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I. Introduction

Private citizens frequently sue law enforcement agencies and the governmental bodies to which they answer.[1] Often, plaintiffs accuse police officers of violating their civil rights under 18 U.S.C. § 1983.[2] With over 215 million private citizens reporting annual face-to-face contact with one of the nearly one million full-time law enforcement employees, problems are certain to occur.[3] Plaintiffs file suits against departments of all sizes, from New York City[4] to Tuscaloosa, Alabama.[5] The city of Oakland, California, recently paid

1. *See* King v. Conde, 121 F.R.D. 180, 188 (E.D.N.Y. 1988) (noting that "lawsuits against local law enforcement officers occur with sufficient frequency in this district . . . that the test specifically tailored to resolving the discovery disputes in those cases needs repeating").

2. *See* Martin A. Schwartz, *Admissibility of Investigatory Reports in § 1983 Civil Rights Actions—A User's Manual*, 79 MARQ. L. REV. 453, 459 (1996) ("Large numbers of § 1983 actions arise out of encounters with law enforcement officers.").

3. *See* ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (120th ed. 2000) (Table No. 352, Table No. 354) (displaying number of police and number of citizens reporting face-to-face encounter with police).

4. *See, e.g.*, Banks v. Yokemick, 177 F. Supp. 2d 239, 243 (S.D.N.Y. 2001) (describing settlement of $750,001 against city and judgment of $650,001 against an individual officer). The plaintiff brought suit when her son died as a result of being knocked from his bike after a

$10.9 million to settle claims brought by over 100 plaintiffs based on the actions of four rogue police officers.[6] One county in Maryland paid over $7.9 million in jury awards and out-of-court settlements in lawsuits alleging police misconduct between July 2000 and January 2003.[7]

These lawsuits serve as external checking mechanisms by encouraging police departments to act within the bounds of the law or face the consequences of illegal behavior in a civil suit.[8] Law enforcement agencies also engage in self-policing through internal affairs investigations, detailed personnel files, and studies regarding police procedures.[9] This Note analyzes the competing interests that a court must balance when these checking mechanisms conflict. When individuals sue a law enforcement agency, they often seek discovery of an agency's self-evaluative documents.[10] In response, agencies typically assert numerous privileges in an attempt to protect these documents from discovery.[11] The self-critical analysis privilege is one such privilege.

The self-critical analysis privilege protects self-evaluative materials from discovery when the public interest in preserving the internal evaluations of organizations outweighs a plaintiff's right to the evidence.[12] Courts recognize that organizations may be less likely to engage in self-policing, and in addition may compile less reliable information when doing so, if plaintiffs can access the results of these self-analyses.[13] This Note analyzes the foundations of the

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pursuing officer threw his radio and struck the decedent in the head. *Id.* at 243–44.

5. *See, e.g.*, Stephanie Taylor, *Inmate Says He Was Beaten*, TUSCALOOSA NEWS, Feb. 1, 2003, at A1 (detailing alleged abuse by correction's officer and possible suit against city).

6. *See* Janine DeFao, *"Rider's" Victims Unmollified*, S. F. CHRON., Feb. 23, 2003, at A17 (detailing settlement and procedures implemented to prevent further abuses).

7. *See* Ruben Castaneda, *Police Abuse Suits Cost Pr. George's $7.9 Million*, WASH. POST, Jan. 3, 2003, at A1 (detailing disclosure by county executive).

8. *See, e.g.*, Boyd v. Gullett, 64 F.R.D. 169, 171 (D. Md. 1974) ("The plaintiffs have brought this action under 42 U.S.C. §§ 1981, 1983, 1986 and 1988, seeking both declaratory and injunctive relief to force the supervisory personnel to establish effective rules and procedures to prevent police brutality and to force the police officers . . . to refrain from further illegal acts.").

9. *See, e.g.*, Ballard v. Terrak, 56 F.R.D. 45, 46 (E.D. Wis. 1972) (describing police chief resisting disclosure of "personnel investigative reports on the grounds that such discovery would impair his ability to obtain the internal reporting necessary to provide for an efficient police force").

10. *See, e.g.*, Burke v. N.Y. City Police Dep't, 115 F.R.D. 220, 223 (S.D.N.Y. 1987) (noting that plaintiff seeks discovery of performance evaluations, discipline logs, internal investigation and an investigatory file).

11. *See infra* Part II.B.2 (discussing overlapping privileges available to law enforcement agencies).

12. *See infra* Part II.A (providing a more complete definition of the privilege).

13. *See infra* Part IV.A.1 (discussing the chilling effect of disclosure).

self-critical analysis privilege as applied to claims brought against law enforcement agencies. Law enforcement agencies are in a unique position to assert a privilege based on the public good because they are duty-bound to act in the public interest. Assertion of this privilege in the law enforcement context provides stark examples of the competing public policies underlying both the validation and rejection of the self-critical analysis privilege.

Part II of this Note provides a definition of the privilege and distinguishes it from closely related privileges available to law enforcement agencies.[14] Part III provides a history of the privilege in order to highlight the uncertain status of the privilege as well as to provide a perspective for the following policy discussion.[15] Part IV analyzes the competing factors that courts must weigh when deciding whether to recognize an assertion of the privilege by law enforcement agencies.[16] Part V discusses two hypothetical assertions of the privilege in order to provide concrete examples of both factor-balancing and inconsistencies in the privilege's application.[17]

II. Definition and Distinction

A. Definition

Courts employ the self-critical analysis privilege to protect documents from discovery when "public policy outweighs the needs of litigants and the judicial system for access to information relevant to litigation."[18] As most courts employ it, the privilege consists of three criteria, but may include up to five criteria.[19] First, the documents must consist of self-evaluative materials undertaken by the asserting party.[20] Law enforcement agencies invoke the privilege attempting to protect such documents as personnel files,[21] internal

14. *See infra* Part II (providing definition and distinction from other privileges).

15. *See infra* Part III (discussing history of privilege).

16. *See infra* Part IV (analyzing factors favoring protection and those favoring disclosure).

17. *See infra* Part V (analyzing hypotheticals).

18. Melhorn v. N.J. Transit Rail Operations, Inc., No. 98-CV-6687, 2001 U.S. Dist. LEXIS 6320, at *3 (D.N.J. May 15, 2001).

19. *See* Clark v. Pa. Power & Light Co., No. 98-3017, 1999 U.S. Dist. LEXIS 5118, at *5 (E.D. Pa. Apr. 14, 1999) (stating that privilege generally has three requirements).

20. *See id.* ("The materials must have been prepared for mandatory government reports, or for a self-critical analysis undertaken by the party seeking protection.").

21. *See* Scouler v. Craig, 116 F.R.D. 494, 495 (D.N.J. 1987) (granting motion to compel release of personnel files in part after *in camera* inspection).

investigation files concerning police officers' conduct,[22] transcripts of review committee meetings,[23] evaluations of internal affairs divisions' effectiveness,[24] reports regarding health care provided to inmates,[25] and task force reports of informants' activities.[26]

Second, the privilege generally protects only the subjective aspects of the documents, not the underlying factual basis.[27] Courts often order an *in camera* review of the documents to determine the factual or subjective nature of the documents.[28] According to one court, *in camera* supervision of discovery "may

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22. *See* Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27 (E.D.N.Y. 1997) (granting motion to squash subpoena *duces tecum* concerning a "District Attorney's special investigations file"); Torres v. Kuzniasz, 936 F. Supp 1201, 1214 (D.N.J. 1996) (denying motion to protect factual aspects of internal investigation report).

23. *See* Urseth v. City of Dayton, 653 F. Supp. 1057, 1061–62 (S.D. Ohio 1986) (noting value of "self-critical efforts," but ordering disclosure due to exceptional need).

24. *See* Skibo v. City of New York, 109 F.R.D. 58, 64 (E.D.N.Y. 1985) (balancing plaintiff's need for discovery against chilling effect on department's self-examination).

25. *See* Joe v. Prison Health Servs., Inc., 782 A.2d 24, 34–35 (Pa. Commw. Ct. 2001) (finding that defendants had failed to prove that releasing reports concerning prison health care would curtail flow of information).

26. *See* Bergman v. Kemp, 97 F.R.D. 413, 417 (W.D. Mich. 1983) (finding privilege had been waived by voluntary disclosure and did not apply to task force report).

27. *See* Clark v. Pa. Power & Light Co., No. 98-3017, 1999 U.S. Dist. LEXIS 5118, at *5 (E.D. Pa. Apr. 14, 1999) (noting that privilege "extends only to subjective, evaluative materials, but not to objective data in the reports"); Paul A. Weiss, *Who's Watching the Watchdog?: Self-Evaluative Privilege and Journalistic Responsibility in* Westmoreland v. CBS, Inc., 7 HASTINGS COMM. & ENT. L.J. 149, 153 (noting that "most important" limitation of the privilege "is the rule that the SEP [self-evaluative privilege] does not extend to factual materials"). *But see* Robert J. Bush, Comment, *Stimulating Corporate Self-Regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597, 609 (1993) (noting that limiting privilege's protection to opinion "ignores the fact that informed, sound legal decision-making depends entirely upon accurate factual information"); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1100 (1983) [hereinafter *Self-Critical Analysis*] (concluding that courts should "recognize all of the various ways in which self-analysis may be chilled, and protect factual portions of self-analyses that meet the privilege's criteria").

28. *See* Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27–28 (E.D.N.Y. 1997) (protecting intradepartmental memoranda submitted for *in camera* review); Troupin v. Metro. Life Ins. Co., 169 F.R.D. 546, 550 (S.D.N.Y. 1996) (ordering *in camera* inspection for determining "which portions of [report regarding diversity planning by defendant and results of employee survey] constitute discoverable facts, and which constitute narrative, evaluative or analytical materials protected by the Privilege"); *see also* Tice v. Am. Airlines, Inc., 192 F.R.D. 270, 273 (N.D. Ill. 2000) (protecting safety reports and noting that after *in camera* review court found reports irrelevant). *But see Clark*, 1999 U.S. Dist. LEXIS 5118, at *2–3 (ordering disclosure of "those portions of the affirmative action plans containing factual information (as distinguished from evaluative or analytical information)" but making no mention of *in camera* review and apparently leaving the matter to the party's discretion); Note, *The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L.

be necessary to protect the decision-making process in the various government agencies" even though "[m]aterial of a non-factual nature, i.e., official criticisms, recommendations of action, policy recommendations or opinions of supervisory personnel . . . could well be relevant to the plaintiffs' case."[29] Even after an *in camera* evaluation, the distinction between facts and subjective conclusions presents a difficult line to draw.[30]

Third, the defendant must demonstrate clearly that the factors favoring protection outweigh the policies favoring disclosure.[31] As a corollary of the third element, some courts require that the party invoking the privilege show that the processes producing the information "would be curtailed if discovery is allowed."[32] Courts recognize that law enforcement agencies may lose valuable constructive criticism if participants fear public disclosure of their deliberations.[33] Determining when the threat of disclosure would curtail the process requires a fact-specific inquiry.[34]

REV. 405, 417 (1984) [hereinafter *Self-Critical Analysis Privilege*] (noting that "[s]ome courts have allowed the employer to remove the self-criticism without court inspection").

29. *See* Boyd v. Gullett, 64 F.R.D. 169, 178 (D. Md. 1974) (refusing to recognize "general privilege against discovery of police files"). *But see* Hampton v. City of San Diego, 147 F.R.D. 227, 229–30 (S.D. Cal. 1993) (noting discovery dispute regarding personnel files and internal affairs documents should be handled by parties because "[i]t is certainly not fair to the taxpayers to have to pay the costs and expenditures of the federal courts for work that attorneys should be doing"); Loigman v. Kimmelman, 102 N.J. 98, 108–09 (1986) (stating that "information may be so highly confidential that its disclosure to anyone, including a judge, will irreparably hamper an agency's procedures").

30. *See* James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 557 (1983) (noting that distinction is "necessarily blurred" and suggesting that "only obviously subjective and conclusory material is protected"); *see also Self-Critical Analysis Privilege*, *supra* note 28, at 417 (noting that affirmative action plans are "a blend of statistics and prose, often with no clear lines between self-evaluation and fact").

31. *See Clark*, 1999 U.S. Dist. LEXIS 5118, at *5–6 ("The policy favoring exclusion must clearly outweigh plaintiff's need for the documents.").

32. Skibo v. City of New York, 109 F.R.D. 58, 64 (E.D.N.Y. 1985); *see* Brunt v. Hunterdon County, 183 F.R.D. 181, 186 (D.N.J. 1998) (using identical language (citing Torres v. Kuzniasz, 936 F. Supp. 1201, 1214–15 (D.N.J. 1996))).

33. *See* Wylie v. Mills, 478 A.2d 1273, 1277 (N.J. Super. Ct. Law Div. 1984) ("It is not realistic to expect candid expressions of opinion or suggestions as to future policy or procedures in an air of apprehension that such statements may well be used against one's colleague or employer in a subsequent litigated matter."). The goal of self improvement is lost "if the input is not reliable." *Id.* "It is clear that the reliability of the input in this situation varies inversely with the risk of disclosure of the input or resulting criticisms." *Id.*

34. *See* Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 387 (N.D. Ga. 2001) (denying motion to compel "reports produced for Lockheed's Diversity Council relating to the company's work culture . . . because . . . frank assessments contained in the reports as such evaluations would almost certainly be curtailed if discovery were allowed" but granting motion to compel other documents at issue because "any chilling effect would be de minimis since the

Many courts add a fourth element that requires a party asserting the privilege to prove that the documents were prepared with the expectation of confidentiality and that they were, in fact, kept confidential.[35] This confidentiality requirement applies to virtually any privilege.[36] Disclosure to an unnecessary third party waives the privilege because the law concerning the self-critical analysis privilege tracks the law concerning other privileges in this regard.[37] Whether voluntary disclosure to a federal agency constitutes waiver is one example of how the law of self-critical analysis privilege mirrors the debate regarding the attorney-client privilege.[38]

Following another general privilege rule, courts do not recognize assertion of the self-critical analysis privilege if it is asserted in furtherance of a crime or fraud.[39] As in situations involving waiver, jurisprudence regarding other

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documents are mandated by law").

