

Jan 1st, 12:00 AM

# Deliberative Privilege

Sally French Paulson

Delta State University, spaulson@deltastate.edu

Follow this and additional works at: <https://lib.dr.iastate.edu/sciencecommunication>



Part of the [Speech and Rhetorical Studies Commons](#)

---

Paulson, Sally French (2016). Deliberative Privilege. Jean Goodwin (Ed.), *Confronting the Challenges of Public Participation in Environmental, Planning, and Health Decision-Making*. <https://doi.org/10.31274/sciencecommunication-180809-11>

This Event is brought to you for free and open access by the Conferences and Symposia at Iowa State University Digital Repository. It has been accepted for inclusion in Iowa State University Summer Symposium on Science Communication by an authorized administrator of Iowa State University Digital Repository. For more information, please contact [digirep@iastate.edu](mailto:digirep@iastate.edu).

# Deliberative Privilege

SALLY FRENCH PAULSON

*Division of Languages and Literature  
Delta State University  
1003 West Sunflower Road  
Cleveland, MS  
spaulson@deltastate.edu*

**ABSTRACT:** The concept of deliberative privilege poses a true threat to maintaining public involvement in public policy decision-making. The threat arises from the very nature of privileges themselves. They sacrifice individual interests in the interest of a larger public good. Unfortunately, deliberative privilege sacrifices such interests as ensuring justice for the individual and public participation. However, a way exists to overcome the threats the privilege establishes – characterize criteria as facts and thus discoverable and open to public scrutiny. Just knowing the criteria upon which public administrators base their decisions could give the public confidence in those administrators and their policies.

**KEYWORDS:** administrative decision-making, criteria, deliberative privilege, Freedom of Information Act, LUST, public participation, Tennessee Department of Environment and Conservation (TDEQ), LUST

## 1. INTRODUCTION

By the 1980's, over half of the million petroleum underground storage tanks in the United States were leaking and thus potentially contaminating groundwater, soil and air. Consequently, in 1986 Congress created the Leaking Underground Storage Tank (LUST) Trust Fund, and in September of 1988 the United States Environmental Protection Agency (EPA) issued underground storage tank regulations. Those regulations required owners of underground storage tanks to locate, remove, upgrade or replace all their underground tanks. Further, it gave each state the authority to establish a program to compensate those owners. In Tennessee that program is run by the State of Tennessee's Division of Underground Storage Tanks, a division of the Tennessee Department of Environment and Conservation. Under that program, rather than being conducted by the State itself, independent contractors do the actual remediation work and then the State reimburses them according to its reimbursement guidelines. Southern Environmental Management & Specialties (SEMS) is one of those contractors for the State of Tennessee.

## 2. BACKGROUND

In the winter of 2014, SEMS implemented a corrective action plan that included the installation of a Corrective Action System (CAS) at a former Amoco gasoline station now owned by Ali Aman. On March 31, 2014, SEMS, on behalf of the owner Aman, submitted a reimbursement application to the State of Tennessee's Division of Underground Storage Tanks requesting payment for corrective action costs incurred between January 1, 2014 and February 28, 2014. On April 22, 2014, while it approved almost all requests, still the Division denied \$8,992.00. On May 19, 2014, SEMS appealed the denial. In its letter dated May 23, 2014, the

Division approved payment for \$4,761.00 of the appealed amount, but still denied the remaining \$4,231.00.

SEMS made several arguments in its May 19, 2014 appeal letter for why the disallowed costs should be reimbursed. While the State agreed with one of them, hence the approval of the \$4,761.00, it did not accept the others. Therefore, it continued to deny the \$4,231 submitted for the rental of storage drums for construction debris on which no laboratory analysis had been performed to determine if it were contaminated and the cost for the removal of those drums.

