding certain documents from disclosure in order to protect both the government and the public at large.\textsuperscript{57}

Another case, \textit{Commonwealth of Kentucky Revenue Cabinet v. Graham}, implies the Kentucky Supreme Court’s recognition of the deliberative process privilege.\textsuperscript{58} In \textit{Graham}, the Kentucky Revenue Cabinet argued executive privilege protected certain documents from in camera review.\textsuperscript{59} The Kentucky Supreme Court deemed the in camera review of documents appropriate.\textsuperscript{60} The court never challenged the Revenue Cabinet’s claim of executive privilege or questioned its existence.\textsuperscript{61} Further, they appeared to acknowledge the purpose of such a privilege, noting the in camera procedure would not have “a chilling effect on the Revenue Cabinet’s decision

\textsuperscript{53} \textit{Id.} at 10.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} at 7.

\textsuperscript{56} \textit{Id.} at 8.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Commonwealth of Kentucky Revenue Cabinet v. Graham}, 710 S.W.2d 227 (Ky. 1986).

\textsuperscript{59} \textit{Id.} at 228.

\textsuperscript{60} \textit{Id.} at 229.

\textsuperscript{61} \textit{See id.}
making process inasmuch as the Circuit Court alone, in camera, will be involved in the review. After that only that deemed non-privileged will be disseminated.\textsuperscript{62}

However, some sources contradict the existence of a deliberative process privilege in Kentucky. In \textit{Weaver v. Commonwealth}, the prosecuting attorney wished to withhold an audiotape of a drug bust, based on a so-called "police surveillance privilege."\textsuperscript{63} The Kentucky Supreme Court overturned an earlier case, \textit{Jett v. Commonwealth},\textsuperscript{64} recognizing the privilege.\textsuperscript{65} In doing so, the court cited Article 5 of section 501 of the Kentucky Rules of Evidence (KRE 501), which provides: "Except as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Court of Kentucky, no person has a privilege to . . . refuse to disclose any matter."\textsuperscript{66}

The Kentucky Supreme Court held that the appellate court overstepped its bounds by acknowledging a privilege not specifically mentioned by statute or supreme court opinions.\textsuperscript{67} The \textit{Weaver} opinion casts some doubt on the existence of the deliberative process privilege. While the KORA may imply a deliberative process privilege exists, like the police surveillance privilege discussed, it is not expressly recognized in the statute or a Supreme Court opinion.

In addition, in the \textit{Kentucky Law Evidence Handbook}, author Robert G. Lawson questions whether a deliberative process privilege can be claimed in light of KRE 501.\textsuperscript{68} Lawson considers the Graham decision "slight" evidence of supreme court adoption of the privilege, but notes that the case decision predates the adoption of the KRE 501 in 1998.\textsuperscript{69} According to Lawson, KRE 501 functions to prevent the withholding of evidence.\textsuperscript{70} Supporting this argument is a statement

\begin{itemize}
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Weaver v. Commonwealth, 955 S.W.2d 722, 727 (Ky. 1997).
\item \textsuperscript{64} Id. at 727, discussing Jett v. Commonwealth, 862 S.W.2d 908, 910 (Ky. 1993).
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id (citing KY. R. EVID. 501).
\item \textsuperscript{67} Id.
\item \textsuperscript{68} ROBERT G. LAWSON, THE KENTUCKY LAW EVIDENCE HANDBOOK, § 5.25 (3d ed. 2002).
\item \textsuperscript{69} Id. § 5.25.
\item \textsuperscript{70} Id. § 5.05.
\end{itemize}
by the drafters of KRE 501: “The Federal Rules of Evidence . . . relegate the entire subject of privilege to common law. In Kentucky, however, privileges are codified -- by these Rules and by the Kentucky Revised Statutes, and it is appropriate, therefore, to include a rule which embodies the general obligation to testify.”

Finally, though Lawson believes the language of KRE 501 is more indicative of intent to abolish, rather than preserve privileges, ultimate resolution of the matter rests with the Kentucky Supreme Court.

In light of the contrary authority in Kentucky, the Commonwealth would benefit from a clear directive by the Kentucky Supreme Court endorsing the existence of the deliberative process privilege. Shielding the pre-decisional process gives an agency the liberty to “think out loud,” allowing them to try out ideas and argue policy unrestrained by the peril of these speculative but rejected ideas becoming topics of public discussion. Also, clarifying the issue would instruct private citizens on what documents they may review and alert public agencies as to what may be withheld.

