IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, **MURRAY AMERICAN ENERGY, INC.**, **THE AMERICAN COAL COMPANY**, **AMERICAN ENERGY CORPORATION**, **THE HARRISON COUNTY COAL COMPANY**, **KENAMERICAN RESOURCES, INC.**, **THE MARION COUNTY COAL COMPANY**, **THE MARSHALL COUNTY COAL COMPANY**, **THE MONONGALIA COUNTY COAL COMPANY**, **OHIOAMERICAN ENERGY INC.**, **THE OHIO COUNTY COAL COMPANY**, and **UTAHAMERICAN ENERGY, INC.**,

Plaintiffs,

v.

Civil Action No. 5:14-CV-39
Judge Bailey

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR IN CAMERA REVIEW, TO COMPEL PRODUCTION OF DOCUMENTS, AND TO PERMIT DEPOSITIONS

Pending before this Court is Plaintiffs' Motion for In Camera Review, to Compel Production of Documents, and to Permit Depositions [Doc. 223 & 226]. The Motion has been fully briefed and is ripe for decision.

In their Motion, the plaintiffs request this Court to conduct an *in camera* review of 137 documents listed in a proposed order filed with the Motion; compel production of

documents containing directives and decisions responsive to plaintiffs' discovery requests; compel production of deliberative documents leading up to and related to the directives and decisions that defendant has already disclosed after the production deadline; and permit the plaintiffs to continue two depositions. The EPA responds that the Motion is time-barred under this Court's orders, the Local Rules of Civil Procedure, and Plaintiffs' stipulation to end fact discovery. The EPA also argues that it has properly asserted the deliberative process privilege and that the subject matter waiver is not applicable in this case.

Inasmuch as many of the issues presented by the Motion involve the deliberative process privilege, this Court will begin with some of the basic rules surrounding the privilege, most of which are clear. The Fourth Circuit's most recent discussion of the privilege is found in ***Solers, Inc. v. Internal Rev. Svs.***, __ F.3d __, 2016 WL 3563487 (4th Cir. June 30, 2016). ***Solers*** involved a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, in which the IRS invoked the deliberative process privilege found in exemption 5 of the FOIA, which states that the FOIA does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.A. § 552(b)(5).

While this case does not involve the FOIA, the case law on the deliberative process privilege is applicable to discovery requests in litigation. "'Among the privileges Exemption 5 encompasses are the attorney-client privilege ... and the deliberative process privilege.' ***Rein*** [***v. U.S. Patent & Trademark Office***], 553 F.3d [353], 371 [(4th Cir. 2009)]. 'And the deliberative process privilege . . . 'rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery

and front page news.' ***Dep't of Interior v. Klamath Water Users Protective Ass'n***, 532 U.S. 1, 8–9 (2001). The privilege thus 'encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding deliberations; and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, but for matters they considered before making up their minds.' ***City of Virginia Beach v. U.S. Dep't of Commerce***, 995 F.2d 1247, 1252–53 (4th Cir. 1993) (internal quotation marks and citation omitted)." ***Solers*** at *4.

"To justify application of the deliberative process privilege, 'the government must show that, in the context in which the materials were used, the documents were both predecisional and deliberative.' ***City of Virginia Beach***, 995 F.2d at 1253 (internal quotation marks and citation omitted). Predecisional documents are those 'prepared in order to assist an agency decisionmaker in arriving at his decision,' ***Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.***, 421 U.S. 168, 184 (1975), and deliberative documents are those that 'reflect[ ] the give-and-take of the consultative process by revealing the manner in which the agency evaluates possible alternative policies or outcomes,' ***City of Virginia Beach***, 995 F.2d at 1253 (internal quotation marks and citation omitted). The privilege thus protects "recommendations, draft documents, proposals, suggestions, and other **subjective documents which reflect the personal opinions of the writer rather than the policy of the agency**." ***Id***. (emphasis added) (internal quotation marks and citation omitted). But the privilege 'does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment.' ***Ethyl Corp.*** [***v. U.S. EPA***], 25 F.3d [1241] at 1248 [4th Cir. 1994]. In

addition, 'since the prospect of disclosure is less likely to make an advisor omit or fudge raw facts than opinions, purely factual material does not fall within the exemption unless it is inextricably intertwined with policymaking processes such that revelation of the factual material would simultaneously expose protected deliberation.' ***City of Virginia Beach***, 995 F.2d at 1253 (internal quotation marks and citations omitted). ***Id***.