In its appeal letter, SEMS argued even if no analysis had been performed, the rental of additional containers for the storage of “construction debris” that included non-contaminated soil generated from trenching for piping and drilling recovery wells should be covered as well as the removal of that “debris” from the site. SEMS stated this was the first time it was aware of construction debris disposal being denied reimbursement. Further, the Company noted it had only recently been informed that excavated pipe trenching material or non-contaminated drill cuttings “should be used as backfill or spread on-site.” SEMS made several arguments for why neither of those was a “reasonable solution” in this situation.

First, SEMS explained the company had previously used excavated material as backfill but, since that material was difficult to compact, with time trench subsidence and cracking of the trench concrete surface had occurred, and thus additional costs had been incurred to remove and replace the concrete. Further, it argued that since the Reimbursement Guidance Document – 002, specifically Task 4.4.a.5, CAS Trench Installation, includes in the cost of \$65.00 per foot for trenching the cost per foot of 10 tons of gravel, then gravel, not soil, should be used as fill material, and it noted Task 4.4.a.5 “does not specify that non-contaminated soil must be used as fill material.” (Appeal Request, p. 2) Second, it argued that because the site is an active car lot, the Division’s second suggestion would not work simply because “There is no place on-site to spread construction debris.” (Request, p. 2) Third, it argued the disposal of non-contaminated soil cuttings from the installation of the CAS recover well should be reimbursable first because there was no place to spread those cuttings on-site; and second, in direct contrast to the Division’s characterization of the soil cuttings as merely soil, SEMS contended, “The soil cuttings should also be treated as construction debris, since they are the waste product of the installation of groundwater monitoring and recovery wells.” (Request, p. 2)

However, in its letter dated May 23, 2014, the Division merely ignored SEMS’ arguments concerning the practicality of spreading the soil on-site; the Company’s reliance on the Division’s past actions of reimbursing for the removal of construction debris, and its argument that the soil cuttings should be characterized construction debris. Instead, the State continued to deny the amount of \$4,231.00 solely on its characterization of the soil cuttings and trenching as simply “ uncontaminated soil” arguing, “Because since the soil was not separate from the asphalt/concrete debris there is no knowledge how much trenching soil was included with the debris.” It then concluded “UST does not reimburse for trenching material to be removed. UST does not reimburse for the removal and disposal of non-contaminated soil.” On June 19, 2014, the owner, Ali Aman, through his attorney, submitted a “Petition for Review and Hearing.”

In his Petition, Aman, in line with SEMS own appeal, made several arguments for why the matter should be heard before the Tennessee Solid Waste and Underground Storage Board. He asserted: (1) the “non-contaminated soil” should be considered construction debris because it was generated during the installation of a Corrective Action System’s (CAS) groundwater

recovery wells (drill cuttings) and conveyance piping from the recovery wells to the CAS (excavated trench soil); (2) the site is an active, pre-owned car lot whose surface is covered with asphalt/concrete paving; therefore, the “non-contaminated soil” could not be spread onsite; and (3) the excavated soil and drill cuttings are not suitable for piping trench backfill because, since they cannot be compacted back to “native conditions,” the resulting subsidence “could cause cracking of the piping trench concrete cap” and thus “additional costs would be incurred to replace the concrete. (Petition, June 19, 2014) Significantly, Aman’s Petition revealed some key issues with the Division’s position.

First, while the Division did correctly state that its *Reimbursement Guidance Document – 002* (effective date January 2, 2012) establishes the Division does not pay for the storage and removal of “non-contaminated soil,” it must be emphasized it was “non-contaminated soil” as defined by the State of Tennessee. 1.4j under Task 1.4 TRBCA Closure Process states, “This SOW will include all costs necessary for disposal of petroleum contaminated soil at a permitted landfill. *Disposal of soil with contamination levels below the Division’s site-specific cleanup levels will not be reimbursed.*” (Reimbursement Guidelines, p. 34) Significantly, site-specific clean-up levels are just that – they are specific to each site.

