The Deliberative Process Privilege In State Controversy Matters

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Taxpayers involved in state tax controversy matters often request information and documentation from state tax authorities to analyze audit adjustments. Some of those requests are thwarted by state tax authorities’ assertions of the deliberative process privilege to prevent the disclosure of information or documentation that may compromise the state tax authorities’ legal position.

The deliberative process privilege applies only in limited circumstances. It is not an absolute bar against disclosure. Even if the privilege applies to the information or documentation sought, taxpayers may be able to overcome the privilege by demonstrating that their interest in disclosure outweighs the government’s interest in maintaining the confidentiality of the information or documentation.

In this installment of A Pinch of SALT, we deconstruct the deliberative process privilege by describing the requirements for asserting the privilege and analyzing the extent to which state tax authorities may invoke the privilege. We also examine taxpayers’ ability to overcome the privilege to obtain information or documentation.

Deconstructing the Deliberative Process Privilege

The deliberative process privilege is a common-law evidentiary privilege afforded to government agencies, including state tax authorities. Generally speaking, the deliberative process privilege prevents the disclosure of information and documentation that reflects opinions, recommendations, and deliberations that make up the process by which governmental decisions and policies are formulated. The privilege has its roots in both the centuries-old crown privilege and executive privilege and has evolved out of a concern for protecting the integrity of a sovereign’s decision-making process.

The deliberative process privilege furthers three policies. It encourages forthright discussions within an agency. It avoids creating confusion that is likely to result from the premature disclosure of an agency’s opinions before the agency has established its final policy. It also protects the integrity of an agency’s decision by preventing the public from judging agency officials according to the information they consider before making their final decisions. In federal courts have long recognized the common-law deliberative process privilege, and state courts draw heavily from federal precedent when applying the deliberative process privilege in state tax controversy matters. Thus, an understanding of the federal deliberative process privilege is critical in terms of understanding state deliberative process privileges. It should be noted, however, that not all states recognize a common law deliberative process privilege. See, e.g., Rigel Corp. v. State, 234 P.3d 633, 741 (Ariz. Ct. App. 2010) (refusing to recognize a deliberative process privilege); Babets v. Sec’y of Exec. Office of Human Servs., 526 N.E.2d 1261, 1262, 1263 (Mass. 1988) (declining to recognize a deliberative process privilege). See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). Some state courts have referred to an “executive privilege,” “administrative deliberation privilege,” “precedential deliberative process privilege,” “governmental privilege,” and “official informational privilege.” See, e.g., Doe v. Alaska Superior Court, 721 P.2d 617 (Alaska 1986); Guy v. Judicial Nominating Comm’n, 659 A.2d 777, 782 (Del. Super. Ct. 1995); Hamilton v. Verdov, 414 A.2d 914, 920 (Md. 1980); City of Colorado Springs v. White, 967 P.2d 1042, 1049-1050 (Colo. 1998).

Deconstructing the Deliberative Process Privilege

The deliberative process privilege is a common-law evidentiary privilege afforded to government
sum, the deliberative process privilege is meant to protect the quality of an agency's decisions and its predecisional processes and promote frank discussion of policy matters.

Blanket assertions of privilege over unqualified material are inappropriate and constitute overreaching.

Two threshold requirements must be met before the deliberative process privilege applies. First, the government agency must demonstrate that the document in question is "deliberative." Second, the government agency must demonstrate that the document in question is "predecisional." If the government agency successfully demonstrates that information or documentation is deliberative and predecisional, the deliberative process privilege applies and protects the information or documentation from disclosure. However, because the privilege is a qualified privilege, the party seeking disclosure may overcome the privilege by showing that its need for the information or documentation outweighs the government's interest in nondisclosure.

The Deliberative Process Privilege in State Tax Controversy Matters

Although the deliberative process privilege may protect interagency information or documentation that is predecisional and deliberative, blanket assertions of privilege over unqualified material are inappropriate and constitute overreaching. We believe that the deliberative process privilege should apply in very limited circumstances in state tax controversy matters.

What Types of Decisions Implicate the Privilege?

When a state tax authority asserts the deliberative process privilege, the taxpayer first has to consider whether the information or documentation in question relates to a "decision" made by the state tax authority that implicates the privilege. In most cases, the "decision" must relate to the general application of the law the agency is responsible for administering. A state tax authority may make a decision for purposes of the deliberative process privilege when the authority arrives at its interpretation of state tax law (for example, when it promulgates a rule or regulation or publishes guidance). A decision also may result from audit activity when audit staff request guidance regarding the general application of the tax law to a novel set of facts. An examination that presents a novel state tax question may result in advice, opinions, or reasoning regarding the state tax authority's legal position on the question, which could constitute a decision for purposes of the deliberative process privilege.