IV. TRENDS IN STATE OPEN RECORDS STATUTES AND THE RECOGNITION OF THE DELIBERATIVE PROCESS PRIVILEGE

Over twenty years ago, authors Braverman and Heppler suggested state courts should look to federal cases interpreting the FOIA when construing their open records laws. Because several state statutes were modeled after the FOIA, federal precedent would prove pertinent. The authors suggested federal precedent would be especially helpful in dealing with state open records act exemptions. Today, many states have recognized exemptions in their open records acts similar to exemption five of the FOIA. These similarities have led state courts to conclude that their open records

71. Id. § 5.00. (quoting EVIDENCE RULES STUDY COMMITTEE, KENTUCKY RULES OF EVIDENCE - FINAL DRAFT 38-39 (Nov. 1989)).
72. Id.
75. Id.
76. Id.
act exemptions establish a deliberative process privilege for state agencies identical to the deliberative process privilege incorporated into the FOIA for federal agencies.

A. Colorado

The Supreme Court of Colorado officially acknowledged the deliberative process privilege in 1998. In *City of Colorado Springs v. White*, David White requested copies of an internal evaluation of the Community Services Department of the City of Colorado Springs, performed by an outside consultant.\(^7\) The report contained results of an examination of the Industrial Training Division, a unit under the management of the Community Services Department.\(^7\) The head of the Community Services Department invoked the deliberative process privilege, denying disclosure under section 24-72-204 (3)(a)(IV) of Colorado’s statutes, which exempts disclosure of “[t]rade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person.”\(^7\) White argued that the deliberative process privilege did not exist in Colorado so the Community Services Department had no foundation for denying his request.\(^8\) The trial court held that open records laws exempted documents protected by the deliberative process privilege.\(^8\) However, the Colorado Court of Appeals reversed, noting that federal authority recognizes a deliberative process privilege but found “no corollary authority in Colorado law.”\(^8\) Therefore, citizens were entitled to the report under Colorado’s open records laws.\(^8\)

The Community Services Department sought review from the Colorado Supreme Court, asserting the deliberative process privilege exists at common law, independent of open records laws or the

78. Id.
79. Id. at 1046 (citing COLO. REV. STAT. § 24-72-204 (1998)).
81. Id.
82. Id.
83. Id.
The Colorado Supreme Court noted that neither FOIA nor Colorado’s open records laws mention the deliberative process privilege by name. However, the court determined the material covered by the privilege was protected by general reference to discovery principles. The Supreme Court noted that neither FOIA nor Colorado’s open records laws mention the deliberative process privilege by name. Since the common law deliberative process privilege predated the enactment of the open records laws, the statutes did not have to identify it specifically in order for it to be preserved. The Community Services Department document in question contained observations about the working environment of the Industrial Training Division and was pre-decisional because it was designed to help petitioners develop strategies to better the division. The report was also deliberative, composed of employees’ candid and personal views as to the strengths and weaknesses of the Industrial Training Division and its director. The court agreed with the trial court; knowledge that these opinions could be exposed to the public would discourage this type of frank discussion in the future.

B. West Virginia

West Virginia’s Freedom of Information Act (WVFOIA) has been found to provide a deliberative process privilege for state agencies. In Daily Gazette v. West Virginia Development Office, a newspaper made requests for information regarding a pulp mill proposed for construction. The development office released some document but withheld others on the ground they were internal

84. Id.
85. Id. at 1049.
86. Id. at 1055.
87. Id. at 1049.
88. Id. at 1049.
89. Id. at 1057.
90. Id.
91. Id.
93. Id.
memoranda exempt from disclosure under WVFOIA. Section 29B 1-4(8) of the WVFOIA provides a disclosure exemption for “[i]nternal Memoranda or letters prepared or received by any public body.” The West Virginia Court of Appeals found that the Development Office had failed to prove all of the items were deliberative, internal memoranda protected by the privilege. However, items actually consisting of opinions, advice, or recommendations reflecting the offices deliberations would be exempt from disclosure. The court of appeals acknowledged that the deliberative process privilege wording of FOIA exemption five differs from that of WVFOIA exemption eight. Despite this, it still interpreted the two clauses as consistent with one another. Noting the close relationship between the two statutes, it found federal precedent valuable in construing the state’s similar provisions. Therefore, WVFOIA exemption eight creates a deliberative process privilege exempting from disclosure:

Written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s deliberative, decision making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions, and recommendations to a public body from outside consultants or experts obtained during the public body’s deliberative, decision making process.