In Tennessee, site-specific clean-up levels are based on indoor inhalation from soil or contaminated groundwater and vary depending on such factors as the type of property, commercial or residential; the depth of the soil; the direction of groundwater flow; the potential for contaminants to “migrate” off-site and contaminate other properties or flow into various receptors such as city groundwater wells, etc.

Second, nothing could be found in the 2012 regulations stating the Division would not pay for the removal of trenching debris, in fact, the term “trenching debris” could not be located anywhere in those regulations. An additional issue arose concerning the Division’s directive that non-contaminated soil should be spread on-site. As noted in SEMS appeal, nothing in the regulations required that to be done and, as both SEMS and Aman’s appeals revealed, doing so was simply not practical in this situation.

Thus, at this point it appeared the State had two distinct possible solutions for how it could deal with the soil generated through drilling and trenching. One, it could do, as SEMS and Aman proposed, characterize it as construction debris and pay for its removal from the site. Two, the State could do, as it chose, characterize the soil as merely “non-contaminated soil” and direct it be used as backfill or merely spread on-site. Hence, in his *First Set of Interrogatories and Request for Production for Robert J. Martineau*,” (Robert J. Martineau being the Commissioner of TDEQ), Aman raised several issues.

Key to Aman’s position was the fact that Tennessee, after the remediation system was installed on his property, changed the guidelines by adding another task, Task 4.4.a13, and that change seemed to highlight further issues with the State’s position. The Task states, “This SOW (Scope of Work) will include the cost for the proper disposal of noncontaminated materials that must be removed from the site during installation of the CAS and associated trenching. This includes asphalt, concrete/rebar, scrap trench piping but does not include disposal of soils or gravel.” (RGD-002 Revised 04-15-14, p. 64) Considering the State had denied Aman’s request to pay for the removal of the soil generated by drilling and trenching based on the argument that they were not construction debris but non-contaminated soil, but now the State felt the need to define explicitly what was and was not construction debris, i.e. non-contaminated material the State will pay to have removed, in his *First Set of Interrogatories and Request for Production of Documents*, Aman asked several questions.

First, in Question 2 he asked that the State “Please identify the section and page number of the previous Reimbursement Guidance Document that specified excavated CAS trench soil or gravel was not considered site debris.” (*Aman’s Interrogatories*, p. 4) Second, as the new task demonstrated, since prior regulations had been silent on the issue of what precisely constituted site debris, in Question 3 he asked that the State “Please provide the rationale for excluding trench soil or gravel as site debris under the prior RGD when the Division now defines site debris as ‘non-contaminated materials that must be removed from the site during installation of the CAS and associated trenching.’” (*Aman’s Interrogatories*, p. 4-5)

Aman’s question 4 emerged from a possible conflict between the State’s guidelines and its decision not to pay for the removal of the trench soil and drill cuttings. In its 2012 *Guidance Document*, in Section V. Eligible Costs, under Section D, Risk Management and Corrective Action, the State clearly lists as covered costs associated with the “installation of recovery wells, trenches, and associated piping.” (*Guidance Document*, p. 11) Hence, in question 4 he first noted that the “trench soil/construction debris” at the facility “was generated during the installation of a CAS in accordance with an approved Division Corrective Action Plan.” Then, considering the Reimbursement Package for the site was submitted prior to April 15, 2015, he asked that the State, “please provide the rationale for excluding trench soil or gravel as site debris when the Division currently defines site debris as ‘non-contaminated materials that must be removed from the site during installation of the CAS and associated trenching.’” (*Aman’s Interrogatories*, p. 5).