Although the deliberative process privilege protects decision-making processes related to a state tax authority's interpretation of the law or formulation of policy, it does not protect the decision-making processes regarding the application of the law to a taxpayer's specific set of facts and which are unrelated to the formulation of new agency policy. Also, an auditor's communications regarding a matter of settled agency interpretation would not implicate the deliberative process privilege, for not all agency communications are protected. The deliberative process privilege "protects only those agency communications or parts of agency communications that relate to the agency's policymaking." In any challenge to a state tax authority's assertion of the deliberative process privilege, it is critical for taxpayers to force the state tax authority to identify the decision that resulted from a deliberative process.

In any challenge to an assertion of the deliberative process privilege, it is critical for taxpayers to force the state tax authority to identify the decision that resulted from a deliberative process. We believe that the privilege should apply in limited circumstances in state tax controversy matters, because

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5 NLRB, 421 U.S. at 151.
7 Some courts require the government agency to identify the final decision or policy that resulted from a deliberative process as part of the agency's burden of proving that the privilege applies. General Elec. Co. v. Johnson, 2006 U.S. Dist. LEXIS 64907, at *14 (D.D.C. 2006). But see NLRB, 421 (Footnote continued in next column.)
10 City of Garland, 22 S.W.3d at 364.
most decisions made during the course of an examination are not decisions for purposes of the deliberative process privilege.

When Is Information or Documentation Deliberative?

Whether information or documentation is deliberative depends on the nature of the communication. Deliberative information or documentation “reflect[s] the give-and-take of the consultative process,” and may include such things as advice to a senior employee at the agency or discussions regarding the advantages and disadvantages of a possible strategy. However, information or documentation reflecting straightforward explanations of an agency’s existing policy or interpretation, even explanations that are applied to a set of facts, generally are not regarded as deliberative. An agency’s explanation of the law, including evaluations of the strengths and weaknesses of competing interpretations, may not be deliberative because “the government’s opinion about what is the law is as much a statement of government policy as its opinion about what the law is.”

Most courts, including the U.S. Supreme Court, recognize a distinction between documents containing purely factual information, which are not protected by the deliberative process privilege, and documents that reflect opinions, recommendations, or advice, which are protected. In the case of a state tax assessment, information or documentation that is involved in determining why an assessment was issued or why an adjustment was made is generally factual in nature and, as such, is beyond the purview of the deliberative process privilege. By comparison, information or documentation that reflects recommendations or opinions regarding draft rules, regulations, or formal guidance would be more likely to meet the deliberative prong of the deliberative process privilege.

When Is Information or Documentation Predecisional?

Information or documentation must be predecisional in order to fall within the protections afforded by the deliberative process privilege. Information or documentation is predecisional if it “preced[es], in a temporal sequence, the ‘decision’ to which it relates.” The line of demarcation between predecisional and post-decisional can be blurry, but courts view information and documentation as post-decisional “at the very instant that [the] agency aligns its policy or program congruently with the views expressed in a particular document.” At that time, the information or documentation is thought to reflect the agency’s “official” position as opposed to the drafter’s personal opinion.

Taxpayers may be able to overcome the privilege by demonstrating that their need for information or documentation outweighs the state tax authority’s interest in confidentiality.

Information or documentation that precedes the moment the state tax authority arrives at a final decision satisfies the predecisional prong of the deliberative process privilege. The determination of whether the information or documentation precedes the decision “requires” a facts and circumstances analysis. Taxpayers should carefully review the timing of the information or documentation to decide whether it was in fact created before the state tax authority arrived at a final decision.

Overcoming the Deliberative Process Privilege in State Tax Controversy Matters

If the deliberative process privilege is successfully asserted, taxpayers may be able to overcome the privilege by demonstrating that their need for information or documentation outweighs the state tax authority’s interest in confidentiality. Courts generally consider the following factors when balancing these competing interests:

- the relevance of the evidence sought to be protected;

11Id. at 866.
12Id. at 868.
14See, e.g., NLRB, 421 U.S. at 161 n.27; Trentadue v. Integrity Comm., 501 F.3d 1215, 1227 (10th Cir. 2007). Other courts, including the Ninth Circuit and the D.C. Circuit, have adopted a more process-oriented approach that exempts factual materials the disclosure of which “would be tantamount to the ‘publication of the evaluation and analysis of the multitudinous facts’ conducted by the agency.” Nat’l Wildlife Fed’n v. U.S. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) (quoting Montrose Chem. Corp. of Cal. v. Train, 491 F.2d 63, 68 (D.C. Cir. 1974)). If it is reasonably clear to the court that the party seeking disclosure is entitled to some of the documents sought, the court may inspect the documents in camera to make a determination as to what should be disclosed.
15Hinckley v. United States, 140 F.3d 277, 284 (D.C. Cir. 1988) (quoting United States Senate ex rel. Judiciary Committee v. United States Dep’t of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987)).
17See, e.g., King v. IRS, 684 F.2d 517, 519-521 (7th Cir. 1982).
18Cobell, 257 F. Supp. 2d at 206 (citations omitted).
A taxpayer challenging the substance of a naked assessment has a compelling argument that its need for information to understand the assessment outweighs the state tax authority’s interest in preserving the confidentiality of the deliberative process.