35. *See, e.g.*, Dowling v. Am. Haw. Cruises, 971 F.2d 423, 426 (9th Cir. 1992) (noting this "general proviso" in discussion of self-critical analysis privilege); *see also* Stephen C. Simpson, *The Self-Critical Analysis Privilege in Employment Law*, 21 J. CORP. L. 577, 595 (1996) (noting that "[t]o be privileged, documents generally must be prepared with the expectation and understanding that they will remain confidential").

36. *See* Morgan v. Union Pac. R.R. Co., 182 F.R.D. 261, 266 (N.D. Ill. 1998) ("Like every other privilege, confidentiality is an essential element of the self-critical analysis privilege."); *see also* 8 WIGMORE ON EVIDENCE § 2285 (4th ed. 1961) (stating that "four fundamental conditions" of proposed privilege should include "(1) [t]he communications must originate in a *confidence* that they will not be disclosed [and] (2) [t]his element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties").

37. *See* Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985) (stating that "[w]e need not decide, however, whether the district court's order denying pretrial discovery of defendants' self-critical evaluations was proper in this case [because] [t]he voluntary use by defendants at trial of their affirmative action efforts to prove nondiscrimination opened the door and waived whatever qualified privilege may have existed"); *see also* David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 115 (1988) (proposing model legislation for codifying privilege); John F. X. Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 SEC. REG. L. J. 229, 242 (1990) (noting that few courts have "discussed waiver of the self-evaluation privilege by an organization" but noting that "decisions concerning the attorney-client privilege are instructive").

38. *See* Bush, *supra* note 27, at 611 (noting that "this is the most disturbing development in the emerging SEP [self-evaluative privilege] doctrine because voluntary disclosure to regulatory agencies (i.e., voluntary compliance) represents the very foundation of the privilege"). Bush notes that although waiver "is completely counterproductive . . . [f]ortunately, this waiver doctrine does not *mean* what it purports to *say*." *Id.* Courts are likely to apply a limited waiver "to prevent private litigants and other agencies from gaining access to such voluntarily disclosed self-evaluative information." *Id.* at 612.

39. *See* Leonard, *supra* note 37, at 147–48 (discussing crime or fraud exception to proposed codification of privilege); *see also* Brad Bacon, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 KAN. J.L. & PUB. POL'Y

privileges, particularly the attorney-client privilege and the work product doctrine, should "guide courts" in the proper application of the crime or fraud exception.[40] One commentator notes that courts may use a higher standard and not recognize assertion of the privilege by parties acting in bad faith.[41] This higher standard is reasonable given that the party asserting the self-critical analysis privilege does so on a public policy basis.[42]

B. Distinction

1. Synonyms

Consistent with the practice of most courts and commentators, this Note uses the term "self-critical analysis privilege" to describe the privilege.[43] It is worth noting that courts refer to the privilege by many other names: "self-evaluative privilege,"[44] "self-evaluation privilege,"[45] "critical self-analysis privilege,"[46] "self-examination privilege,"[47] "self-policing privilege,"[48] and

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221, 227 (1999) (noting that versions of self-critical analysis privilege enacted by state legislatures incorporate common exceptions to privileges including "loss of the privilege if it is asserted for purposes of fraud").

40. Leonard, *supra* note 37, at 147–48.

41. *See* Peloso, *supra* note 37, at 241 (noting that courts have not respected assertion of privilege "if the organization has acted fraudulently or in bad faith").

42. *See* Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 357 (1987) (noting corporation's "manipulation of the privilege should not be allowed to hamper the grand jury process . . . [because] it would be inconsistent with the purposes of the privilege").

43. *See* Abdallah v. Coca-Cola Co., No. 1:98-CV-3679-RWS, 2000 U.S. Dist. LEXIS 21025, at *18 n.2 (N.D. Ga. Jan. 25, 2000) (noting that "[a]lthough this privilege is sometimes referred to by other names, 'self-critical analysis' is the most common"); Peloso, *supra* note 37, at 234 (noting that privilege is referred to "by courts and commentators as a qualified privilege for self-evaluation or, more commonly, the privilege for self-critical analysis").

44. *See* Wei v. Bodner, 127 F.R.D. 91, 100 (D.N.J. 1989) (recognizing that "self-evaluative privilege, sometimes known as the self-critical analysis privilege . . . exists as a matter of both New Jersey and federal common law").

45. *See* Kaiser Aluminum & Chem. Corp. v. United States Dep't of Labor, 214 F.3d 586, 593 n.20 (5th Cir. 2000) (stating that "[t]he self-evaluation privilege is also known as the 'self-critical analysis' privilege and the 'self-evaluative' privilege").

46. *See* Melhorn v. N.J. Transit Rail Operations, Inc., No. 98-CV-6687, 2001 U.S. Dist. LEXIS 6320, at *3 (D.N.J. May 15, 2001) (noting that "court has employed the 'critical self-analysis' privilege where public policy outweighs the needs of litigants and the judicial system for access to information").

47. *See* Rosario v. N.Y. Times Co., 84 F.R.D. 626, 631 (S.D.N.Y. 1979) (stating that privilege "exists to permit free discussion looking toward compliance with law").

48. *See* Mason v. Stock, 869 F. Supp. 828, 834 (D. Kan. 1994) (noting privilege is akin to

"self-criticism privilege."[49] Adopted by numerous states, a "statutory environmental audit privilege" is a situation-specific application of the privilege.[50] And at least one court has recognized a "special officer's privilege" in the context of a securities investigation and litigation which mirrored the self-critical analysis privilege.[51]

The peer review privilege can be understood as a sister privilege of the self-critical analysis privilege.[52] The peer review privilege, which many states have codified,[53] protects medical committee reviews of patient care by guaranteeing the confidentiality of the proceedings.[54] The self-critical analysis privilege is perhaps best viewed as "a more broadly focused, or generalized, variant of peer review."[55] Courts first recognized the self-critical analysis privilege in the medical peer review context,[56] but now recognize it in a wide variety of circumstances.[57]

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self-critical analysis privilege).

49. *See* S. Kay McNab, *Criticizing the Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675, 675 (analyzing "self-criticism privilege in light of the traditional rationales of privacy and social policy that justify existing privileges").

50. *See* Phillip Leahy, *The Privilege for Self-Critical Analysis in Statutory and Common Law*, 7 DICK. J. ENVTL. L. & POL'Y 49, 49 (1998) (noting that over twenty states have adopted privilege, which "has its beginning in the common law privilege for self-critical analysis").

51. *See In re* LTV Sec. Litig., 89 F.R.D. 595, 619 (N.D. Tex. 1981) (protecting special investigative counsel's report because "it is likely that corporations will be less willing to engage in this sort of self-investigation if the results of such an investigation can be discovered in parallel civil litigation"); *see also* Nancy C. Crisman & Arthur F. Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege*, 21 AM. CRIM. L. REV. 123, 153 (1983) (noting that court in *LTV* "fashioned a privilege that resembled a combination of all the privileges available to the government agency and the corporation encompassing attorney-client privilege, work-product protection, and executive branch investigatory confidentiality").

52. *See* Nilavar v. Mercy Health Sys., No. C-3-99-612, 2002 U.S. Dist. LEXIS 20046, at *22 n.12 (S.D. Ohio Sept. 13, 2002) (noting that "the two concepts stem from the same trunk").

53. *See, e.g.*, ARIZ. REV. STAT. § 36-445 (2002); PA. STAT. ANN. tit. 63 § 425.1 (West 2002); WIS. STAT. ANN. § 146.38 (West 2002).

54. *See* Joe v. Prison Health Servs., Inc., 782 A.2d 24, 32 (Pa. Commw. Ct. 2001) (noting that "[w]ithout the protection afforded through the confidentiality of the proceedings, the ability of the [medical] profession to police itself effectively would be severely compromised").

55. *Id.*

56. *See infra* Part III.A (discussing privilege's origin in *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970)).

57. *See* Peloso, *supra* note 37, at 236 (stating that "principles of *Bredice* have been applied in a variety of contexts where disclosure of the requested reports might have inhibited future organizational self-analysis").

2. Overlapping Privileges Available to Law Enforcement

In addition to the varying names by which parties refer to the privilege, closely related yet distinct privileges aggravate the confusion surrounding the self-critical analysis privilege.[58] While these privileges may protect some of the same information, and in this sense are overlapping, the self-critical analysis privilege is unique in the breadth of its coverage.[59] Parties often assert numerous privileges in an attempt to protect the same documents.[60] The following subsections provide a brief summary of the three most significant overlapping privileges.[61]

a. Executive Privilege

Much like the self-critical analysis privilege, the executive privilege protects information that "the disclosure of which would be contrary to the public interest."[62] Like the self-critical analysis privilege, the executive privilege is called by other names[63] and often is invoked and analyzed in

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58. *See* Everitt v. Brezzel, 750 F. Supp 1063, 1066 (D. Colo. 1990) (stating that various names attached to privileges, such as state secrets privilege, executive privilege, deliberative process privilege, self-critical analysis privilege, and official information privilege "prevent the disclosure of information whose disclosure would be contrary to the public interest"); *Self-Critical Analysis*, *supra* note 27, at 1088 (noting that in context of discovery disputes over police department investigations, "the self-critical analysis privilege and the executive privilege overlap" and so "courts should therefore look to both doctrines for guidance in this area").

59. *See infra* notes 67–68, 73–76, 81–82 and accompanying text (discussing breadth of self-critical analysis privilege as compared to executive privilege, deliberative process privilege, and law enforcement investigatory privileges); *see also* Stuart E. Rickerson, 68 DEF. COUNS. J. 474, 474 (2001) (book review) (noting that self-critical analysis privilege is "the broadest of all privileges generally available to corporations").

60. *See, e.g.*, Hampton v. City of San Diego, 147 F.R.D. 227, 228 (S.D. Cal. 1993) (noting that defendants had claimed "the self-critical analysis privilege, the official information privilege and the executive privilege"); Boyd v. City of New York, No. 86 Civ. 4501-CSH, 1987 U.S. Dist LEXIS 1044, at *1 (S.D.N.Y. Feb. 9, 1987) (invoking self-critical analysis and executive privileges to protect human resources report in investigation of police officer conduct).

61. *See infra* Part II.B.2 (discussing executive privilege, deliberative process privilege, and law enforcement investigatory privilege).

62. Elliot v. Webb, 98 F.R.D. 293, 296 (D. Idaho 1983).

63. *See* Hinsdale v. City of Liberal, No. 96-1249-F6T, 1997 U.S. Dist. LEXIS 13779, at *2 (D. Kan. Aug. 27, 1997) (stating that "deliberative process privilege [is] also known as the executive privilege"); Torres v. Kuzniasz, 936 F. Supp 1201, 1209 (D.N.J. 1996) (stating that law enforcement privilege is "sometimes referred to as an 'executive' privilege or 'official information' privilege").

precisely the same manner as the self-critical analysis privilege.[64] Analysis of the executive privilege is relevant to a discussion of the self-critical analysis privilege.[65] The self-critical analysis privilege, the deliberative process privilege, and the law enforcement investigatory privilege are narrow applications of the executive privilege.[66] However, a valid assertion of the executive privilege requires action by the head of a department.[67] The self-critical analysis privilege contains no such limitation and in this sense is more expansive than the executive privilege.[68]

b. Deliberative Process Privilege

The deliberative process privilege[69] is closely related to the self-critical analysis privilege.[70] One commentator labeled the self-critical analysis privilege and the

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64. *See Elliot*, 98 F.R.D. at 296–98 (protecting evaluative material in personnel files after assertion that revealing information would have adverse effect on department's ability to conduct evaluations); *see also* Case Comment, *Civil Procedure: Self-Evaluative Reports—A Qualified Privilege in Discovery?*, 57 MINN. L. REV. 807, 814 (1973) [hereinafter *Self-Evaluative Reports*] (noting that "'qualified privilege' for confidential self-evaluations . . . resembles the executive privilege and supports a similar policy of preserving the free flow of communication vital to an important public interest").

65. *See, e.g.*, Cruz v. Coach Stores, Inc., 196 F.R.D. 228, 232 (S.D.N.Y. 2000) (citing United States v. Nixon, 418 U.S. 683, 713 (1974), in discussion of the self-critical analysis privilege); Flanagan, *supra* note 30, at 551 (same).

66. *See* Skibo v. City of New York, 109 F.R.D. 58, 63 (E.D.N.Y. 1985) (noting that "executive privilege is the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest" while the policy behind the self-critical analysis privilege is "to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations"); *see also* Landry v. FDIC, 204 F.3d. 1125, 1135 (D.C. Cir. 2000) (noting that deliberative process and law enforcement privileges are qualified, common law executive privileges); Vons Co. v. United States, 51 Fed. Cl. 1, 22 (2001) (noting that "the Supreme Court recognized that within the scope of the executive privilege exists a deliberative process privilege").

67. *See Landry*, 204 F.3d. at 1135 (noting that privilege requires "a formal claim of privilege by the 'head of the department' having control over the requested information [and] assertion of the privilege based on actual personal consideration by that official").

68. *See supra* Part II.A (discussing four common elements of self-critical analysis privilege).

69. *See* Hopkins v. United States Dep't of Hous. & Urban Dev., 929 F.2d 81, 84 (2d Cir. 1991) (stating that requirements of privilege are "[f]irst, the document must be predecisional, that is, prepared in order to assist an agency decisionmaker in arriving at his decision [and] [s]econd the documents must be deliberative, that is, actually . . . related to the process by which policies are formulated" (internal citations and quotations omitted)).

70. *See* Morrissey v. City of New York, 171 F.R.D. 85, 89 (S.D.N.Y. 1997) (noting that self-critical analysis privilege's "contours seem to map the deliberative process privilege"); Hinsdale v. City of Liberal, No. 96-1249-F6T, 1997 U.S. Dist. LEXIS 13779, at *2 (D. Kan.

deliberative process privilege as "twin privileges."[71] In arguing for greater recognition of the self-critical analysis privilege, this commentator treated the "deliberative process privilege [as] the government's version of private enterprise's self-critical analysis privilege."[72] The deliberative process privilege contains two requirements not found in the self-critical analysis privilege. First, the documents must be both predecisional and deliberative, in that they must be prepared to assist an agency decisionmaker in formulating policy.[73] While evaluations protected by the self-critical analysis privilege may result in change within the organization and in this sense are predecisional, this possibility is not an explicit requirement for effective implementation of the privilege.[74] Second, the opinions protected by the self-critical analysis privilege are broader in scope than the deliberations protected by the deliberative process privilege.[75] While the two are admittedly closely related, the self-critical analysis privilege can be applied in scenarios in which the deliberative process privilege cannot.[76]

Aug. 27, 1997) (describing two privileges as "similar").