The State’s answer to Interrogatory 2 clearly highlights the fundamental disagreement between its perspective on soil/gravel and Aman’s as well as the fluid nature of what defines “contaminated” versus “non-contaminated” soil. Rather than directly explaining why trench soil/drill cuttings and gravel should not be considered “construction debris,” under the 2012 guidelines, the State simply ignored Aman’s argument that it should. Instead, it merely referenced those tasks in the old *Reimbursement Guidance Document* that dealt with soil – not construction debris. Noting the 2012 guidelines cover this site, in its answer the State contends, “The old reimbursement guidance document which governs this appeal explicitly states disposal of soil with contaminant concentrations below state specific clean up levels will not be reimbursed.” (*Respondent’s Answers*, p. 5) However, it should never be forgotten that the State itself determines when soil is or is not “contaminated” and that determination varies from site to site. Note, rather than “state specific clean up levels, the guidelines actually state “Site Specific Clean-up Levels” (*Guidance Document*, p. 34) Furthermore, the State’s response still begs the question of whether or not “trench soil/drill cuttings” should be characterized merely as soil, or, as Question 4 clearly suggests, since they were generated during the construction of a CAS, as construction debris. Questions 3 and 4 are attempts to force the State to provide the grounds for its decision not to characterize trench soil/drill cuttings and gravel as construction debris and pay for its removal.

In its response to Question 3, after objecting that the form of the question was unclear, the State then argued, “The Department also objects to the interrogatory to the extent it calls for information protected from disclosure by the deliberative process privilege ....” (*Respondent’s Answers*, p. 5) Its response to Question 4 is identical. Once again, after first objecting that the form of the question is unclear, the State then contended, “The Department also objects to the interrogatory to the extent it calls for information protected from disclosure by the deliberative process privilege and to the extent it calls for a legal argument and conclusion.” (*Respondent’s Answers*, p. 6) All-important, in its answer to these two

interrogatories the State relied upon the extremely controversial “deliberative privilege” doctrine. Furthermore, in direct contrast to contemporary calls for greater stakeholder participation, its use here provides a very clear example of how that privilege can be utilized to cut the public out of the process of public decision-making. To examine this issue further, this paper will first discuss the motivation behind and goal of privileges in general and then the motivations behind and goals of the deliberative privilege in particular. To highlight the dangers that privilege presents, it will discuss the concepts presented in terms of the particular example of the State’s responses to Aman’s questions. Finally, it will suggest a way out of the “black hole” of deliberative privilege.

### 3. PRIVILEGES

Because of their inherent internal dynamics, privileges in general are extremely controversial. That is, privileges exist to allow one party in a dispute to refuse to produce/reveal to another party material that may be essential for the attainment of justice. As Charles T. McCormick explained in 1938, many privileges “... do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.” (McCormick, p. 447-8) Hence, as McCormick further explains, inherent in the notion of privileges is a “straining toward conflicting ends, the end of truth and the end of furthering the outside interest.” (p. 464) Objections to the deliberative privilege specifically emerge from issues with privileges in general.

In 1990 Gerald Wetlauffer discussed and defined the deliberative privilege, explaining, “The general deliberative privilege is relatively new to the list of evidentiary privileges that the federal executive may assert in the course of judicial proceedings. It is a qualified privilege under which the executive is now routinely excused from the obligation to disclose, in civil litigation, the advice, opinions and recommendations that are communicated during a deliberation that leads to the making of any decision in the executive branch.” (Wetlauffer, p. 847) Continuing, he notes, “The underlying rationale is that disclosure of deliberative communications will chill future communications, thus diminishing the effectiveness of executive decisionmaking and injuring the public issue.” Hence, directly in line with privileges in general, the deliberative privilege is a balance between attaining justice for an individual plaintiff and a broader outside interest in effective executive policy making.

However, it is the secretive nature of the privilege that is perhaps its most disturbing aspect. As Wetlauffer explains, “The general deliberative privilege is a privilege that is best defined in terms of its rationale. That rationale is the instrumental claim that secrecy is necessary to candor, that candor is necessary to effective decisionmaking by the executive, and that enhancing the effectiveness of executive decisionmaking serves the public interest.” (p. 849) Unfortunately, as Wetlauffer reveals, effective executive decision-making may not be the actual result of reliance on the privilege.