A taxpayer also may have a well-founded argument that its interest in the disclosure of privileged information or documentation outweighs the government’s interest in confidentiality if the taxpayer’s cause of action against the state tax authority includes allegations of discrimination or malfeasance or when the state tax authority’s decision-making process is the central issue. Some
courts have even suggested that the balancing test is unnecessary under such circumstances because “the need for documents will likely outweigh any negative consequences of disclosure.”

Equal protection and uniformity and equalization challenges to state tax assessments frequently turn on the state tax authority's decision-making processes. In those cases, information or documentation reflecting the state tax authority's decision-making processes is highly relevant, comparable evidence is not likely to be available from other sources, and the seriousness of charges of discrimination and misconduct likely would weigh in favor of the taxpayer's interest in disclosure. Furthermore, the public's interest in open and effective government, in the face of allegations of discrimination or misconduct by the state tax authority, is likely to weigh in favor of disclosure.

Overcoming the Privilege Based on an Affirmative Right

A taxpayer attempting to overcome the deliberative process privilege should also review the state taxpayer bill of rights (TABOR). A number of state TABORs provide taxpayers the right to understand their tax liabilities. Taxpayers in those states may be able to assert that they have an affirmative right under the TABOR to understand their tax liabilities, and that right trumps the state tax authority's interest in confidentiality.

An argument can be made that some TABORs require the disclosure of information or documentation containing information concerning a state tax authority's determination of a deficiency and calculation of an assessment. Generally, a TABOR entitles the taxpayer to understand the bases for any deficiencies assessed against it. A state tax authority's failure or inability to describe the basis or bases for an assessment is a violation of the TABOR, and the deliberative process privilege is not intended to shield a state tax authority's assessment from scrutiny, judicial or otherwise, or prevent a taxpayer from fully understanding the bases of a tax liability. Also, a showing that the state tax authority has been less than forthcoming during discovery may also tip the scales in favor of disclosure.

We are unaware of any cases in which a taxpayer challenged the deliberative process privilege based on a TABOR, but several cases have presented the situation in which a party seeking the disclosure of information or documentation protected by the deliberative process privilege had an affirmative right to the information or documentation. Those cases involve a clash between two inconsistent bodies of law — one granting a person the right to access information and another granting the government a qualified exemption from disclosure of information — and support the proposition that a taxpayer can successfully overcome the deliberative process privilege based on a showing of an affirmative right to the information or documentation sought.

Taxpayer Bill of Rights (giving taxpayers the right “to a complete and accurate written description of the basis for any additional tax assessed.”).

See, e.g., County of Riverside v. Superior Court, 42 P.3d 1034 (Cal. 2002). In County of Riverside, a question arose regarding whether a law enforcement agency was required to disclose to a probationary peace officer confidential documents created or compiled during a background investigation of the officer. California’s Public Safety Officers Procedural Bill of Rights Act gives public safety officers the right to view any adverse comments placed in their personnel files. The county withheld the confidential documents from the officer on the grounds that they were protected by several privileges, including the deliberative process privilege. Although it was unclear to the California Supreme Court whether those privileges applied to the confidential documents, the court nevertheless held that the specific provisions of the Public Safety Officers Procedural Bill of Rights Act granting officers’ right to adverse comments took precedence over the common law privileges asserted by the county. While each of the common law privileges asserted by the county turned on a balancing of the public interest in nondisclosure against the public interest in disclosure, the court found that the California Legislature had already balanced those competing interests “by guaranteeing peace officers the right, irrespective of the various privileges that might apply, to view” the information sought. Id. at 1036-1041.
TABORs may provide a solid basis for overcoming the deliberation process privilege when the information or documentation sought would inform taxpayers' understanding of their tax liabilities. Taxpayers challenging naked assessments or assessments based on alternative theories may have a compelling argument that based on the rights afforded by the TABOR, they have a right to that information or documentation. We believe that the legislature's enactment of a TABOR entitling taxpayers to information regarding the bases for their tax liabilities means that the legislature has already weighed the public interest in disclosure versus nondisclosure.26 Taxpayers' interest in disclosure must outweigh the government’s interest in nondisclosure when taxpayers have no way of understanding the bases for assessments without the information or documentation sought.

**Conclusion**

State tax authorities cannot claim the deliberative process privilege to prevent taxpayers from obtaining information or documentation that does not satisfy the requirements of the privilege. Furthermore, an assertion of the deliberative process privilege should not deter taxpayers from requesting information or documentation regarding a state tax authority’s basis for an adjustment or assessment.

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26We caution that not all TABORs are created equally. The extent to which a TABOR has been codified by the state legislature, rather than simply promulgated by the state tax authority, and whether it provides affirmative rights to taxpayers, will dictate the effectiveness of using a state's TABOR to overcome the deliberative process privilege.