94. Id.
95. Id. at 183 (citation omitted).
96. Id. at 192.
97. Id. at 191 (citing W. VA. CODE § 29B-1-8 (1977)).
98. Id. at 180.
99. Id. at 188.
100. Id. at 192 (citing § 29B-1-8).
C. Texas

Texas courts have interpreted the Texas Public Information Act\textsuperscript{101} (TPIA) as providing an exception for the deliberative process privilege.\textsuperscript{102} The provision was interpreted in \textit{City of Garland v. Dallas Morning News}, where a dispute arose when a newspaper requested a memorandum detailing the city finance director’s termination and the wrongful acts that formed the basis for his termination.\textsuperscript{103} The memoranda was copied and circulated among city council members. Later, a settlement was reached with the finance director and he resigned.\textsuperscript{104} The City Development Office sought to exclude the memorandum pursuant to Section 552.111 of TPIA, while the newspaper argued that there was no deliberative process privilege available to Texas state agencies.\textsuperscript{105} The court found the memorandum at issue was not exempt from disclosure because it did divulge decisions related to public policy.\textsuperscript{106}

However, in deciding the issue the court also held that the Act’s agency memoranda exception included a deliberative process privilege for state agencies.\textsuperscript{107} Section 552.111, the exemption clause of the TPIA, contains language nearly identical to that found in 5 U.S.C. § 552(b)(5), the federal Freedom of Information Act.\textsuperscript{108} Because the legislature modeled the state act on the FOIA, the court presumed the legislature knew of, and intended to, accept the federal court’s construction of the FOIA.\textsuperscript{109} Hence, the Supreme Court of Texas held that section 552.111 of the Texas Code incorporated the deliberative process privilege.\textsuperscript{110}

\textsuperscript{101} TEX. GOV’T CODE ANN. § 552.001 (Vernon 1994).
\textsuperscript{102} City of Garland v. Dallas Morning News, 22 S.W.3d 351, 360 (Tex. 2000).
\textsuperscript{103} Id. at 354.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 360.
\textsuperscript{106} Id. at 364.
\textsuperscript{107} Id. at 368.
\textsuperscript{108} Id.; see also Freedom of Information Act, 5 U.S.C. § 552(b)(5) (2000 & Supp. III); supra notes 10-12 and accompanying text.
\textsuperscript{109} City of Garland, 22 S.W.3d at 368.
\textsuperscript{110} Id.
D. California

Like Texas and other states, California has consistently followed the reasoning of federal courts in construing the California Public Records Act.\footnote{111} In \textit{Wilson v. Superior Court of Los Angeles County}, a reporter used the California Public Records Act to request "documents which describe or contain the names and background information about" people who applied for a seat on the Orange County Board of Supervisors.\footnote{112} California's governor at the time, Pete Wilson, declined; the Los Angeles Times, filed a writ of mandate in the Superior Court of Los Angeles County.\footnote{113} The court granted the newspaper's petition, holding that disclosure of the completed application forms would not impose on the deliberative process.\footnote{114} However, when Governor Wilson appealed the decision, the California Court of Appeals disagreed.\footnote{115} Because California's Public Record Act is modeled after the FOIA and the two share a common function, "[t]he legislative history and judicial construction of the FOIA thus 'serve to illuminate the interpretation of its California counterpart.'"\footnote{116} Therefore, the court found California's Public Record Act, like § 552(b)(5) of the FOIA, exempts documents protected by the deliberative process privilege from disclosure.\footnote{117}