71. John Louis Kellogg, *What's Good for the Goose . . . Differential Treatment of the Deliberative Process and Self-Critical Analysis Privileges*, 52 WASH. U. J. URB. & CONTEMP. L. 255, 257 (1997).

72. *Id.* at 262; *see also* John Calvin Conway, Note, *Self-Evaluative Privilege and Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 634 n.57 (1995) (stating that "[t]he self-evaluative privilege looks like a private version of the deliberative privilege").

73. *See* Kellogg, *supra* note 71, at 266–67 (discussing elements of deliberative process privilege).

74. *See supra* Part II.A (discussing four common elements of self-critical analysis privilege).

75. *See* Soto v. City of Concord, 162 F.R.D. 603, 612 (N.D. Cal. 1995) (noting that while two privileges are "closely related" deliberative process privilege "should be invoked only in the context of communications designed to directly contribute to the formulation of important public policy"); Joe v. Prison Health Servs., Inc., 782 A.2d 24, 34 (Pa. Commw. Ct. 2001) (noting that self-critical analysis privilege protects "subjective analysis" and deliberative process privilege only protects communications that are "deliberative in character"). *But see* Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 26 (E.D.N.Y. 1997) (analyzing "deliberative privilege, or 'self-critical' analysis privilege" as same privilege).

76. *See, e.g.*, Granger v. Nat'l R.R. Passenger Corp., 116 F.R.D. 507, 510 (E.D. Pa. 1987) (protecting from discovery results of investigatory committee report).

c. Law Enforcement Investigatory Privilege

The law enforcement investigatory privilege[77] allows police to conduct criminal investigations without exposing the details of the manner in which the investigations are carried out.[78] The law enforcement privilege has been codified both federally[79] and by numerous states.[80] Although both privileges involve a balancing of public interests,[81] successful assertion of the self-critical analysis privilege protects more information than the law enforcement privilege. The law enforcement privilege requires the head of a department, after personal consideration, to invoke the privilege, a procedural step not found in the self-critical analysis privilege.[82]

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77. *See In re* Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 687 (N.D. Ga. 1998) (listing three requirements of privilege: "(1) the head of the department having control over the documents must raise a formal claim of privilege; (2) the department head must assert the privilege based on his or her actual personal consideration of the documents; and (3) the claimant must make a detailed specification of the information" and "explain why this information properly falls within the scope of the privilege").

78. *See* Tuite v. Henry, 98 F.3d 1411, 1413 (D.C. Cir. 1996) (noting that privilege "protects against the release of documents whose disclosure might reveal law enforcement investigative techniques or sources"); Dep't of Investig. v. Myerson, 856 F.2d 481, 484 (2d Cir. 1988) (stating that "purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation").

79. *See* 5 U.S.C. § 552(b)(7) (2000) (codifying exception to Freedom of Information Act protecting law enforcement information and records that meet one of six criteria).

80. *See, e.g.*, N.Y. PUBLIC OFFICERS LAW § 87(2)(e) (McKinney 2002) (providing exception from state law requiring availability of public inspection and copying of documents that are "compiled for law enforcement purposes" and that meet one of four criteria).

81. *See* Ostrowski v. Holem, No. 02-CJ-0281, 2003 U.S. Dist LEXIS 794, at *4 n.1 (N.D. Ill. Jan. 21, 2003) (listing factors to be considered when balancing assertion of law enforcement privilege against plaintiff's need for information).

82. *See In re* Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988) (noting that law enforcement privilege requires "a formal claim of privilege by the head of the department . . . based on actual personal consideration"); *Ostrowski*, 2003 U.S. Dist. LEXIS 794, at *6 (same). *But see* Schwartz, *supra* note 2, at 513 (stating that "debate over existence of a critical self-evaluation privilege" is not of significance in discussion of admissibility of § 1983 investigatory reports because "the pertinent competing private and governmental interests are already considered under the qualified privilege for investigatory materials").

III. History of the Self-Critical Analysis Privilege

Courts and commentators agree that in *Bredice v. Doctors Hospital, Inc.*,[83] the District Court for the District of Columbia first established the self-critical analysis privilege.[84] While at least one court has categorically denied its existence,[85] many courts recognize the privilege and allow parties to employ it to protect sensitive

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83. Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970). In *Bredice*, the court considered objections to a pretrial examiner's recommended denial of the motion for production of certain documents relating to the death of a patient. *Id.* at 250. In furtherance of a malpractice suit, the plaintiff sought to compel the "[m]inutes and reports of any Board or Committee of Doctors Hospital or its staff concerning the death of Frank J. Bredice" as well as other reports. *Id.* at 249–50. The court first considered that the minutes and reports of any board or committee meeting were made "pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals." *Id.* at 250. The court then noted that the "Commission has said that the 'sole objective' of such staff meetings is the 'improvement' in the available care and treatment." *Id.* After noting that the committee work was performed with an expectation that all communications were to be kept confidential, the court stated "[c]onfidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients." *Id.* Allowing discovery of these documents, "without a showing of exceptional necessity," would result in the end of these beneficial critiques. *Id.* One final aspect of the documents that weighed against disclosure was the fact that they were retrospective in nature and "not a part of current patient care." *Id.* Finding "an overwhelming public interest in having those staff meetings held on a confidential basis," the *Bredice* court overruled the objections brought on the recommendation not to disclose. *Id.* at 251.

84. *See* Johnson v. United Parcel Serv. Inc., 206 F.R.D. 686, 688 (M.D. Fla. 2002) (stating that "[t]he self-critical analysis privilege was first recognized in *Bredice*"); Spencer Sav. Bank v. Excell Mortgage Corp., 960 F. Supp. 835, 839 (D.N.J. 1997) (noting that "[t]he privilege had its origin in *Bredice*"); Aramburu v. Boeing Co., 885 F. Supp. 1434, 1438 (D. Kan. 1995) (noting that *Bredice* "is commonly referred to as the seminal case recognizing the privilege"); Donald P. Vandegrift Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 175 (1996) (citing *Bredice* as the first enunciation of "the principles underlying the privilege"). At least one court has noted possible earlier origins. *See* Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 525 (N.D. Fla. 1994) (noting that prior to *Bredice* former Fifth Circuit had provided "immunity from discovery" to "retrospective accident investigations" and finding no grounds upon which "to distinguish it [the immunity] from the self-critical analysis privilege" (citing S. Ry. Co. v. Lanham, 403 F.2d 119, 130–33 (5th Cir. 1968))); Richards v. Me. Cent. R.R., 21 F.R.D. 590, 591–92 (D. Me. 1957) (applying similar privilege without calling it "self-critical analysis"); *see also* Charles S. McCowan Jr. & L. Victor Gregoire, *The Discoverability of the Accident Investigating Committee's Report*, 31 GONZ. L. REV. 115, 117 (1995–96) (noting that although *Richards* was first case to apply privilege it "did not set the parameters" and "[h]ence, jurisprudence recognizes *Bredice* . . . as the source of the privilege").

85. *See* Spencer Sav. Bank v. Excell Mortgage Corp., 960 F. Supp. 835, 844 (D.N.J. 1997) (concluding "that a self-critical analysis privilege does not exist at federal common law"). *But see* Morgan v. Union Pac. R.R. Co., 182 F.R.D. 261, 264 n.2 (N.D. Ill. 1998) (noting that as of 1998 "no other court has adopted the reasoning and conclusion of the *Spencer Savings* court").

documents.[86] Still other courts decline to decide the issue, but even assuming the privilege's viability, reject its application to the facts presented.[87] This part of the Note considers the privilege's origins in *Bredice*, the wide variance in application at the district court level, the few circuit courts of appeals decisions that have considered the privilege's application, and finally, the one relevant Supreme Court case.

A. Bredice v. Doctors Hospital, Inc.—*Origin of the Privilege*

The basic premise underlying *Bredice*'s recognition of the privilege is that significant public policies against discovery may outweigh a plaintiff's need for certain information.[88] The court noted in *Bredice* that valuable discussions regarding "the efficiency of medical procedures and techniques" would be lost if such conversations were opened to the discovery process.[89] The court stated that "[t]he public interest may be a reason for not permitting inquiry into particular matters by discovery."[90] Only "evidence of extraordinary circumstances" justifies disclosing the information and overcomes the significant public policy against disclosure.[91] Because the party seeking access

86. *See, e.g.*, Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994) (recognizing privilege asserted to protect "reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution"); *see also* Tice v. Am. Airlines, Inc., 192 F.R.D. 270, 273 (N.D. Ill. 2000) (applying privilege to safety reports and protecting reports from discovery in employment discrimination suit); Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27 (E.D.N.Y. 1997) (finding "that the intra-departmental memoranda contained within the District Attorney's special investigations file are privileged and non-discoverable").

87. *See, e.g.*, *In re* Mercury Fin. Co., No. 97-L-3035, 1999 U.S. Dist. LEXIS 11236, at *11 (N.D. Ill. July 12, 1999) ("Even assuming the privilege does exist, [the defendant] fails to meet its burden to show that the privilege should apply to bar production of the documents requested."); *see also* Clawans v. United States, No. 98-3053, 98-3312, 94-4568, 2000 U.S. Dist. LEXIS 18808, at *42 (D.N.J. Dec. 26, 2000) ("This evidence cannot plausibly be argued to lie within the self-critical analysis privilege, assuming one exists."); Stabnow v. Consol. Freightways Corp., No. 99-641(MJD/RLE), 2000 U.S. Dist. LEXIS 13612, at *20 (D. Minn. Aug. 15, 2000) ("[E]ven if the 'self-critical analysis' privilege were extant in the State of Minnesota—a prospect we necessarily leave open—the circumstances here do not warrant its invocation."); Abdallah v. Coca-Cola Co., No. 1:98-CV-3679-RWS, 2000 U.S. Dist. LEXIS 21025, at *31 (N.D. Ga. Jan. 25, 2000) (stating that "even assuming the recognition of some form of self-critical analysis privilege in this district, both of the documents at issue are documents to which any such privilege would have been waived").

88. *See Self-Critical Analysis*, *supra* note 27, at 1087 (noting that the "*Bredice* court emphasized . . . that the free flow of information is essential to promote recognized public interests").

89. Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 250 (D.D.C. 1970).

90. *Id.* (quoting 4 MOORE, FEDERAL PRACTICE ¶ 26.22(2), at 1287 (2d ed. 1969)).

91. *Id.* at 251.

to the documents did not show good cause for disclosure, the court refused to order production of the requested records.[92]

B. Federal District Courts

Application of the self-critical analysis privilege is "problematic,"[93] "confusing and analytically incoherent,"[94] "murky,"[95] "unsettled,"[96] "largely undefined,"[97] surrounded by "uncertainty,"[98] "a morass,"[99] and is "inconsistent" in its application.[100] The federal district courts are in a special position to consider the privilege because it is in these courts that parties most often invoke and attack the privilege.[101] As noted earlier, courts vary wildly in the application of the privilege, from outright denial of its existence to successful implementation.[102] This Note attempts to limit the confusion surrounding the

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92. *Id.* The Federal Rules of Civil Procedure in effect when *Bredice* was decided required "that there be good cause for discovery to be obtained." FED. R. CIV. P. 34 (amended 1970). One court has stated that the *Bredice* court "did not need to address any privilege" without a showing of good cause. Spencer Sav. Bank v. Excell Mortgage Corp., 960 F. Supp. 835, 839 (D.N.J. 1997). Accordingly, "*Bredice* should not be relied on as a basis for recognition of a new federal common law privilege." *Id.*; *see also* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 968 n.280 (1999) (stating that "[b]ecause good cause is no longer required, the *Bredice* holding arguably is inapposite"). *But see* Robinson v. Magovern, 83 F.R.D. 79, 85 n.4 (W.D. Pa. 1979) (noting that although *Bredice* "was handed down before the 1970 amendments to the Federal Rules of Civil Procedure, when a good cause showing was required for the production of minutes and reports, the decision did not turn on that").

93. *Abdallah*, 2000 U.S. Dist. LEXIS 21025, at *18.

94. Pollard, *supra* note 92, at 967.

95. Bacon, *supra* note 39, at 224.

96. Bush, *supra* note 27, at 602.

97. Bergman v. Kemp, 97 F.R.D. 413, 416 (W.D. Mich. 1983) (quoting Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518, 522 (E.D. Tenn 1977)).

98. Vandegrift, *supra* note 84, at 193; Christine A. Amalfe & Karen L. O'Keeffe, *Road to Self-Discovery Can Lead to Legal Discovery*, NAT'L L.J., June 26, 2000, at B15.

99. Gary J. Cohen, *A Guide Through the Morass of the Self-Critical Analysis Privilege*, 35 ARIZ. ATT'Y 34 (July 1999).

100. McNab, *supra* note 49, at 686.

101. *See* Pollard, *supra* note 92, at 967 ("Various federal [district] courts produced a myriad of decisions representing different models of privilege analysis."). "Ultimately, factually indistinguishable cases produced directly contrary decisions . . . ." *Id.*; *see also* Leahy, *supra* note 50, at 50 ("Decisions upholding [the privilege's] existence and validity have almost exclusively been relegated to the [federal] district courts.").

102. *See supra* notes 85–87 and accompanying text (discussing courts' varied stances on privilege's applicability).

privilege by structuring the discussion around the assertion of the privilege by law enforcement agencies.

C. Courts of Appeals

The federal circuit courts of appeals have provided little assistance to the lower courts in clarifying the confusion surrounding the privilege.[103] Perhaps this lack of guidance is due to the great deference appellate courts give to trial courts in discovery and evidentiary matters.[104] Several circuit courts of appeals facing the issue have decided not to address the privilege's viability directly, but rather find that it does not apply to the facts presented.[105] Although the circuit courts of appeals have not provided substantial guidance in the application of the privilege,[106] several have protected documents from discovery in order to prevent the chilling effect disclosure has on an organization's ability to conduct self-evaluation.[107]

1. Law Enforcement Context

Two circuits applied the self-critical analysis privilege, without explicitly labeling their actions as such, in claims brought against law enforcement agencies.[108] At the trial court level in each case, motions in opposition of

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103. *See* Abdallah v. Coca-Cola Co., No. 1:98-CV-3679-RWS, 2000 U.S. Dist. LEXIS 21025, at *18–19 (N.D. Ga. Jan. 25, 2000) (noting that "[v]ery few Circuit Courts of Appeals have directly addressed the self-critical analysis privilege").