In addition to the secrecy it permits, Wetlauffer also criticizes the deliberative privilege because of the damage its use causes to the credibility of the executive. He argues that rather than aiding executive decision-making, the privilege actually diminishes the effectiveness of the executive because, by harming the executive’s credibility, it diminishes the ability of the executive to “implement” executive decisions. “When a government keeps secret the processes

by which its most ordinary decisions are reached or defends itself in court through a poorly justified form of executive privilege, it uses up some of the respect, the legitimacy and the credibility on which rests its ability to govern.” (p. 890) Wetlaufer provides still another argument against a general deliberative privilege.

Expanding upon the need for balance inherent in any privilege, Wetlaufer contends, “... the decision whether to grant this privilege affects interests other than the executive’s .... the decision to grant this privilege will have significant adverse effects on the judiciary, on individual litigants including those who have perfectly just claims against the government, and on the principle of citizen sovereignty.” (Wetlaufer, p. 890-1) Concerning the judiciary, he notes the privilege “operates to defeat the ends of justice” and threatens “the very integrity of the judicial system and public confidence in that system.” (p. 891) Concerning individual litigants, he contends the privilege “has its most direct effect on individual litigants who are denied access to documents and testimony that bear closely enough upon their case that, absent the privilege, discovery would have been permitted” and concludes, “The effects that the privilege is likely to have on individual litigants include: a diminished likelihood that the individual will win a case that, absent the privilege, would have been decided in her favour; a diminished likelihood that she will secure a settlement consistent with the true strength of her claim; an increase in the cost of the litigation; and, in the event that she loses, a diminished sense that she has been treated fairly by the system.” (p. 892)

In terms of its effects on citizens, particularly, citizen sovereignty, he presents two key arguments for why the deliberative privilege hurts that. First, he notes, “Executive secrecy also has a number of effects, almost all bad, on the power and effectiveness of the citizens who we regard as sovereigns and on the possibilities that we might realize the ideals of democracy and self-government. First, executive secrecy operates to disempower citizens by depriving them of the information that they may need in order effectively to promote their interests.” (Wetlaufer, p. 892) He postulates specifically, the privilege may “diminish the level of information available to citizens” concerning precisely how the government is operating and the degree to which it is attending to their needs. (p. 893)

Second, Wetlaufer argues, “Additionally, the establishment of the general deliberative privilege will operate to diminish the sense of accountability under which executive officials do their business” and contends that diminished sense of accountability “may increase the likelihood that the official will act in a way that is sloppy or incompetent, that he will confuse his own self-interest (or that of a particular constituency) with the interests of the public, or that he will engage in various kinds of bad acts with which he would not want to be publicly associated.” (p. 893) So, in light of its possible negative effects, the question becomes why does the deliberative privilege even exist, for not only does it exist, but it is being utilized more and more. The answer, somewhat incongruously, is found within the Freedom of Information Act itself.

#### 4. FREEDOM OF INFORMATION ACT

Historically, under Section 3 of the Administrative Procedure Act of 1946 (APA), a government agency was allowed to withhold information “in the public interest” for “good cause shown.” Unfortunately, agencies often relied upon the section to conceal government misconduct. In 1966, believing that the increased availability of governmental information to the general public would serve democratic values, Congress enacted the Freedom of

Information Act or FOIA. FOIA was intended to make governmental disclosure the norm, rather than the exception. However, in spite of its lofty goals, the statute lists nine exemptions upon which a federal agency may rely to withhold information in certain circumstances. The exemption relied upon the most is Number 5 which “protects against disclosure of internal agency communications that would expose an agency’s deliberative process or that are otherwise privileged.” Thus, opinions and recommendations that reflect an agency’s pre-decisional deliberations are shielded from disclosure by Exemption 5. Significantly, Exemption 5 has been highly criticized, particularly as it relates to administrative decision-making.