Here, the applications were predecisional documents whose sole function was to assist the Governor in selecting an appointee.\footnote{118} The process depended on comparing qualifications listed in the applications with private and candid discussions of candidate's political ideals, competence, and behavior.\footnote{119} Further, applicants and those providing information about them were assured information given would only be divulged to the Governor and his senior staff in

\begin{footnotesize}
112. \textit{Wilson}, 283 Cal. Rptr. at 539.
113. \textit{id.}
114. \textit{id.} at 540.
115. \textit{id.} at 537.
116. \textit{id.} at 540 (quoting \textit{Times Mirror Co.}, 283 Cal. Rptr. at 900).
117. \textit{id.} at 541.
118. \textit{id.}
119. \textit{id.}
\end{footnotesize}
order to ensure candidates would be forthcoming.\textsuperscript{120} The court adopted the practical approach of the California’s Supreme Court in 
\textit{Times Mirror Company}, stating “[t]he deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it.”\textsuperscript{121} Though the newspaper argued that the public interest in the appointment of high government official was great, the appellate court applied a balancing test and found the public benefit from nondisclosure was greater.\textsuperscript{122}

\textbf{E. Pennsylvania}

Pennsylvania has also concurred with sister states in allowing certain privileges for state agencies.\textsuperscript{123} The issue was addressed in \textit{Lavalle v. Commonwealth of Pennsylvania}.\textsuperscript{124} A conflict arose when Gerald Lavalle, a state senator, sought access to reports prepared by accountants for the Pennsylvania Department of Transportation pursuant to the state’s Right to Know Act.\textsuperscript{125} The accountants had been retained in response to a breach of contract suit brought by administrators of an automotive emissions testing program that the state had abandoned.\textsuperscript{126} The suit was ultimately settled for over $145 million dollars.\textsuperscript{127} The Department of Transportation argued against disclosure, claiming the report was part of their deliberations on the lawsuit.\textsuperscript{128} The Pennsylvania Supreme Court held that any portion of the report that reflected on the Department of Transportation’s deliberative process was not subject to disclosure pursuant to the Right to Know Act.\textsuperscript{129} Unlike other states’ equivalent of FOIA, the

\begin{itemize}
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id. at 542.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Lavalle v. Commonwealth of Pennsylvania, 769 A.2d 449, 458 (Pa. 2001).
  \item \textsuperscript{124} See id.
  \item \textsuperscript{125} Id. at 451.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id. at 452.
  \item \textsuperscript{129} Id. at 458.
\end{itemize}
Pennsylvania’s Right to Know Act,130 does not provide for a specific exception or exclusion for records created in the deliberative process.131 However, the Act described public records as “concrete decisional implements,” such as minutes, orders, decisions, accounts, vouchers and contracts.”132 The court found these records distinguishable from records that reflect the underlying thought processes and opinions of agency employees and their agents. Therefore, the definition of public records in the Right to Know Act did not apply to materials that would expose the deliberative, predecisional aspects of agency decision making to public scrutiny.133

The issue of agency privilege arose again in Tribune-Review Publishing Company v. Department of Community & Economic Development.134 The Tribune-Review requested disclosure of applications for state funded grants under the Community Revitalization Program pursuant to the Right to Know Act.135 The Department of Community and Economic Development denied the request, arguing that because they had not been reduced to final, executed contracts, and therefore, they were deliberative documents not subject to disclosure under the Act.136 Initially, the trial court ordered that the documents be released.137 However, the Pennsylvania Supreme Court disagreed based on their decision in Lavalle, and reversed and remanded the case.138 On remand, the lower court cited the importance of candid internal exchange of information within agencies, reaffirming the deliberative process privilege.139

131. Id.
132. Id.
133. Id.
134. Tribune-Review Publ’g Co. v. Dep’t of Cmty. & Econ. Dev., 814 A.2d 1261 (Pa. 2003).
135. Id. at 1262.
136. Id. at 1263.
137. Id.
138. Id.
139. Id. at 1264.
F. Alaska

The Supreme Court of Alaska considered the role of the deliberative process privilege. In *Fuller v. City of Homer*, a city manager denied Abigail Fuller’s request for access to documents used in preparing a petition to annex certain areas adjoining the city pursuant to the deliberative process privilege. Fuller argued that the privilege would not extend to municipalities. The state supreme court found that in the case at hand, the public interest in obtaining the information was great and that deliberations had ended. Under the circumstances, the public interest in disclosure outweighed the city’s need for confidentiality. However, the court found no compelling reason why the deliberative process privilege would not extend to municipalities under a different set of facts. The Alaska Public Records Act does not contain a specific exemption for government agencies similar to exemption five of the FOIA and analogous state statutes, such as the KORA. However, Alaska Statute 40.25120(a)(4) provides an exemption for “records required to be kept confidential by . . . state law.” The court noted that Alaska’s statutory definition of “state law” encompasses common law. Because the common law courts acknowledged an executive privilege, they found the executive privilege to be one of the judicially recognized “state law” exceptions to public access under the public records act.