104. *See, e.g.*, Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 425 (9th Cir. 1992) (stating that Ninth Circuit reviews "a district court's rulings concerning discovery for abuse of discretion"); Brown v. Thompson, 430 F.2d 1214, 1215–16 (5th Cir. 1970) (noting that trial court has great discretion in decisions regarding disclosure of government documents and that it is "unusual and exceptional case where the determination of a trial court is set aside").

105. *See, e.g.*, *Dowling*, 971 F.2d at 426 (stating that "[e]ven if such a privilege exists, the justifications for it do not support its application to voluntary safety reviews").

106. *See id.* at 425 n.1 (stating that "the circuit courts have neither definitively denied the existence of such a privilege, nor accepted it and defined its scope").

107. *See* Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 382 (N.D. Ga. 2001) (noting that "few federal appellate courts . . . have suggested that the policy rationale underlying the SCA [self-critical analysis privilege] are valid").

108. *See* Cruz v. Bd. of Supervisors, No. 91-1547, 1993 U.S. App. LEXIS 187, at *11 (4th Cir. Jan. 7, 1993) (affirming trial court's denial of motion to compel discovery and grant of summary judgment motion in suit alleging excessive force by Fairfax County police); Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 438 (10th Cir. 1981) (affirming trial court's motion to compel discovery of staff inspection bureau files but noting exemption of "any opinions or policy decisions of investigative officers").

disclosure cited the executive privilege.[109] However, the Court of Appeals for the Fourth Circuit balanced the plaintiff's need for the materials against the county's fear of the negative effect that disclosure would have upon its ability to effectively gather information.[110] Similarly, the Court of Appeals for the Tenth Circuit balanced the parties' competing interests while affirming the trial court's order to disclose only the factual aspects of police files.[111] While the circuit courts of appeals do not regularly cite the privilege by name,[112] several have used the underlying methodology on which it is based.[113]

2. *Accident Reports*

Analysis regarding the production of accident reports is relevant to an analysis of police files because both contain evaluations of a particular incident and possible means of avoiding future occurrences of similar problems.[114] The Court of Appeals for the Ninth Circuit refused to protect results of routine pre-accident safety reviews from discovery in suits brought by plaintiffs injured after the reports were conducted.[115] The court recognized the chilling effect

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109. *Cruz*, 1993 U.S. App. LEXIS 187, at *2 (noting that both police chief and Fairfax County were "[c]laiming executive privilege"); *Lichtenstein*, 660 F.2d at 437 (noting that the "Association contends that disclosure would violate their executive or governmental privilege").

110. *Cruz*, 1993 U.S. App. LEXIS 187, at *7 (noting that trial court "struck a fair balance that accommodated Cruz's interest—by providing him access to the factual components of the report . . . as well as the interests of the county in protecting sensitive information"). Fairfax County argued that disclosure of the reports "would strike at the heart of any Department's ability to fully and frankly investigate incidents of this type and to police its own as disclosure has a 'chilling effect' upon the ability of police administrators to obtain candid information." *Id.* at *6 (quoting Appellee's Br. at 14). Thus, their argument is grounded on the foundation of the self-critical analysis privilege, namely "the concern that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations." Hardy v. N.Y. News Inc., 114 F.R.D. 633, 640 (S.D.N.Y. 1987).

111. *See Lichtenstein*, 660 F.2d at 437–38 (noting that "any opinions or policy decisions of investigative officers were exempt from discovery").

112. *See* Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 425 n.1 (9th Cir. 1992) (stating that "the circuit courts have neither definitively denied the existence of such a privilege, nor accepted and defined its scope").

113. *See* Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 382 (N.D. Ga. 2001) (noting that "few federal appellate courts . . . have suggested that the policy rationales underlying the SCA [self-critical analysis privilege] are valid").

114. *See* Leon v. County of San Diego, 202 F.R.D. 631, 637 (S.D. Cal. 2001) (discussing *Dowling* in denying assertion of privilege to shield documents related to provision of medical care given to inmates).

115. *See Dowling*, 971 F.2d at 427 ("We hold that voluntary routine pre-accident safety reviews are not protected by a privilege of self-critical analysis.").

disclosure has on postaccident reviews but found no such rationale for protecting pre-accident reviews.[116] The Court of Appeals for the Fifth Circuit declined to address this distinction because it found that even if the privilege applied, it did not apply where a government agency sought production.[117] The Court of Appeals for the Eleventh Circuit, sitting en banc, evenly split on whether to allow discovery of a postaccident investigative report.[118]

3. Affirmative Action Plans

Organizations often assert the privilege to protect affirmative action plans.[119] These cases are relevant to a general assertion of the privilege by law enforcement agencies primarily because of their acceptance of the policy underlying the privilege. In addition, some departments assert the privilege to protect reports from officers alleging discrimination.[120] Both the Sixth and District of Columbia Circuits expressly recognized the self-critical analysis privilege in protecting employer reports from labor unions.[121] The Court of Appeals for the Seventh Circuit faced the same issue but found that the

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116. *See id.* ("The candid analysis of the causes of accidents is more likely to be stifled by a disclosure requirement than would the routine review of safety concerns.").

117. *See* Kaiser Aluminum & Chem. Corp. v. United States Dep't of Labor, 214 F.3d 586, 593 n.420 (5th Cir. 2000) (stating that "[t]he Fifth Circuit has not recognized the self-evaluation privilege" but declining to "recognize such a privilege . . . where a government agency seeks pre-accident documents"); *see also* S. Ry. Co. v. Lanham, 403 F.2d 119, 131 (5th Cir. 1968) (overturning trial court's order of production of accident report investigations because "fear of discovery might deter it [the railway] from seeking full and candid evaluations of the cause of accidents").

118. *See* Rainey v. Beech Aircraft Corp., 827 F.2d 1498, 1500–01 (11th Cir. 1987) (noting that court was evenly divided and so "there is no useful purpose in the publication of opinions setting forth the reasoning of either view").

119. *See, e.g.*, Reid v. Lockheed Martin Aeronautics, Co., 199 F.R.D. 379, 380 (N.D. Ga. 2001) (noting defendant's assertion of privilege to protect affirmative action plan and status reports).

120. *See, e.g.*, LaClair v. City of St. Paul, 187 F.3d 824, 827 (8th Cir. 1999) (noting that "the City wanted to exclude the results of a workplace assessment survey on the basis of an alleged evidentiary privilege for self-critical analysis").

121. *See* Arasco, Inc. v. NLRB, 805 F.2d 194, 200 (6th Cir. 1986) (stating that "[t]he practice of uninhibited self-critical analysis, which benefits both the union's and employer's substantial interest in increased worker safety and accident prevention, would undoubtedly be chilled by disclosure"); Int'l Union of Elec. Workers v. NLRB, 648 F.2d 18, 28 (D.C. Cir. 1980) (stating that "[a]n employer's self-analysis, often including admissions and desirably candid self-criticism, is necessarily chilled by a foreknowledge that the results of that analysis must be disclosed to the union").

defendant waived the privilege by voluntarily using its affirmative action plan at trial.[122]

D. University of Pennsylvania v. EEOC

University of Pennsylvania v. EEOC[123] is the most relevant Supreme Court decision regarding the privilege of self-critical analysis.[124] In *University of Pennsylvania*, the Court refused to recognize the peer review privilege in the context of an EEOC investigation into alleged discrimination resulting from a tenure decision.[125] The Court stated that it must construe any asserted privilege "strictly" and refused to exercise its authority to develop the rules of privilege

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122. *See* Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985) ("The voluntary use by defendants at trial of their affirmative action efforts to prove nondiscrimination opened the door and waived whatever qualified privilege may have existed.").

123. Univ. of Pa. v. EEOC, 493 U.S. 182 (1990). In *University of Pennsylvania*, the Court considered "whether a university enjoys a special privilege, grounded in either the common law or the First Amendment, against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions." *Id.* at 184. Plaintiff Rosalie Tung was an associate professor who was denied tenure. *Id.* at 185. Tung filed a complaint with the EEOC alleging discrimination on the basis of race, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964. *Id.* In the course of conducting its investigation, the EEOC requested a number of documents relating to the tenure decision. *Id.* at 186. After the University refused to produce the documents, the EEOC issued a subpoena ordering disclosure. *Id.* The University applied for a "modification of the subpoena to exclude what it termed 'confidential peer review information.'" *Id.* The EEOC rejected the appeal for modification. *Id.* at 186–87. Both the United States District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit held for the EEOC and ordered enforcement of the subpoena. *Id.* at 187. The Court began by noting that when Congress eliminated an exemption to Title VII for educational institutions, Congress "did not see fit to create a privilege for peer review documents." *Id.* at 189. Furthermore, adopting a requirement that the EEOC demonstrate a specific reason for disclosure beyond a showing of relevance "would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination." *Id.* at 194. This requirement contravenes the EEOC's important mission to discover invidious discrimination. *Id.* at 193. The Court noted that Congress decided to subject educational institutions to Title VII and that "[i]f it dislikes the result, it of course may revise the statute." *Id.* at 194. The Court also noted that the University's First Amendment claim of academic freedom was inapplicable to the factual scenario. *Id.* at 197. The Court unanimously affirmed the Third Circuit and refused to "accept the University's invitation to create a new privilege against the disclosure of peer review materials." *Id.* at 189, 202.

124. *See Reid*, 199 F.R.D. at 382 (noting that "[t]he uncertainty surrounding the SCA [self-critical analysis privilege] was furthered with the Supreme Court's decision").

125. *See Univ. of Pa.*, 493 U.S. at 192–93 (stating that University "does not offer any persuasive justification" for providing greater level of protection for confidentiality of tenure reports than Congress included in its amendments to Title VII).

expansively.[126] The Court emphasized that Congress had considered the issue of confidentiality in its amendments to Title VII, but had not codified a peer review privilege.[127]

The Court did note that it can create and apply an evidentiary privilege when it "promotes sufficiently important interests to outweigh the need for probative evidence."[128] Importantly, *University of Pennsylvania* did not directly address the viability of the self-critical analysis privilege.[129] The Court did not refer to the privilege "either expressly or by implication, and not one case cited by the Court addresses it."[130] Thus, *University of Pennsylvania* should be limited to the narrow facts before the court and should not be read as a rejection of the privilege by the Court.[131] Yet several courts have read the opinion as a disapproval of the privilege by the Court.[132]

IV. Competing Factors

Application of the self-critical analysis privilege requires a court to balance competing factors in hopes of reaching a result that is both just and in

126. *Id.* at 189 (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

127. *See id.* at 192 (noting that "Congress apparently considered the issue of confidentiality, and it provided a modicum of protection" but declining to "strike the balance differently from the one Congress adopted"); *see also In re* Nieri, No. M12-329, 2000 U.S. Dist. LEXIS 540, at *10 (S.D.N.Y. Jan. 20, 2000) (noting that "the Supreme Court concentrated on a factor not present in many other cases, namely, Congressional preemption").

128. *Univ. of Pa.*, 493 U.S. at 189 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

129. *See* Peloso, *supra* note 37, at 247 (stating that "there is no evidence in the *University of Pennsylvania* case of any intent on the part of the U.S. Supreme Court to erode the rationale" of privilege). *But see* Kellogg, *supra* note 71, at 261 (stating that in *University of Pennsylvania* "the Supreme Court refused to expand the self-critical analysis privilege").

130. Peloso, *supra* note 37, at 247.

131. *See* Johnson v. United Parcel Serv. Inc., 206 F.R.D. 686, 691 (M.D. Fla. 2002) (stating that some courts and commentators have noted that because privilege was not addressed, case should not be read as rejection of privilege and should be limited to facts); Bush, *supra* note 27, at 613–14 (stating that "*University of Pennsylvania* should not jeopardize future expansion of the SEP [self-evaluative privilege] outside the employment discrimination context"). *But see* Simpson, *supra* note 35, at 591 (stating that in *University of Pennsylvania* "the Court implicitly rejected the self-critical analysis privilege because the arguments supporting it are so similar to the arguments the Court rejected" but noting that "Court did not explicitly discuss the self-critical analysis privilege").

132. *See In re* Nieri, 2000 U.S. Dist. LEXIS 540, at *8 (noting that "some doubt about the doctrine's continuing viability has arisen in light of the Supreme Court's analysis in *University of Pennsylvania*"); Kellogg, *supra* note 71, at 261 (stating that "[w]hile most courts recognize existence of the privilege, many courts limited its application, relying on the Supreme Court's decision in *University of Pennsylvania*").

the interests of the public as a whole.[133] The fear that disclosure to litigants will hamper organizations' efforts at internal policing and improvement provides the primary incentive to protect self-evaluative materials.[134] This negative effect on an organization's ability to engage in self-analysis manifests itself both directly, in that disclosure provides a disincentive to an organization to engage in self-critical analysis, and indirectly, because individual participants are less likely to fully cooperate if their self-evaluations are discoverable.[135] Part IV.A discusses the direct and indirect chilling effect of disclosure, the fact/opinion distinction, an unfairness rationale behind protection of self-evaluations, invasion of privacy concerns, and discovery concerns related to frivolous suits.[136] Part IV.B considers the factors favoring disclosure.[137]

A. Factors Favoring Protection

The most important factor favoring protection is avoiding the chilling effect disclosure may have on the ability of organizations to self-police effectively.[138] This policy lies at the very heart of the privilege.[139] Courts often require the asserting agency to establish that the reports contain the type of information that would be cut off if disclosed.[140] The fact/opinion distinction

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133. *See* Loigman v. Kimmelman, 102 N.J. 98, 106 (1986) (noting that "implicit in the concept is a judicial weighing" of "public interest in confidentiality" and "the citizen's right of access"). The court cites a decision by Justice Brennan, writing as a Superior Court judge, as an example of the balancing of public good and confidentiality. *Id.* at 105; *see also* Vandegrift, *supra* note 84, at 176 (noting that "court which is called upon to rule on the privilege must balance two competing interests: the public interest in protecting candid . . . self-assessments and the private interest of the litigant"). *But see* Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (noting that Congress had "considered the relevant competing concerns" in academic peer review discrimination context and stating that this "balancing of conflicting interests . . . is particularly a legislative function").