Kristi A. Miles notes the FOIA was enacted “with the express intention of forcing disclosure of government information that was being withheld from the public under Section 3 of the APA.” (Miles, p. 1327) Then, focusing directly on administrative decision-making, she argues the FOIA should be a means for the public to hold “federal administrative agencies accountable for their actions,” and warns, “These agencies are not (directly) subject to the political process that operates as a check on the legislature. If ‘[w]e the people’ are to retain any meaningful power over the burgeoning administrative bureaucracy, we must be an informed citizenry.” (p. 1340) It should be noted that, like all other privileges, Exemption 5 also entails a balancing of conflicting interests.

On the one hand, the privilege is justified by the “chilling effect.” Those who favour it argue that if administrators know their deliberations will be open to discovery, they may not feel free to debate openly about various administrative issues. However, numerous commentators have questioned the validity of that justification, noting that no empirical evidence has ever been presented to justify it. For her part, Miles notes that even if Exemption 5 “may indeed encourage candid debate within the halls of the federal bureaucracy. We are likely to find, however, that allowing the rulemaking process to operate as a ‘black box’ with uncertain contents will have consequences far worse than whatever adverse effects might result from too much disclosure.” (p. 1341) Thus, Miles clearly points out that the deliberative privilege doctrine has the potential to shut the public out from a large part of the process of public policy decision-making – all that occurs in the context of the “burgeoning administrative bureaucracy.” The State’s response to Aman’s interrogatories serves as an example of how the administration may try to block the public from participating in administrative decision-making.

In his third and fourth interrogatories, Aman asked the State to identify the rationale/criteria that formed the basis for its decision not to include soil generated from well drilling and trenching in its definition of construction debris, a decision that allowed the State to classify that material merely as non-contaminated soil and, further, to direct contractors to separate that soil out from the construction debris and use it as backfill or simply spread it on-site. In terms of its first alternative, using that soil as backfill, in its letter dated May 19, 2014, SEMS, an environmental contractor with wide experience in the field, had clearly explained why that was not a satisfactory solution. Yet, rather than responding directly to SEMS arguments, the information SEMS provided seemed to go straight into the “black hole” of administrative decision-making as the State merely ignored the company’s arguments and, relying upon the deliberative process privilege instead, merely argued it was not obligated to provide that information because it was part of the deliberative process. However, because of its potential to create a true health and environmental hazard, the true danger of its use of that privilege emerges from its second alternative, just spreading the soil on the ground.



Benzene is a carcinogen. That fact was one of the key motivators behind the initial passage of the LUST law. Furthermore, and all-important, it can be absorbed through the skin. As a result of this situation, a difference exists between Tennessee's "site specific" criteria for determining non-contaminated soil and one for when that same soil has the potential for dermal contact. Significantly, the depth of soil considered for UST work in Tennessee is 3-30 feet. Anything above 3 feet is considered "surface soil," and UST work does not cover contamination of "surface soil," just contamination from underground storage tanks; soil below 30 feet is considered too deep to affect indoor inhalation levels. Consequently, whether or not soil at those levels is contaminated is irrelevant to the establishment of site-specific clean-up levels. It should be noted that this is not the case in all states. The more universally accepted EPA requirements have an objective contamination level for when soil containing benzene has the potential for coming into dermal contact, and, in contrast to Tennessee, some states consider that potential when determining site-specific clean-up levels. For example in Missouri, when establishing those levels, the State considers the potential for children to play in the water, eat the dirt excavated from the site, etc. Consequently, due to surface spills as well as the possibility for leaking drainage pipes, soil from trenching, according to some standards, although not according to the State of Tennessee, might well be contaminated, and thus, spreading it on the site could, as the State of Missouri fully recognizes, create a potential environmental and health hazard. The difference between these standards motivated Aman's second and third interrogatories.