Further, in a recent case, *Blanas v. Alaska Worker’s Comp. Board*, the plaintiff, Blanas appealed numerous findings by the Alaska Workers’ Compensation Board. Blanas claimed he would

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141. *Id.* at 1060.
142. *Id.* at 1064.
143. *Id.* at 1065.
144. *Id.*
145. *Id.* at 1064.
146 ALASKA STAT. §§ 40.25.100-.124 (2004).
147. *Fuller*, 75 P.3d at 1062 (quoting ALASKA STAT. § 40.25.120(a)(4) (2004)).
148. *Id.* at 1063.
149. *Id.*
not have signed a Compromise and Release agreement if the attorney representing his employer and their insurer had disclosed certain employment training opportunities would not be available to him due to his injuries.\textsuperscript{151} He sought to depose a member of the Workers' Compensation Board, looking for evidence the Compromise and Release Agreement would not have been approved had they been apprised of the information in question.\textsuperscript{152} The Board refused to allow the deposition, arguing testimony regarding the deliberative processes of its members should be excluded.\textsuperscript{153} The supreme court agreed, noting that although "it has never adopted the deliberative process privilege by that exact name, it has adopted the executive privilege to address the same policy concerns."\textsuperscript{154}

\textit{G. Maryland}

Maryland recently dealt with the deliberative process privilege in \textit{Stromberg Metal Works, Inc. v. University of Maryland}.\textsuperscript{155} Stromberg Metals Works was a subcontractor on a construction project for the University of Maryland.\textsuperscript{156} Stromberg became concerned that the University lacked adequate funding when the project began to run millions of dollars over budget.\textsuperscript{157} Invoking Maryland's Public Information Act (PIA), Stromberg requested several documents related to the project including budget reports prepared by the University's Department of Architecture, Engineering, and Construction.\textsuperscript{158} The University turned documents over to the State Attorney General, custodian of public records under the PIA, who reviewed the requested documents for any privileged material.\textsuperscript{159} The budget reports were submitted in redacted form.\textsuperscript{160} In particular, dollar amounts forecasting the cost of project

\textsuperscript{151.} \textit{Id.} at *2.
\textsuperscript{152.} \textit{Id.} at *23.
\textsuperscript{153.} \textit{Id.} at *26.
\textsuperscript{154.} \textit{Id.} at *24.
\textsuperscript{155.} \textit{Stromberg Metal Works, Inc. v. Univ. of Md.}, 854 A.2d 1220 (Md. 2004).
\textsuperscript{156.} \textit{Id.} at 1222.
\textsuperscript{157.} \textit{Id.}
\textsuperscript{158.} \textit{Id.}
\textsuperscript{159.} \textit{Id.} at 1222-23.
\textsuperscript{160.} \textit{Id.} at 1223.
completion and budget shortfalls were omitted and litigation to obtain the records ensued.\textsuperscript{161}

The University claimed the redacted information was protected by executive privilege based on two provisions of the PIA.\textsuperscript{162} Section 10-615(1) obligates a custodian to refuse inspection of a public record if "by law, the public record is privileged or confidential."\textsuperscript{163} Section 10-618(b) allows a custodian to deny examination of "any part of an inter-agency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the [governmental] unit."\textsuperscript{164} The University argued the financial data were not just mere numbers but a "subjective assessment of the potential final cost to the University for the project" provided to facilitate decisions on the quantity of resources committed to the project and whether more funding was needed.\textsuperscript{165}

In response, the court reasoned that the deliberative process privilege was incorporated into PIA's exemption statute, Section 10-618(b).\textsuperscript{166} The court held that while it was undisputed that the reports were predecisional in nature, the financial figures were mostly factual, not deliberative, in character.\textsuperscript{167} Therefore, the redacted figures were not subject to shielding under the deliberative process privilege exemption of Section 10-618(b) of the PIA.\textsuperscript{168}