134. *See* Joe v. Prison Health Servs., Inc., 782 A.2d 24, 34 (Pa. Commw. Ct. 2001) (noting that self-critical analysis privilege "is grounded on the premise that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations").

135. *See Self-Critical Analysis*, *supra* note 27, at 1091–93 (discussing "dual chilling effect of disclosure of self-critical analyses").

136. *See infra* Part IV.A (discussing factors favoring protection).

137. *See infra* Part IV.B (discussing factors favoring disclosure).

138. *See* Bacon, *supra* note 39, at 223 ("The first rudimentary reason for protecting this type of information is to avoid so-called 'chilling effects.'").

139. *See* Skibo v. City of New York, 109 F.R.D. 58, 63 (E.D.N.Y. 1985) ("The policy behind the privilege is 'to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations.'").

140. *See id.* at 64 ("[C]ourts have declined to apply the privilege of self-critical analysis

and the invasion of privacy concerns relate to an agency's ability to gather reliable data.[141] The unfairness rationale and protection from frivolous suits may buttress a court's decision to protect the internal investigations.[142]

1. Chilling Effect on Self-Examinations

a. Direct Chill

Some courts recognize that disclosure to litigants of internal investigations or evaluations acts as a disincentive to conduct these programs for agencies interested in improving safety and performance.[143] Police departments may avoid resolving internal problems if plaintiffs may subsequently use the self-evaluative data detailing the problems in a civil suit against the department.[144] Given the fact that organizations and individuals generally ignore their internal inadequacies, refusing to conduct self-critical analysis simply maintains the status quo.[145] Defenders of the privilege argue that it promotes socially beneficial self-evaluations of police departments.[146]

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when the proponent of the privilege fails to show that the process would be curtailed if discovery were allowed.").

141. *See* Boyd v. Gullett, 64 F.R.D. 169, 178 (D. Md. 1974) (stating that deletion of certain private information and protection of "[m]aterial of a non-factual nature . . . may be necessary to protect the decision making process in the various government agencies").

142. *See infra* Part IV.A.3 (discussing unfairness factor).

143. *See* Urseth v. City of Dayton, 653 F. Supp. 1057, 1061 (S.D. Ohio 1986) (noting that "it is counter-productive to create the spectre that opinions expressed in frank and open firearms hearings" could be used against department in subsequent litigation). "In order to preserve this important vehicle for self-evaluation, participating police department supervisors must be allowed to engage in the type of free-flowing exchange of ideas which can lead to honest reflection and considered re-evaluation of past practices." *Id.*

144. *See* Price v. County of San Diego, 165 F.R.D. 614, 619 (S.D. Cal. 1996) (noting sheriff's office assertion of privilege to protect results of investigation of hogtying of arrested individuals "because of the need for a free flow of information regarding police procedures and criticisms of those procedures").

145. *See* Allen & Hazelwood, *supra* note 42, at 357 (noting that discoveries of internal "housekeeping" investigations act as "incentives to avoid aggressive managerial action [and thereby] increase[] the possibility that illegal, unethical, and inefficient conduct will not become known by the corporation, thus decreasing the ability of the corporation to respond with appropriate managerial action").

146. *See Self-Critical Analysis*, *supra* note 27, at 1088 (stating that courts that "have shielded from discovery the results of police department investigations" have done so in recognition of "the public interest in permitting police departments to conduct thorough investigations to reduce the number of improper police actions").

Law enforcement agencies play a crucial role in maintaining order and promoting justice.[147] These interests undoubtedly are of utmost importance[148] and proper police documentation is essential to a department's efficiency and reputation.[149] Less certain is whether the self-critical analysis privilege serves to promote departmental self-evaluation and preserve the flow of interdepartmental information necessary for effective policing.[150]

Law enforcement agencies have an inherent obligation to correct internal problems due to the overwhelming public interest in their effective functioning.[151] Thus, the self-critical analysis privilege is in this sense paradoxical because a greater public interest in correcting police problems corresponds to a greater built-in incentive to self-correct, and a lesser need for the protection afforded by the privilege.[152] This argument assumes that

147. *See* SAM S. SOURYAL, ETHICS IN CRIMINAL JUSTICE: IN SEARCH OF THE TRUTH 91 (1992) (quoting "law enforcement code" for proposition that "law enforcement officer['s] . . . fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all men to liberty, equality, and justice"); *see also* ALAN COFFEY ET AL., HUMAN RELATIONS: LAW ENFORCEMENT IN A CHANGING COMMUNITY 160 (3d. ed. 1982) (stating that "responsibility of the police officer is basically to protect the life and property, regulate the conduct, and minister to the needs of people of all classes of life").

148. *See Urseth*, 653 F. Supp. at 1061 ("The public's interest in self-evaluation by the Dayton Police Department is beyond doubt.").

149. *See* EARL M. SWEENEY, THE PUBLIC AND THE POLICE: A PARTNERSHIP IN PROTECTION 15–16 (1982) (stating that police officers, and "[e]ven written police reports," are viewed by public as "a symbol of law, order, justice, bravery, vigilance, and integrity").

150. *See* Mercy v. County of Suffolk, 93 F.R.D. 520, 522 (E.D.N.Y. 1982) (recognizing "that police department self-evaluation and remedial action do serve an important police policy, but such policy will not be hindered by the disclosure ordered here"); *see also* Note, *Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence*, 105 HARV. L. REV. 1339, 1350–51 (1992) (noting that much of debate surrounding privilege focuses on "the empirical validity" of privilege's underpinning that discovery curtails flow of useful information).

151. *See* Skibo v. City of New York, 109 F.R.D. 58, 63–64 (E.D.N.Y. 1985) (noting that "public has a strong interest in the police department's ability to investigate its personnel and improve its procedures" and that police department must "continue to monitor itself to ensure that department procedures are effective"); *see also* PAUL B. WESTON & PHILIP K. FRALEY, POLICE PERSONNEL MANAGEMENT 139 (1980) (stating that in order to "achieve its stated objectives" police department must utilize performance appraisals to identify any "employee whose work performance is substandard" and take "prompt remedial action").

152. *See* Bush, *supra* note 27, at 597–98 (noting that responsibilities for corrections have shifted internally and that "[t]hese developments urge aggressive managerial action, both to honor contemporary social mores to which an organization may subscribe, and to advert adverse publicity and potential liability"). However, responding to these internal pressures to be a more socially responsible organization may lead an organization to invest "substantial time and financial resources to produce a 'smoking gun' for its opponents in future litigation" if assertion

agencies recognize this built-in incentive through an appreciation of the weighty public interest. Detractors of the privilege cite a lack of evidence negating this assumption as evidence of the assumption's validity.[153]

Most courts balance the competing interests as asserted on an individual, case-by-case basis.[154] Assertions of the privilege by departments require a detailed description of the harm the assertions seek to prevent.[155] Thus, courts often place the burden of proving that the information will cease to flow if the court allows discovery on the agency.[156] Vague references by an agency to possible beneficial ends generally will not outweigh a plaintiff's specific request for information important to her case.[157] The self-critical analysis privilege provides the agency with the framework and terminology necessary to demonstrate the harm of disclosure.[158]

b. Indirect Chill

Individual officers' concerns regarding possible personal or departmental repercussions from fully cooperating with self-investigations represent the

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of privilege is rejected. *Id.* at 599.

153. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 664 (N.D. Cal. 1987) (stating that reasoning behind privilege is "empirically unsupported" and problematic because "it acknowledges the great importance of enforcing federal civil rights policies [but] fails to articulate a reason for deciding to ascribe less weight to that enforcement effort than to the unmeasured harm to government interests that might follow from disclosure of evaluative material in internal affairs files").

154. *See, e.g.*, Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27 (E.D.N.Y. 1997) (weighing "the defendants' need for the memoranda against the District Attorney's assertion that disclosure of its internal memoranda will have a chilling effect upon the agency's effectiveness").

155. *See* Soto v. City of Concord, 162 F.R.D. 603, 621 (N.D. Cal. 1995) (noting that assertion "that disclosure of citizen complaints would adversely impact the public's interest in having the police department critically evaluate the quality of its services" is too "general [an] assertion of harm to the public interest" to warrant protection for documents).

156. *See Skibo*, 109 F.R.D. at 64 ("[C]ourts have declined to apply the privilege of self critical analysis when the proponent of the privilege fails to show that the process would be curtailed if discovery is allowed.").

157. *See* Taylor v. L.A. Police Dep't, 1999 WL 33101661, at *5 (C.D. Cal. Nov. 10, 1999) (stating that "a general assertion that a police department's internal investigatory system would be harmed is insufficient" grounds to deny discovery); *see also* Ballard v. Terrak, 56 F.R.D. 45, 46 (E.D. Wis. 1972) (granting motion for protective order after police chief summarized in detail which documents he would willingly submit and which would hamper investigation into possible disciplinary action).

158. *See Self-Critical Analysis*, *supra* note 27, at 1087 (stating that privilege "applies to a number of similar problems and . . . has generally applicable parameters"); *see also* Leonard, *supra* note 37, at 123–24 (proposing model codification of privilege).

indirect chilling effect that disclosure has on the effectiveness of such investigations.[159] Law enforcement agencies likely will be unable to get reliable information from their employees if the officers fear this information will be available for a plaintiff's use in future suits against the individual officers, their colleagues, or the department as a whole.[160] Disclosure of officers' self-assessments and critiques of coworkers' performances to hostile parties curtails the channels necessary for frank and open communication.[161]

Based on a foundation similar to the self-critical analysis privilege, the attorney-client privilege protects confidential communications based upon public policy concerns regarding the chilling effect of disclosure.[162] Thus, the attorney-client privilege recognizes that fostering open dialogue between parties often requires that the communications not be used as weapons against those

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159. *See* Kott v. Perini, 283 F. Supp. 1, 2 (N.D. Ohio 1968) (stating that officers' "knowledge that some of the confidential information recorded might be later exposed to outside parties would have a certain and chilling effect upon the internal use of such record making"); *see also* Urseth v. City of Dayton, 653 F. Supp. 1057, 1062 (S.D. Ohio 1986) (noting that "chilling effect [on personnel involved in Firearms Committee] which would accompany the disclosure of these documents is reduced" by prior public testimony about committee meeting); *Self-Critical Analysis*, *supra* note 27, at 1092 ("[C]ourts must be aware of the chilling effect not only on the self-analyst, but also on persons asked to supply the data that make internal analyses possible.").

160. *See* Elliot v. Webb, 98 F.R.D. 293, 296 (D. Idaho 1983) (denying motion to compel brought by plaintiff in § 1983 suit seeking results of psychological evaluations and polygraph examination based on asserted "detrimental effect on the future ability of the department to conduct such tests" and resulting deterrence on "full cooperation of the participants").

161. *See* Price v. County of San Diego, 165 F.R.D. 614, 619 (S.D. Cal. 1996) (noting defendants' claim that review of county's hogtying procedures should be privileged "because of the need for a free flow of information regarding police procedures and criticisms of those procedures"). The court ultimately rejected assertion of the privilege because of the Ninth Circuit's decision in *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (1992), precluding protection of "routine internal reviews of matters related to safety concerns." *Id.* Whether these documents were "routine" reviews or self-evaluations concerning a particular problem facing the department is unclear from the opinion. *See id.* at 617 (describing documents as "obtained by or relied upon by the San Diego County Sheriff's Department in formulating policies").

162. *See* Laural C. Alexander, *Should Alabama Adopt a Physician-Patient Evidence Privilege?*, 45 ALA. L. REV. 261, 264 n.26 (1993) (noting that "basis for the attorney-client privilege [has] shifted from 'honor' to the necessity for open communications between attorney and client"); Bush, *supra* note 27, at 603 (noting that "[m]any courts and commentators have recognized public policy as a legitimate rationale for restricting broad pretrial discovery" and the self-critical analysis privilege "represents a specific manifestation of this public policy limitation on discovery"); Alexander A. Meyers, *Protective Function Privilege: A Study of the Proposed 'Protective Function Privilege': Compelling Secret Service Testimony*, 1999 ANN. SURV. AM. L. 43, 48–49 (noting that "the primary reasoning behind the modern attorney-client privilege" is recognition of fact that "benefit to justice of encouraging societal obedience outweighs the benefit of individual testimony").

involved.[163] Courts might easily import this reasoning into the debate over the self-critical analysis privilege.[164] In addition, empirical evidence shows that the attorney-client privilege does enhance candor among parties; courts may choose to consider this as evidence that the self-critical analysis privilege will do the same.[165]

Another similarity between these two privileges is that the attorney-client privilege protects only the communications and not the underlying facts in much the same way that the self-critical analysis privilege protects only evaluations or opinions and not the factual basis from which those opinions are drawn.[166] While scholars and courts debate the wisdom of this distinction,[167] most courts that recognize the self-critical analysis privilege protect only the subjective aspects of self-evaluations, realizing that this is the type of

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163. *See* Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) ("The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice . . . but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."); *see also* Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1313 (1999) (discussing split of authority on whether inadvertent disclosure of attorney-client privileged information can be used against disclosing party); Peloso, *supra* note 37, at 247 (stating that to extent documents "are related to an organization's self-audit in order to conform to regulatory requirements, the [self-critical analysis] privilege is merely a necessary extension of the attorney-client privilege").

164. *See* Bush, *supra* note 27, at 626 (noting that courts could justify expansion of self-critical analysis privilege "based upon the fundamental principles that underlie" attorney-client privilege and work product doctrine). An example of a fundamental principle underlying each privilege is "the voluntary compliance model of corporate regulation." *Id.* at 626–27.

165. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 244 (1989) (noting that clear majority of attorneys and CEOs believe that privilege enhances candor).

166. *See Upjohn Co.*, 449 U.S. at 395 ("The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."); *see also* Patricia L. Andel, *Inapplicability of the Self-Critical Analysis Privilege to the Drug and Medical Device Industry*, 34 SAN DIEGO L. REV. 93, 99–100 (1997) (noting that rationale underlying attorney/client privilege "is similar to that underlying the self-critical analysis privilege" and that "attorney-client privilege . . . protects only the confidential communication itself [but not] the underlying information nor the self-critical evaluations of a client are protected"). *But see* Bush, *supra* note 27, at 627 (noting that "traditional privileges afford primacy to the factual investigation stage" and proposing expansion of self-critical analysis privilege "primarily upon protecting factual investigative material").