The possibility existed that, in order to save the State the cost of hauling off the soil generated through drilling and trenching, the State utilized the site-specific standard, rather than the EPA dermal contact standard, to define that soil as non-contaminated and thus "safe" to use as backfill or simply spread on-site and allowed to dry. Obviously applying the site-specific standard to establish the safety of the soil once the possibility existed for it to make dermal contact would put the State in the position of using a federal law intended to alleviate an environmental/health hazard to create a new and potentially more dangerous environmental/health hazard. However, rather than providing the criteria upon which it based its decision, the State once again merely retreated to the "black hole" of the deliberative privilege doctrine. Significantly, at this point, it should be pointed out a very real possibility exists for shining at least a ray of light into that black hole: classifying criteria as facts.

## 5. CRITERIA AS FACTS

Not surprisingly, considering its location in Washington, D.C., the headquarters of many federal government agencies, the D.C. Circuit Court has reached more decisions concerning Exemption 5 than has any other court, and its holdings establish a very significant distinction. The Court has held that purely factual material, or factual portions of otherwise deliberative documents, is not protected from disclosure. That is, it created an "opinion/fact distinction. While it does acknowledge facts might not be released if they would reveal the "underlying substantive nature of those deliberations," still, the D.C. Circuit Court explicitly argued Exemption 5 only protects factual material if such material was "selectively collected in the course of the decisionmaking process." The Court clearly pointed out that, "To allow agencies to simply label particular documents 'deliberative' and therefore exempt from disclosure 'would result in a huge mass of material forever screened from public view.'" (Miles, p. 1331)

The State's response to Aman's interrogatories illustrates why making criteria discoverable could be so helpful.

Tennessee seems to contradict itself with its two possibilities for how to deal with non-contaminated soil. In light of SEMS arguments concerning the additional costs that would be involved, its directive to use that material as backfill seems to ignore any monetary concerns. However, its directive to spread that material on site seems to place monetary concerns above all others – even the very real possibility of creating an additional health and environmental hazard. Furthermore, Aman's fourth interrogatory seems to bring out another contradiction. In light of the State's assertion in its guidelines that it would pay for the costs associated with the installation of a CAS remediation system, including the installation of recovery well, trenches, and associated piping and considering the soil in question was generated during the installation of such, why would the State refuse to define the soil SEMS generated when drilling wells and trenching for piping as construction debris and pay for its removal?

Due to these conflicts in its position, it is not surprising the State was reticent to reveal the criteria upon which it based its decision and retreated to a deliberative privilege argument instead. That is, in line with Wetlaufer's contentions, rather than making administrative decision-making better by avoiding the "chilling effect," even if it had a legitimate basis for its decision, the State's reliance upon the deliberative privilege gave the appearance it was merely trying to hide sloppy decision-making. However, characterizing criteria as facts would be one way to ensure a more valid administrative decision-making process.

First, in line with the D.C. Circuit Court's opinion, criteria can legitimately be defined as facts. That is, while the process of arriving at site-specific clean-up levels and applying those to evaluate the acceptability of the suggested possible solutions can be characterized as forms of deliberation and thus, non-discoverable, the actual criteria themselves are objective facts/values, and thus, discoverable. For example, in this particular legal proceeding, the Plaintiff was not asking for any information about the deliberations involved in either establishing or applying those criteria, instead, in light of the very real difference between the safety level of benzene in soil depending on whether that level is site-specific or the EPA's more objective one that applies when the possibility for dermal contact exists and the State's own assertion it will pay for the costs of installing a remediation system, knowing what criteria the State employed when establishing its public policy of simply spreading the soil generated from the drilling and trenching that occurs during the installation of a remediation system on-site to dry or using it as backfill rather than the State paying for its disposal would provide key insights into the legitimacy of that policy.