\textbf{V. KENTUCKY SHOULD USE OTHER STATES' PRECEDENT AS A MODEL FOR ADOPTING THE DELIBERATIVE PROCESS PRIVILEGE}

Case law from other jurisdictions provides coherent, persuasive authority for Kentucky. Kentucky should acknowledge the logic that sister states have applied in officially recognizing the deliberative process privilege and follow suit. Case history suggests a willingness of state courts to recognize the wisdom of other states' construction

\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. (quoting MD. CODE ANN., STATE GOV'T § 10-615(1) (LEXIS 2005)).
\textsuperscript{164} Id. at 1223-24 (quoting MD. CODE ANN., STATE GOV'T § 10-618(b) (LEXIS 2005)).
\textsuperscript{165} Id. at 1224.
\textsuperscript{166} Id. at 1226-27.
\textsuperscript{167} Id. at 1228-30.
\textsuperscript{168} Id. at 1231.
when interpreting similar statutes. For example, Texas upheld the constitutionality of a statute deeming possession of mercury without a bill of sale a criminal act.\textsuperscript{169} The Texas Supreme Court found persuasive the fact that New Mexico upheld the constitutionality of a statute on the possession of mercury nearly identical to the Texas statute.\textsuperscript{170} The court decided New Mexico had construed the statute similar to theirs in a scholarly and persuasive manner when deciding its constitutionality.\textsuperscript{171} Finally, the Texas Supreme Court noted in passing that “the construction placed by a court of another jurisdiction on a statute similar to a statute of Texas will undoubtedly be given due consideration.”\textsuperscript{172} Also, when a corporation challenged an interpretation of the Massachusetts Statute of Frauds, the court found the construction of the statute was proper because states with similarly worded statutes used that interpretation.\textsuperscript{173}

Kentucky has already followed California’s lead in the \textit{Jones} case, finding their supreme courts reasoning valid when interpreting the KORA. It appears illogical to borrow reasoning from California courts to support an exemption from the KORA and then reject the same state’s assertion that a deliberative process privilege exists. Further, a review of other states’ open records acts reveals them to be similarly worded to KORA.

Moreover, by enacting a state statute parallel to the FOIA, the legislature evinces an intent that Kentucky should follow the federal courts’ construction of FOIA in interpreting the KORA. Inept or unclear wording should not defeat the purpose of a statute.\textsuperscript{174} If a statute is unclear, courts must interpret the statute as to effectuate legislative intent.\textsuperscript{175} Federal courts have held that Section 552 establishes a privilege to protect federal agencies’ deliberative processes. Therefore, because the exemption clause in Section 61.878 (i)-(j) of the Kentucky Revised Statutes has been subject to different interpretations; Kentucky must look to the FOIA for clarity.

\textsuperscript{170} Id. at 745-746.
\textsuperscript{171} Id. at 746.
\textsuperscript{172} Id.
\textsuperscript{175} Id.
and defer to legislative intent by recognizing the deliberative process privilege.

Finally, a survey of case law from surrounding states illustrates a pertinent point; contrary to the fears of its distracters state recognition of the deliberative process privilege has not allowed agencies to hide behind the privilege. In reality, litigation involving the deliberative process privilege actually shows that the need for agency privacy is carefully weighed against the right to public disclosure. State agencies have to demonstrate that the harm created by nondisclosure outweighs the public good in order to successfully invoke the privilege.

VI. CONCLUSION

A state agency’s evaluative process would suffer no less damage from being forced to divulge predecisional documents than their federal counterparts. Whether state or federal government is involved, employees fear of “operating in a fishbowl.” Also, public confusion may occur when predecisional records are released, presenting problems for administrative agencies. Arguably, the agency operations on a local or state level have the greatest impact on peoples’ day-to-day lives. Therefore, stifling a state agency’s candid discussions and thorough debate on policy presents a public harm at least equal to that created by exposure of federal agencies processes.

Future litigation surrounding an open records request pursuant to KORA and a state agency’s refusal under a claim of privilege is foreseeable. The Kentucky Supreme Court must grant certiorari when the issue is presented to them and officially recognize a deliberative process privilege for state administrative agencies. To do so recognizes the persuasive value of other jurisdiction’s interpretation of similar statutes, the purpose of adopting similar federal statutes, and the importance of state agencies.