167. *See* Bush, *supra* note 27, at 609 (noting that limiting privilege's protection to opinion "ignores the fact that informed, sound legal decision-making depends entirely upon accurate factual information"); *Self-Critical Analysis*, *supra* note 27, at 1100 (concluding that courts should "recognize all of the various ways in which self-analysis may be chilled, and protect factual portions of self-analyses that meet the privilege's criteria").

information that will most likely be restricted through the indirect chill of discovery.[168]

Some courts have cast the argument regarding the indirect chilling effect in terms of the honesty of law enforcement agents.[169] This view overlooks several important distinctions. First, the difference between obtaining a meaningful, in-depth self-critical analysis and simply going through the motions does not depend solely upon the honesty of those involved, but also on critical factors such as thoroughness, motivation and departmental habits.[170] Second, feelings of distrust and suspicion sometimes develop between officers and internal affairs units, unrelated to issues of honesty on either side.[171] Knowledge that these investigations may be used later against the department, by outsiders no less, simply aggravates this possibly antagonistic, uncooperative attitude.[172] Finally, law enforcement officers engage in a dangerous, sometimes deadly occupation.[173] This high level of stress and mutual dependence on fellow officers may develop into an "us against them" mentality.[174] Disclosure

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168. *See* Elliot v. Webb, 98 F.R.D. 293, 296 (D. Idaho 1983) (granting motion to compel results of internal investigations, but only factual aspects, in recognition of assertion that disclosure of evaluative aspects would "discourage members of the Boise City Police Department from coming forward and bringing matters appropriate for disciplinary review to the attention of their superiors, and discourage complete, accurate and candid disciplinary reviews which are necessary in providing quality police services to the community").

169. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 664 (N.D. Cal. 1987) (stating that some courts incorrectly assume that police officers "doing this work [internal affairs investigations] would not express their views honestly if they knew their words might be used against individual officers or the police department by a civil rights plaintiff").

170. *See* Burke v. N.Y. City Police Dep't, 115 F.R.D. 220, 228 (S.D.N.Y. 1987) ("What was asked in the interviews and what answers were given will reflect the degree to which a good faith investigation was carried out and may suggest whether the ultimate and partially adverse disposition of plaintiff's complaint was based on the evidence obtained or on an unspoken policy . . . .").

171. *See* EDWARD A. MALLOY, THE ETHICS OF LAW ENFORCEMENT AND CRIMINAL PUNISHMENT 38 (1982) (noting officers' "strong identification with their co-workers" and "strong suspicion about . . . hostile interventions into police life").

172. *See* Ballard v. Terrak, 56 F.R.D. 45, 46 (E.D. Wis. 1972) (granting protective order preventing discovery of internal investigation files "designed to determine whether disciplinary action should be pursued" on grounds "that such discovery would impair [the department's] ability to obtain the internal reporting necessary to provide for efficient police force").

173. *See* ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (120th ed. 2000) (Table No. 355) (listing annual numbers of law enforcement agents assaulted and killed from 1990–1998).

174. *See* George L. Kirkham, *A Professor's "Street Lessons"*, FBI L. ENFORCEMENT BULL., March 1974, at 20 (describing professor's experience working as police officer for six months). "The same kinds of daily stresses which affected my fellow officers soon began to take their toll on me." *Id.* "I became sick and tired of being reviled and attacked by criminals . . . [and of] living under the axe of news media and community pressure groups, eager to seize upon the

of internal reviews—that is, forced disclosure of "us" discussing how we can better ourselves to "them"—can only hamper a department's attempts to operate in the best interests of society.[175]

2. Fact/Opinion Distinction

As noted earlier, courts often protect the evaluative aspects of an internal analysis while ordering disclosure of the underlying facts.[176] By drawing this distinction, courts respect the important policies underlying the privilege while simultaneously providing plaintiffs with ample ammunition to state their claims.[177] Courts' protection of opinion allows law enforcement agencies to fully investigate themselves without fear of honest evaluations being used as weapons in subsequent suits.[178] Protection of factual material strikes both courts and commentators as unwarranted and unnecessary to further the policies underlying the privilege.[179]

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slightest mistake made by myself [sic] or a fellow officer." *Id.*; *see also* Brown v. Thompson, 430 F.2d 1214, 1217–18 (5th Cir. 1970) (Coleman, J., dissenting) ("I am well aware that a favorite ploy of the law violator is to discourage law enforcement officials by suing them on some pretext or another, false arrest or malicious prosecution . . . if an officer dares arrest one of them or has to hurt him in the line of duty.").

175. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 664 (N.D. Cal. 1987) ("Some courts have concluded that evaluative comments and opinions expressed by officers conducting internal affairs investigations should be protected by a privilege that is almost absolute."). The court in *Kelly* rejected this line of thinking based on lack of empirical support and private incentives for disclosure. *Id.* at 665–66.

176. *See supra* notes 27–30 and accompanying text (discussing fact/opinion distinction).

177. *See* Boyd v. Gullett, 64 F.R.D. 169, 178 (D. Md. 1974) (noting that appropriate "restrictions on discovery" of police files include limiting discovery of "[m]aterial of a non-factual nature, i.e., official criticisms, recommendations of action, policy recommendations or opinions of supervisory personnel" which should be "submitted to the court for in camera review"). The court stated that "[a]lthough the latter materials could well be relevant to the plaintiffs' case, some supervision of discovery may be necessary to protect the decision making process in the various government agencies involved in this case." *Id.*

178. *See* Elliot v. Webb, 98 F.R.D. 293, 296–97 (D. Idaho 1983) (stating that "evaluative summaries or recommendations" contained in police department's internal investigation are not discoverable due to "the serious detrimental effect on the future ability of the department" to obtain reliable information). *But see Kelly*, 114 F.R.D. at 664 (criticizing analysis in *Elliot* and similar cases as "unsupported and very debatable").

179. *See* Wood v. Breier, 54 F.R.D. 7, 10–12 (E.D. Wis. 1972) (stating that after conducting *in camera* review the court found "[a]ll the material in the file [to be] of a factual as opposed to a policy discussion nature, and nowhere in the file are there any recommendations made for future action or criticisms of past actions" and concluding that while "defendant's arguments may have merit," protecting factual reports would not "impair the ability of the Chief of Police to obtain full and candid reporting from police of their activities because of a chilling effect"); Weiss, *supra* note 27, at 161 ("Because the quality of the facts and statistics compiled

Law enforcement agencies should clearly label various aspects of their internal evaluations.[180] Failure to do so further muddles the already unclear line between fact and opinion.[181] If agencies clearly draw the fact and opinion distinction, the harm brought about by disclosure becomes more readily apparent to courts applying the privilege.[182] Conducting investigations with this distinction in mind, carefully reporting results in a manner most likely to highlight the evaluative nature of analyses, and making a detailed description of the evaluative nature of documents provides a court with a sufficient basis for enforcing the privilege.[183]

3. *Unfairness*

Some courts and commentators view allowing parties to use their opponents' self-critical analysis as a weapon to be an unfair practice.[184] In this

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has no real relationship to the confidentiality fostered by the [privilege], and because their accuracy is readily verifiable and often available notwithstanding the privilege, the rationale behind the privilege is not applicable to this objective type of information."). *But see supra* note 167 and accompanying text (noting that several commentators argue that factual information should be protected).

180. *See* Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27 (E.D.N.Y. 1997) (protecting assistant district attorneys' memoranda that clearly referred to "steps taken by the assistant district attorneys in completing their investigation, and their professional opinions on the merits of the plaintiff's complaint, and their recommendations to the file and to higher-ranking officials within the Office").

181. *See* Bergman v. Kemp, 97 F.R.D. 413, 418 (W.D. Mich. 1983) (noting that "the circumstances presented by virtue of this case demonstrate good cause requiring disclosure . . . since both factual data not otherwise obtainable by the Plaintiff and evaluations of the Task Force are intertwined within the Report").

182. *See* Loigman v. Kimmelman, 102 N.J. 98, 112–13 (1986) (noting that "after evaluating the detailed description of the material furnished to it by the Attorney General," court must consider various factors in deciding whether to order disclosure including "the degree to which the information sought includes factual data as opposed to evaluative reports").

183. See Torres v. Kuzniasz, 936 F. Supp. 1201, 1215 (D.N.J. 1996) (ordering disclosure of internal affairs report over assertion of privilege because "the report consists largely of facts underlying the investigation [and] . . . there has been no showing that the report was undertaken as part of an institutional-wide or department-wide process of evaluation and self-improvement, nor is this information the type whose flow would be curtailed if discovery were allowed").

184. *See Self-Evaluative Reports*, *supra* note 64, at 819 (noting that "it may simply seem unfair to allow a party's careful self-assessment to be used against him"); *see also* Hickman v. Taylor, 329 U.S. 495, 510 (1947) (protecting attorney's work product from discovery because "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney"). *But see* Vandegrift, *supra* note 84, at 183 (stating that allowing parties to use favorable reports but protecting unfavorable ones from discovery is unfair and "cuts against application of the privilege").

sense, the self-critical analysis privilege is similar to the ban on admission of subsequent remedial measures to prove negligence found in the Federal Rules of Evidence.[185] Both methods of excluding relevant evidence work to prevent future problems by encouraging self-help.[186] Similarly, each method recognizes the basic unfairness in requiring parties to produce for subsequent lawsuits a "smoking gun" that they created in an attempt to correct perceived shortcomings internally.[187]

4. Privacy

Assertion of the privilege often accompanies an attempt to protect an individual officer's right to privacy.[188] Courts should consider striking personal information in recognition of the possible harm disclosure might bring about.[189] This anonymity furthers an agency's ability to conduct self-evaluations by reducing the possible indirect chill on individual officers' candor.[190] Other courts have been more skeptical of the privilege's assertion in regard to these privacy rights, relying on other mechanisms of protection.[191]

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185. *See* Elliot v. Webb, 98 F.R.D. 293, 298 (D. Idaho 1983) (denying production of officers' disciplinary and reinstatement hearings because "requested records and transcripts appear to fall within the theory behind Rule 407 of the Federal Rules of Evidence since they appear to be essentially remedial in nature"); *see also* McCowan & Gregoire, *supra* note 84, at 116 ("The privilege is analogous to Rule 407 of the Federal Rules of Evidence, which excludes evidence of subsequent remedial measures.").

186. *See* McCowan & Gregoire, *supra* note 84, at 116 (noting that two privileges are analogous in that they each function to eliminate future problems); *see also* Vandegrift, *supra* note 84, at 190 (stating that Rule 407 of Federal Rules of Evidence and privilege "are analogous, and the policy considerations underlying one should buttress the arguments in favor of the other").

187. *See Self-Evaluative Reports*, *supra* note 64, at 821 (stating that "if evidence of remedial measures is inadmissible, the deliberations, recommendations, opinions and conclusions leading up to the measures must also be inadmissible to give the exclusion its proper effect").

188. *See, e.g.*, Hampton v. City of San Diego, 147 F.R.D. 227, 230 (S.D. Cal. 1993) (considering assertion of privilege by city and individual officers and balancing "the need for the requested information against the privacy rights argued by the defendants").

189. *See* Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) (stating that when analyzing assertion of privilege courts should consider "the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed").

190. *See supra* Part IV.A.1.b (discussing indirect chilling effect disclosure has on agencies' ability to acquire information).

191. *See* Taylor v. L.A. Police Dep't, 1999 WL 33101661, at *6 (C.D. Cal. Nov. 10, 1999) (stating that "plaintiff's need for the requested information outweighs any invasion of defendants' privacy rights" and that officers' "privacy interest may be sufficiently protected with

5. Frivolous Claims

In addition, courts must determine whether the lawsuit has any merit before permitting disclosure of sensitive documents.[192] Some courts refuse to allow a plaintiff with a suspect claim to conduct a fishing expedition that would require the disclosure of sensitive information.[193] The balancing of interests the privilege requires only makes sense when the plaintiff has a legitimate claim.[194] Other courts are more leery of judging the strength of the plaintiff's case without discovery of the police documents because the strength of a plaintiff's claim may not be apparent until after the discovery process has run its course.[195] These courts emphasize the policy of broad discovery behind the Federal Rules of Civil Procedure.[196]

B. Factors Favoring Disclosure

1. Public Interest in Plaintiffs' Success

Individuals suing police officers and law enforcement agencies often assert violations of fundamental constitutional rights.[197] Courts recognize the substantial

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the use of a tightly drawn protective order" (internal punctuation and citations omitted)).

192. *See* Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) ("In the context of discovery of police investigation files in a civil rights case . . . the following considerations should be examined . . . [including] whether the plaintiff's suit is non-frivolous and brought in good faith.").

193. *See* Cruz v. Bd. of Supervisors, No. 91-1547, 1993 U.S. App. LEXIS 187, at *7–10 (4th Cir. Jan. 7, 1993) (stating that plaintiff "requested a vast amount of highly sensitive material with little or no notion of what he might find" and noting that he "has come forward with no evidence whatsoever," only vague and conclusory allegations, that would support claim for municipal liability).

194. *See* Brown v. Thompson, 430 F.2d 1214, 1218 (5th Cir. 1970) (Coleman, J., dissenting) (stating that frivolous suits "ought not to be encouraged beyond the requirements of due process, especially in a case admittedly without merit unless something can be turned up by fishing files presently confidential").

195. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 666–67 (N.D. Cal. 1987) (stating that although courts "must beware . . . of permitting frivolous claimants to harass law enforcement agencies . . . courts must be careful not to pre-judge the merits of claims whose strength may be demonstrable only after the very discovery that is in issue" and that "[d]oubts must be resolved, at the discovery stage, in favor of the claimant").

196. *See Taylor*, 1999 WL 33101661, at *2–6 (noting that Rule 26(b)(1) of Federal Rules Civil Procedure should be "liberally interpreted to permit wide-ranging discovery" and to permit consideration of "plaintiff's need for the requested information" in decisions granting plaintiff limited access to police reports).