## 6. PUBLIC PARTICIPATION

Additionally, Aman's example reveals how the concept of deliberative privilege could effectively keep the public out of the process of administrative decision-making. In the context of this particular legal proceeding, it appears the concept of "deliberative privilege" was used not so much to ensure complete and full administrative consideration of the issue as it was to force Aman, and thus ultimately the public at large as well, to accept, no questions asked, what could potentially be a very unsatisfactory public policy. That is, rather than being utilized to avoid the "chilling effect" and thus ensure the broadest, most honest analysis of the situation in this example, it seems the concept of deliberative privilege was employed to keep the public out of the process of establishing a public policy that had the potential to create significant

environmental and health hazard for that public. Thus Aman’s example highlights what is only becoming a bigger and bigger issue for, with the expansion of government/administrative influence/action/regulation, the use of the deliberative privilege doctrine could effectively block the public out of meaningful participation in a very large, very significant area of public policy making.

However, characterizing criteria as “facts” provides the public a window on that process. Knowing that criteria are discoverable would force administrative decision-makers to be very open about their criteria rather than relying on possibly unique, personal, and thus secretive hidden agendas. That is, rather than hurting the State’s credibility by allowing the administrative decision-making process to operate in a “black hole,” a very essential aspect of that process, the factual criteria employed to determine the best possible solution, would be open to the public. Further, while on the one hand, while knowing those criteria might reveal key faults and contradictions within the State’s decision-making process and thus with the policies that result from that process, on the other hand, knowing those criteria could also reinforce the legitimacy of the administrator’s decision-making process and, as a result, shore up public confidence in the validity and, hence, legitimacy of those policies as well.

## 7. CONCLUSION

The deliberative privilege doctrine constitutes a true threat to public participation in the process of public policy decision-making, and thus, poses a threat to America’s democratic form of government itself. However, all is not lost – characterizing criteria as fact and thus discoverable shines a light into the black hole the doctrine creates. That is, forcing administrators to be open about the rationale they utilize can reveal a great deal concerning the deliberating process itself. Most important, it can ensure that, rather than relying on secretive, individual agendas, administrators are keeping the public’s interests first and foremost in their decision-making process. Furthermore, just knowing such is the case will give the public confidence in those administrators and, as a result, make the public more willing to carry out the policies they establish, a situation that, ultimately, can only improve society in general as well.

## REFERENCES

- Ali Aman’s First Set of Interrogatories and Request for Production of Documents to Robert J. Martineau, Commissioner of the Tennessee Department of Environment and Conservation. (December 6, 2014).  
 Administrative Procedural Act, 5 USC §§ 551 et seq. (1964).  
 Commissioner’s Response to Ali Aman’s First Set of Interrogatories and Request for Production of Documents. (January 20, 2015).  
 Ecological Assessment of Hazardous Waste Sites: A Field and Laboratory Reference Document, EPA/600/389/013 NTIS No. PB-89205967, EPA, Washington, DC, March 1989.  
 Freedom of Information Act, 5 USC §§ 552 et seq. (1966).  
 McCormick, C. (1938). The scope of privilege in the law of evidence. *Texas Law Review*, 16, 447-470.  
 Miles, K. A. (1989). The freedom of information act. *George Washington Law Review*, 57, 1326-1341.  
 Missouri Risk-Based Corrective Action Process for Petroleum Storage Tanks, October 17, 2017/Version 3.0. Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Site (RBCA), E 1739-95.

DELIBERATIVE PRIVILEGE

State of Tennessee Department of Environment and Conservation Division of Underground Storage Tanks  
Reimbursement Guidance Document – 002, Revised 01-02-12.

State of Tennessee Department of Environment and Conservation Division of Underground Storage Tanks  
Reimbursement Guidance Document – 002, Revised 04-15-14.

State of Tennessee Department of Environment and Conservation Division of Underground Storage Tanks  
Technical Guidelines Document – 07, Effective Date – December 1, 2004, Revision Dates – December 1,  
2005, September 1, 2006.

Wetlaufer, G. (1990). Justifying secrecy: an objection to the general deliberative privilege. *Indiana Law Journal*,  
65, 845-934.