197. *See* King v. Conde, 121 F.R.D. 180, 188 (E.D.N.Y. 1988) (noting that "[c]ivil rights lawsuits against local law enforcement officers occur with sufficient frequency in this district . . . that the test specifically tailored to resolving the discovery disputes in those cases

public interest in protecting individual liberties.[198] Lawsuits function not only as a means of achieving restitution for an individual's damages but also as a checking mechanism for prevention of future violations.[199] Private litigants act on behalf of the public's welfare by ensuring that law enforcement agencies that violate their duty to serve and protect pay a substantial price.[200]

Of course, the public interest in organizations acting in an informed and socially beneficial manner lies at the foundation of the self-critical analysis privilege.[201] Determining whether successful assertion of the privilege effectively promotes this interest without undermining a plaintiff's attempt at seeking redress requires a case-by-case balancing.[202] Courts need to recognize the resulting paradox: as the public and private interest in seeking vindication of agencies' lapses through private litigation becomes greater, the public interest in effective investigation and evaluation secured by the privilege, through nondisclosure, correspondingly increases.[203] This reasoning underlies the privilege's requirement that the information litigants seek to protect must be the type whose flow would be restricted if discovery were allowed.[204] Courts

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needs repeating").

198. *See Kelly*, 114 F.R.D. at 664 (noting that plaintiff in civil rights law suit brought against city and its police department is "attempting simultaneously to enforce his rights and policies that the people, speaking through Constitutional amendments and federal statutes, have elevated to the highest levels of priority").

199. *See* Wood v. Breier, 54 F.R.D. 7, 11 (E.D. Wis. 1972) (noting that by allowing private suits for violations of Constitutional rights, 18 U.S.C. § 1983 "represents a balancing feature in our government structure whereby individual citizens are encouraged to police those who are charged with policing us all").

200. *See id.* at 10–11 ("Each citizen 'acts as a private attorney general who takes on the mantel of the sovereign,' guarding for all of us the individual liberties enunciated in the Constitution.").

201. *See* Torres v. Kuzniasz, 936 F. Supp. 1201, 1214 (D.N.J. 1996) (stating that purpose behind self-critical analysis privilege is to "further the public interest in institutional self-analysis and improvement").

202. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 662 (N.D. Cal. 1987) ("What the interests of law enforcement are, and how much weight to ascribe to them, can vary with both the kind of information in question and the situation in which it is being sought."); *Wood*, 54 F.R.D. at 11 (noting that decisions on whether to protect police investigations from discovery "must be done on a case by case *ad hoc* basis by balancing the applicable public policies and the material sought to be discovered in each individual case").

203. *See* Skibo v. City of New York, 109 F.R.D. 58, 63–64 (E.D.N.Y. 1985) (recognizing public's "strong interest in the police department's ability to investigate its personnel and improve its procedures" and government's "vital interest in upholding the civil rights of the populace").

204. *See Torres*, 936 F. Supp. at 1214–15 (noting that successful assertion of privilege requires that "the information [contained in the analysis] must be of the type whose flow would

should provide litigants with reasonable discovery if doing so will not cause injury to an agency's ability to conduct a thorough and effective self-analysis.[205]

2. *Right to Every Man's Evidence*

Federal courts permit a broad range of discovery in an attempt to facilitate the search for truth and justice.[206] Courts disfavor privileges because privileges hamper the fact-finding process by keeping information from the jury.[207] While the Federal Rules of Civil Procedure recognize that socially beneficial policies may require that some information be unavailable in discovery,[208] the overall approach provides for open discovery.[209] This presumption of openness accompanies an assertion of any privilege but may weigh more heavily with the self-critical analysis privilege because it is not universally accepted.[210]

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be curtailed if discovery were allowed").

205. *See* Joe v. Prison Health Servs., 782 A.2d 24, 35 (Pa. Commw. Ct. 2001) (affirming trial court's order granting motion to compel results of city's investigation into performance of prison health subcontractor because defendants "have not established that, absent the self-critical analysis privilege, the City would not evaluate the performance of Prison Health").

206. *See* Taylor v. L.A. Police Dep't, 1999 WL 33101661, at *2 (C.D. Cal. Nov. 10, 1999) (noting that Rule 26(b)(1) of Federal Rules Civil Procedure should be "liberally interpreted to permit wide-ranging discovery").

207. *See Kelly*, 114 F.R.D. at 664 (N.D. Cal. 1987) (noting that "privileges operate in derogation of the truth finding process"), Flanagan, *supra* note 30, at 551 ("Any new privilege runs counter to the current strong judicial trend towards restricting evidentiary privileges and is inconsistent with the existing broad scope of permissible discovery.").

208. *See* FED. R. CIV. P. 26(b)(1) (allowing for "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"); *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (stating that purpose of attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); Kellogg, *supra* note 71, at 255–56 ("The primary justification for privileges is that if confidential communications or documents are subject to discovery in litigation, this lack of complete confidentiality will negatively affect numerous socially-useful functions and relationships.").

209. *See* Wood v. Breier, 54 F.R.D. 7, 13 (E.D. Wis. 1972) (stating that "the federal rules of discovery [are] meant to insure that no relevant facts remain hidden").

210. *See* McNab, *supra* note 49, at 675 ("When establishing a new area of privilege, such as self-criticism privilege, courts attempt to base their decisions on the policies and justifications that support existing privileges . . . [and] to justify any exception to this general maxim [of openness] by examining the reasoning that has justified previous exclusions.").

3. Plaintiff's Particularized Need

Courts often consider the overall effect that denying a plaintiff access to documents would have on the status of the plaintiff's case.[211] Generally, the relevance of the internal evaluations is undisputed.[212] However, the issue of relevance may require a fact-specific analysis of the underlying documents and events giving rise to the claim.[213] A few courts have conducted *in camera* reviews of documents in order to determine their relevance.[214]

One specific fact pattern that routinely emerges in suits against law enforcement agencies concerns the liability of governmental bodies. Assume a plaintiff alleges brutality or excessive force by a police officer and sues the city employer for his injuries.[215] In order for the city to be held liable under 42 U.S.C. § 1983, the plaintiff must prove that the constitutional deprivation arose from a governmental custom, policy, or practice.[216] The defendant city attempts to deny access to personnel files,[217] internal investigations,[218] and departmental self-evaluations.[219]

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211. *See* Soto v. City of Concord, 162 F.R.D. 603, 617 (N.D. Cal. 1995) (noting that plaintiff's "need for the requested personnel files is great . . . [and] that the information contained in police personnel files is unlikely to be available from any other source"). *But see Self-Critical Analysis*, *supra* note 27, at 1099 ("[T]he importance of the material sought by the plaintiff actually makes the operation of the privilege's rationale more likely . . . [because] [t]he more crucial the material is to the plaintiff's case, the more likely it is to be the type of material that the privilege was designed to protect.").

212. *See* Kott v. Perini, 283 F. Supp. 1, 2 (N.D. Ohio 1968) (noting that "relevance of the [police records] sought to be discovered by petitioner is not seriously in dispute"). *But see* Elliot v. Webb, 98 F.R.D. 293, 298 (D. Idaho 1983) (denying production of officers' disciplinary and reinstatement hearings and noting "slight relevancy of such remedial proceedings").

213. *See* Bergman v. Kemp, 97 F.R.D. 413, 418 (W.D. Mich. 1983) (stating that "a specific need for this evidence is apparent where all information relative to the actions of [the officer] with regard to the . . . incident is in the hands of a party Defendant").

214. *See, e.g.*, Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 25–26 (E.D.N.Y. 1997) (protecting twenty-one intradepartmental memoranda after *in camera* review and consideration of numerous factors including "the relevance of the evidence sought to be protected").

215. *See, e.g.*, Price v. County of San Diego, 165 F.R.D. 614, 617 (S.D. Cal. 1996) (involving widow suing officers and county after husband died during arrest).

216. *See* Monell v. Dep't of Social Servs., 436 U.S. 658, 690 (1978) ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.").

217. *See* Scouler v. Craig, 116 F.R.D. 494, 495 (D.N.J. 1987) (involving defendant township arguing against motion to compel officer's personnel file).

Courts recognize that often the documents containing the results of the critiques may be the only way to establish the city's liability.[220] This factor may weigh heavily in favor of disclosure.[221]

V. Implementation

The following examples attempt to apply the previous policy discussion to factual scenarios a court might face. Courts need to recognize not only the public interest served by private plaintiffs but also the socially beneficial results of law enforcement agencies conducting self-evaluations.[222] Defendants attempting to protect self-critical analysis carry the burden of persuading a court that specific harms will flow from disclosure.[223] These examples highlight the difficulties defendants face.

A. Example One—Alleged Assault by Officer

John Smith is arrested by Officer Able for disturbing the peace and public intoxication. Smith appears intoxicated and under the influence of narcotics. Private citizens witness the arrest and see no evidence of excessive force. When Smith is processed at the police station, he has a bleeding lip, swelling around both eyes and a laceration on his forehead. Smith alleges that Able clubbed him repeatedly with his nightstick while Smith was detained in the

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218. *See* Manns v. Smith, 181 F.R.D. 329, 330–31 (S.D. W. Va. 1998) (remanding denial of plaintiff's "motion to compel production of all aspects of the Charleston Police Department's internal investigation into the Smith-Manns incident").

219. *See* Urseth v. City of Dayton, 653 F. Supp. 1057, 1060 (S.D. Ohio 1986) (involving city seeking protective order for transcript of Firearms Committee meeting and summary of conclusions).

220. *See* Soto v. City of Concord, 162 F.R.D. 603, 617 (N.D. Cal. 1995) (noting that "the information contained in police personnel files is unlikely to be available from any other source"); Skibo v. City of New York, 109 F.R.D. 58, 62–63 (E.D.N.Y. 1985) (granting motion to compel internal affairs procedural manual because it "contains information that plaintiffs need to determine whether adequate techniques are used to investigate complaints against police officers . . . [and] [s]uch a determination is crucial in order for plaintiffs to establish their theory that the city maintains a policy of supervisory indifference to and tacit approval of police misconduct").

221. *See* Burke v. N.Y. City Police Dep't, 115 F.R.D. 220, 229 (S.D.N.Y. 1987) (noting that "[t]he key consideration is the importance of the information sought to the plaintiff's case" especially when considering "issue of municipal liability under section 1983" (internal citations and punctuation omitted)).

222. *See supra* Part IV.A.1 (discussing dual chilling effect of disclosure).

223. *See supra* notes 31–34 and accompanying text (discussing burden on defendant).

patrol car. Officer Able claims that Smith inflicted the wounds upon himself by banging his head against the window and door of the patrol car.

Smith sues Able and Able's city employer alleging a violation of his civil rights. Prior to these allegations, Officer Able's record is spotless. Smith seeks to discover Able's personnel file and an internal affairs investigative report concerning the incident. The city invokes the self-critical analysis privilege in an attempt to protect both documents from discovery.

1. Personnel File

Like Smith, plaintiffs in suits against law enforcement agencies often seek discovery of officers' personnel files.[224] A personnel file contains personal information, job history, performance evaluations, commendations, and a disciplinary record.[225] A personnel file containing negative evaluations or reprimands may assist a plaintiff in proving that a department was negligent in retaining a certain officer or for failing to remedy certain behavior.[226]

In this instance, the department cannot argue that disclosure will directly chill the department's collection of personnel data. No law enforcement agency will stop compiling personnel files simply because they may be discoverable in a civil suit.[227] The managerial costs in effective retention and promotion are simply too high.[228]

The better argument lies in the indirect chilling effect disclosure may have upon the quality of the information collected.[229] Fellow officers may be less critical in their evaluations if their opinions may be used against the department.[230] Collecting frank and thorough evaluations is critical to a department's ability to promote and retain the best officers.[231]

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224. *See, e.g.*, *Soto*, 162 F.R.D. at 614 (involving plaintiff seeking personnel files of three officers in claim brought under 18 U.S.C. § 1983).

225. *See* WESTON & FRALEY, *supra* note 151, at 102–06 (outlining requirements for "comprehensive personnel information system").

226. *See* Hampton v. City of San Diego, 147 F.R.D. 227, 229 (S.D. Cal. 1993) ("Information contained in these [personnel] files may be relevant on the issues of credibility, notice to the employer, ratification by the employer and motive of the officers.").

227. *See* Mercy v. County of Suffolk, 93 F.R.D. 520, 522 (E.D.N.Y. 1982) (recognizing "that police department self-evaluation and remedial action do serve an important public policy, but such policy will not be hindered by the disclosure ordered here").

228. *See generally* WESTON & FRALEY, *supra* note 151, ch. 7. (detailing importance of personnel information systems).

229. *See supra* Part IV.A.1.b (discussing indirect chilling effect disclosure has on law enforcement agency's ability to gather information).

230. *See* Kott v. Perini, 283 F. Supp. 1, 2 (N.D. Ohio 1968) (stating that officers'

Limiting disclosure of the personnel file to only the factual material, such as the number of complaints filed against an officer, eliminates this indirect chilling effect.[232] Officers are free to provide their subjective analysis regarding Officer Able's performance, both overall and in regard to specific instances, without fear of harm to the department. In addition, allowing disclosure of only the facts protects the officers' privacy rights.[233] Finally, disclosure of the facts recognizes the important policies in favor of disclosure to the plaintiff without compromising an agency's ability to police itself.[234]

The plaintiff has no great need for the subjective component of the personnel file. If the file contains numerous allegations of misconduct against Officer Able, those facts may be relevant to what occurred in the cruiser.[235] On the given facts, Officer Able's record is clean and his personnel file would not be of assistance to the plaintiff's claim.[236] If the department's only concern was winning this case, and not the overall effectiveness of its evaluative methods, the department might disclose the file. This scenario—possible disclosure of the file when information is beneficial and assertion of the privilege is

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"knowledge that some of the confidential information recorded might be later exposed to outside parties would have a certain and chilling effect upon the internal use of such record making").

231. *See* WESTON & FRALEY, *supra* note 151, at 101 (stating that with effective, reliable personnel information "personnel managers and line commanders can make better decisions concerning transfers and assignments, advancements and promotions, and can better plan career development programs").

232. *See* Elliott v. Webb, 98 F.R.D. 293, 296–99 (D. Idaho 1983) (limiting disclosure of personnel records to factual data based on contention that forced disclosure "would deter full cooperation").

233. *See supra* Part IV.A.1.b (discussing indirect chilling effect disclosure of private information may have on agency's ability to acquire information).

234. *See* Boyd v. Gullett, 64 F.R.D. 169, 178 (D. Md. 1974) (limiting disclosure of police files to factual information after noting that disclosure furthers "two major federal policies, i.e., the vigorous enforcement of the civil rights statutes and the broadest possible scope of discovery in civil litigation").

235. *See* Scouler v. Craig, 116 F.R.D. 494, 496 (D.N.J. 1987) (stating that "there can be no question of the relevancy of these materials [personnel files] to the allegations of the complaint").

236. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 672 (N.D. Cal. 1987) (noting that after *in camera* review of police files "there is some reason to believe that after seeing this material plaintiff might decide against expending the time and expense of deposing the parties involved . . . . [T]here is some possibility that access to these documents might help persuade plaintiff to seek an early settlement.").

harmful—is an example of one unfairness aspect underlying the privilege.[237] But, the department has concerns beyond simply winning the case.[238]

2. *Internal Affairs Investigative Report*

The analysis regarding the internal affairs report parallels that of the personnel file in numerous respects. The direct chilling effect is minimal because investigation of alleged abuses through an internal affairs division is too important to be forgone by a police department.[239] Again, the chilling effect materializes in the agency's ability to get in-depth and accurate information from its officers.[240]

The fact/opinion distinction might alleviate the potential for indirect chill.[241] But, in the context of an internal affairs investigation, the line drawing between fact and opinion becomes more difficult.[242] The report contains an investigative officer's impression of what occurred in the cruiser. Determining whether these conclusions are recitation of fact, pure speculation, or assumptions drawn from the facts is an arduous process.[243] A court might attempt to draw the distinction itself through an *in camera* review of the report,[244] though some courts are reluctant to bog themselves down in detailed

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237. *See* Vandegrift, *supra* note 84, at 183 (stating that allowing parties to use favorable reports but protecting unfavorable ones from discovery is unfair and "cuts against application of the privilege").

238. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (noting that discovery dispute "transcends the situation confronting this petitioner" and that problem must be viewed "in light of the limitless situations where the particular kind of discovery . . . might be used").

239. *See* Skibo v. City of New York, 109 F.R.D. 58, 64 (E.D.N.Y. 1985) (granting request for production of internal affairs documents and stating that "[t]he police department needs to continue to monitor itself to ensure that department procedures are effective and that officers are complying with these procedures").

240. *See* Ballard v. Terrak, 56 F.R.D. 45, 46 (E.D. Wis. 1972) (granting petition for protective order by police chief on grounds that disclosure of internal affairs report would "impair his ability to obtain the internal reporting necessary to provide for an efficient police force").

241. *See* Elliott v. Webb, 98 F.R.D. 293, 296–97 (D. Idaho 1983) (limiting disclosure of internal investigations to factual data based on contention that forced disclosure "would deter full cooperation").

242. *See* Burke v. N.Y. City Police Dep't, 115 F.R.D. 220, 232 (S.D.N.Y. 1987) (noting that memorandum containing summary of internal investigation "necessarily involves some characterizations, and the evaluative and factual portions are not segregable").

243. *See* Bergman v. Kemp, 97 F.R.D. 413, 418 (W.D. Mich. 1983) (noting that "both factual data . . . and evaluations of the Task Force are intertwined within the Report").

244. *See Elliott*, 98 F.R.D. at 297 ("If the defendants believe that portions of the internal investigation reports contain evaluative summaries or recommendations that should not be

analysis of discovery materials.[245] Clearly labeling the sections of the reports as either facts or subjective analysis would aid an agency's assertion of the privilege.[246]

Another difference between the discoverability of the personnel file and that of the internal affairs report lies in the plaintiff's need for the latter. The results of the internal affairs report are much more likely to be relevant to the plaintiff's case because they concern the specific act of alleged brutality.[247] Without discovering the report, the plaintiff must rely solely on his own testimony, affected by his drug-addled state at the time of the arrest, to rebut Officer Able's description of the arrest.[248] The court also must consider the strength of the plaintiff's case at this point.[249] The plaintiff was intoxicated. Private citizens assert that Officer Able handled himself professionally during the arrest. Officer Able's record contains no hint of ill will toward the plaintiff. Ordering disclosure of the report, with the accompanying chilling effects of disclosure, in order to assist a plaintiff with a weak case on a fishing expedition does not serve the interest of society or justice.[250]

B. Example Two—Arrestee Dies After Being Hogtied by Officers

Jane Brown is arrested by multiple officers.[251] She violently resists arrest. After handcuffing her hands behind her back and her feet together, officers use a "hogtie" to connect the two restraints for both their and the arrestee's safety.

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discovered, the reports may be submitted to the court for in camera inspection.").

245. *See* Hampton v. City of San Diego, 147 F.R.D. 227, 229 (S.D. Cal. 1993) (refusing to "comb through seven personnel files and seven internal affairs histories" and placing burden on "attorneys to make a good faith effort to resolve as much of this type of [discovery] dispute as possible").

246. *See Burke*, 115 F.R.D. at 232 ("The balance of the document consists of 'Findings' and a 'Recommendation.' This discussion could be characterized, at least in part, as evaluative, but the five paragraphs appearing on the second page below the word 'Findings' are, in essence, factual.").

247. *See* Skibo v. City of New York, 109 F.R.D. 58, 64 (E.D.N.Y. 1985) (noting plaintiff's "overwhelming need" for results of internal affairs documents).

248. *See Bergman*, 97 F.R.D. at 418 ("[A] specific need for this evidence is apparent where all the information . . . is in the hands of the party Defendant.").

249. *See supra* Part IV.A.5 (discussing frivolous claims).

250. *See* Cruz v. Bd. of Supervisors, No. 91-1547, 1993 U.S. App. LEXIS 187, at *7 (4th Cir. Jan. 7, 1993) (noting that plaintiff "requested a vast amount of highly sensitive material with little or no notion of what he might find" and upholding order limiting disclosure to factual aspects of report).

251. This fact pattern is loosely based on *Price v. County of San Diego*, 165 F.R.D. 614 (S.D. Cal. 1996), in which an arrestee died after being hogtied by officers.

During the process, Brown's face is injured by contact with the pavement and begins to bleed heavily. The officers call for paramedics upon seeing the blood. When the paramedics arrive, they discover that Brown is having difficulty breathing and soon stops breathing. The paramedics have the officers release the restraints and immediately begin CPR. They are unable to revive Brown and she dies on the way to the hospital.

Brown's estate sues the officers and their city employer for violating her civil rights. The suit alleges that the police department had a custom and practice of using the hogtie position for restraint despite being aware of possible danger of suffocation to arrestees. The plaintiff seeks discovery of a study conducted by the department regarding the effectiveness and safety of the hogtie restraint conducted approximately two years prior to the accident. The city asserts the self-critical analysis privilege to protect the report.

In the case on which this example is based, the district court rejected assertion of the privilege.[252] The district court noted binding Ninth Circuit Court of Appeals precedent denying protection of "routine internal corporate reviews of matters related to safety concerns."[253] The Ninth Circuit Court of Appeals stated that postaccident investigations may be privileged but that "it is perverse to assume that the candid assessments necessary to prevent accidents will be inhibited by the fear that they could later be used as a weapon in hypothetical litigation they are supposed to prevent."[254]

Protecting only postaccident evaluations ensures that law enforcement agencies remain one step behind the causes of accidents in their evaluative processes.[255] Limiting the privilege to instances in which the damage is already done hamstrings an agency's ability to prevent future accidents.[256] Courts

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252. *See Price*, 165 F.R.D. at 619 ("[T]he claim of self-critical analysis privilege as to all of the documents submitted by the Defendants for *in camera* review is hereby rejected.").

253. *See id.* at 618 (quoting Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992)).

254. *Dowling*, 971 F.2d at 427.

255. *See* Richard L. Kaiser, *The Self-Critical Analysis Privilege for Products Liability: What Is It, and How Can It Be Achieved in Wisconsin?*, 1999 WIS. L. REV. 119, 130 ("Many would argue that the market will dictate the company's actions, regardless of the existence or non-existence of the privilege. *If consumers are getting hurt*, they will sue and stop buying the product, forcing the company to perform safety reviews leading to improved product safety." (emphasis added)). Denying protection to pre-accident reviews leads to organizations implementing change only after individuals are harmed.

256. *See* Ellen Page DelSole, *An Environmental Audit Privilege: What Protection Remains After EPA's Rejection of the Privilege?*, 46 CATH. U. L. REV. 325, 361 (1997) (stating that an "argument could still be made . . . that privilege should extend to prospective investigation if the company shows during in camera review that adequate efforts were made promptly to correct any noncompliance discovered").

utilizing the self-critical analysis privilege should recognize that prevention of future accidents through confidential self-evaluation works in the interest of society.[257]

Even given the Ninth Circuit's holding, the district court erred in analyzing the study as a "routine internal corporate review."[258] The study is not a routine review of safety matters. Instead, the study is a unique self-analysis of a specific procedure. Denying protection of this study while inferring that an "investigation of a particular event of hogtying" would be protected[259] ignores the privilege's goal of promoting socially beneficial self-improvement.[260]

After recognizing the underlying policies of the privilege, a court should find that the department demonstrates a direct chilling effect on disclosure.[261] Unlike Example One, in this scenario the police department has a legitimate argument regarding the direct chilling effect that disclosure would have on the department's willingness to conduct internal evaluations. The study conducted was not an ordinary or routine evaluation of officers or their conduct.[262] Instead, the evaluation concerned an overall consideration of a specific method of restraint.[263] The agency conducted a thorough critique of this procedure in order to determine its safety and effectiveness,[264] precisely the type of self-evaluation that the self-critical analysis privilege fosters.[265]

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257. *See id.* (noting that "[t]he policy reasons for such a position [protecting pre-accident reviews] are evidenced by the inclusion of similar provisions in many of the state environmental audit privilege statutes," which as noted earlier is situation-specific application of the self-critical analysis privilege); *see also supra* note 50 and accompanying text (noting environmental audit privilege).

258. Price v. County of San Diego, 165 F.R.D. 614, 619 (S.D. Cal. 1996).

259. *See id.* (noting that "none of the documents are in the nature of investigation of a particular event of hogtying").

260. *See* Urseth v. City of Dayton, 653 F. Supp 1057, 1061 (S.D. Ohio 1986) (analyzing *Bredice* and subsequent cases as protecting evaluations whose "purpose was . . . to formulate or review . . . policies in general," not evaluation of "one specific incident").

261. *See supra* Part IV.A.1.a (discussing direct chilling effect on law enforcement agencies).

262. *See Price*, 165 F.R.D. at 619 (noting that "the documents reflect a process by the County, following the City of San Diego's Task Force Report on Custody Deaths, to address possible suffocation resulting from arrestees being hogtied"). The court found the report to be a routine review but never explained its reasoning when clearly this type of report was not routinely conducted. *See id.* (finding report routine).

263. *See id.* (explaining that report concerned hogtying).

264. *See id.* (examining report).

265. *See Self-Critical Analysis*, *supra* note 27, at 1088 (noting that courts recognizing law enforcement agencies' assertion of self-critical analysis privilege have done so due to "the public interest in permitting police departments to conduct thorough investigations to reduce the number of improper police actions").

Limiting disclosure to the facts might alleviate some of this chilling effect.[266] But, another factor in the balancing inherent in the privilege favors disclosure because the plaintiff's claim clearly is not frivolous.[267] While there may be concerns regarding unfairness to the agency,[268] disclosure raises only minimal privacy concerns.[269] Given the strong showing of the direct chilling effect, analysis of these factors favors protection of the study from disclosure.[270]

As for the factors favoring disclosure, the plaintiff has a compelling argument for discovery. Both Congress and the federal courts favor a plaintiff's right to broad discovery.[271] The public's interest in vindicating an arrestee's death is high.[272] The strongest factor in favor of discovery is the plaintiff's need for this evidence.[273] A study in which the department sanctions the use of hogties is custom-made for the plaintiff's case. The study establishes the department's awareness of the dangers and is "directly relevant to showing a deliberate indifference."[274]

Whether or not a court orders disclosure requires two decisions. First, a court must consider whether society is best served by plaintiffs enforcing their individual rights through broad discovery, and thus furthering society's rights as a whole, or if society is better served by departments freely engaging in self-critical analysis.[275] Second, assuming a court recognizes the socially beneficial aspects of self-evaluation, this benefit must be weighed against the burden protection places on individual plaintiffs.[276] In this case, a court could

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266. *See supra* Part IV.A.2 (discussing fact/opinion distinction).

267. *See supra* Part IV.A.5 (discussing consideration that strength of plaintiff's claim should play in court's requisite balancing of interests).

268. *See supra* Part IV.A.3 (discussing unfairness inherent in requiring disclosure of internal evaluations).

269. *See supra* Part IV.A.4 (discussing privacy concerns raised by disclosure).

270. *See supra* Part IV.A (discussing factors favoring protection of self-evaluations conducted by law enforcement agencies).

271. *See supra* Part IV.B.2 (discussing plaintiff's presumptive right to broad discovery).

272. *See* Schwartz, *supra* note 2, at 507–08 ("[T]he special public interest in § 1983 litigation is a highly important factor in favor of disclosure.").

273. *See* Burke v. N.Y. City Police Dep't, 115 F.R.D. 220, 229 (S.D.N.Y. 1987) (noting that "[t]he key consideration is the importance of the information sought to the plaintiff's case" especially when considering "issue of municipal liability under section 1983" (internal citations and punctuation omitted)).

274. Price v. County of San Diego, 165 F.R.D. 614, 619 (S.D. Cal. 1996).

275. *See* Manns v. Smith, 181 F.R.D. 329, 330 (S.D. W. Va. 1998) (remanding discovery order due to failure of magistrate to consider competing factors).

276. *See* Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27 (E.D.N.Y. 1997) (balancing "the public interest in insuring the confidentiality of the District Attorney's files" against "the defendants' need for the information").

recognize the importance of both sides by protecting the evaluative aspects of the report but providing access to the raw data.[277]

VI. Conclusion

Application of the self-critical analysis privilege in the law enforcement context remains a troublesome and uncertain prospect. Courts facing assertion of the privilege must evaluate the effectiveness of self-evaluations functioning as internal checking mechanisms as well as the external checking inherent in lawsuits. Courts should recognize assertion of the privilege by law enforcement agencies in situations in which disclosure hampers the ability of the agency to effectively gather reliable information in order to implement socially beneficial change.

277. *See* Boyd v. Gullett, 64 F.R.D. 169, 178 (D. Md. 1974) ("Although the latter materials [of a nonfactual nature] could well be relevant to the plaintiffs' case, some supervision of discovery may be necessary to protect the decision making process in the various government agencies involved in this case.").