The rationale for the deliberative process privilege was explained in ***NLRB v. Sears, Roebuck & Co.***, 421 U.S. 132 (1975):

> That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear, S. Rep. No. 813, p. 9; H.R. Rep. No. 1497, p. 10; ***EPA v. Mink***, [410 U.S. 73] at 86 [(1973)]. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies,' ***Tennessean Newspapers, Inc. v. FHA***, 464 F.2d 657, 660 (6th Cir. 1972); ***Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena***, 40 F.R.D. 318 (D.D.C. 1966); see also ***EPA v. Mink***, 410 U.S., at 86-87; ***International Paper Co. v. FPC***, 438 F.2d 1349, 1358-1359 (2d Cir. 1971); ***Kaiser Aluminum & Chemical Corp. v. United States***, supra, 157 F.Supp. [939], at 946 [Ct. Cl. 1958]; and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' ***Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena***, *supra*, 40 F.R.D., at 324. The

point, plainly made in the Senate Report, is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result. S. Rep. No. 813, p. 9. See also H.R. Rep. No. 1497, p. 10; ***EPA v. Mink***, supra, 410 U.S., at 87. As a lower court has pointed out, 'there are enough incentives as it is for playing it safe and listing with the wind,' ***Ackerly v. Ley***, 420 F.2d 1336, 1341 (D.C. Cir. 1969), and as we have said in an analogous context, '(h)uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.' ***United States v. Nixon***, 418 U.S. 683, 705 (1974) (emphasis added).

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications,

which are privileged, e.g., ***Boeing Airplane Co. v. Coggeshall***, 280 F.2d 654 (D.C. Cir. 1960); ***O'Keefe v. Boeing Co.***, 38 F.R.D. 329 (S.D. N.Y. 1965); ***Walled Lake Door Co. v. United States***, 31 F.R.D. 258 (E.D. Mich. 1962); ***Zacher v. United States***, 227 F.2d 219, 226 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956); ***Clark v. Pearson***, 238 F.Supp. 495, 496 (D.D.C. 1965); and communications made after the decision and designed to explain it, which are not. ***Sterling Drug, Inc. v. FTC***, 450 F.2d 698 (D.C. Cir. 1971); ***GSA v. Benson***, 415 F.2d 878, 881 (9th Cir. 1969); ***Bannercraft Clothing Co. v. Renegotiation Board***, 466 F.2d 345 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974); ***Tennessean Newspapers, Inc. v. FHA***, *supra*. See also S. Rep. No. 1219, 88th Cong., 2d Sess., 7 and 11. This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of post-decisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency and have been held by the lower courts to be

outside the protection of Exemption 5. ***Bannercraft Clothing Co. v. Renegotiation Board***, 466 F.2d at 352; ***Cuneo v. Schlesinger***, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied sub nom*. ***Rosen v. Vaughn***, 415 U.S. 977 (1974); ***Ash Grove Cement Co. v. FTC***, 371 F.Supp. 370 (D.D.C. 1973), *aff'd in part and rev'd in part*, 511 F.2d 815 (D.C. Cir. 1975). Exemption 5, properly construed, calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. 761, 797 (1967); Note, Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harv.L.Rev. 1047 (1973).

This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of 'final opinions,' 'statements of policy and interpretations which have been adopted by the agency,' and 'instructions to staff that affect a member of the public,' 5 U.S.C. s 552(a)(2), represents a strong congressional aversion to 'secret (agency) law,' Davis, supra, at 797; and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.' H.R. Rep. No. 1497, p. 7, U.S.Code Cong. & Admin.News, 1966, p. 2424. We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. s 552(a)(2);

> and with respect at least to 'final opinions,' which not only invariably explain agency action already taken or an agency decision already made, but also constitute 'final dispositions' of matters by an agency, see infra, at 1520-1521, we hold that Exemption 5 can never apply.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-54 (footnotes omitted).

"To invoke the privilege successfully, the government must show that, in 'the context in which the materials are used,' the documents are both predecisional and deliberative. ***Wolfe v. Department of Health & Human Servs.,*** 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). Predecisional documents are 'prepared in order to assist an agency decisionmaker in arriving at his decision.' ***Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,*** 421 U.S. 168, 184 (1975). To satisfy this criterion, the government need not

> identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process ... the line between predecisional documents and postdecisional documents may not always be a bright one.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 nn. 18-19 (1975); *accord* ***Access Reports*** [***v. Dept. of Justice***], 926 F.2d [1192] at 1196 [(D.C. Cir. 1991)](rejecting requirement that government "'pinpoint' a single decision to which the [withheld] memorandum contributed"). ***City of Virginia Beach***, 995 F.2d at 1253.

"Deliberative material 'reflects the give-and-take of the consultative process,' ***Coastal States***, 617 F.2d at 866, by revealing the manner in which the agency evaluates possible alternative policies or outcomes. Thus, the deliberative process exemption protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.' ***Id.***" ***Id***.

"[T]o come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made." ***Vaughn v. Rosen***, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

"FOIA analysis does not end, however, with the determination that documents fall under a specified exemption. 'The focus of the FOIA is information, not documents.' ***Mead Data Central, Inc. v. United States Dep't of Air Force***, 566 F.2d 242, 260 (D.C. Cir. 1977). Thus, the statute requires that '[a]ny reasonably segregable portion of a record shall be provided ... after deletion of the portions which are exempt. . ..' 5 U.S.C. § 552(b)." ***City of Virginia Beach***, 995 F.2d at 1253.

"Initially, all agency documents are available unless specifically exempt." ***United States v. J.B. Williams Co.***, 402 F.Supp. 796 (S.D. N.Y. 1975). "Given the statute's presumption for disclosure, its enumerated exemptions are to be construed narrowly, . . . and the burden of justifying nondisclosure rests squarely upon the government. 5 U.S.C.

§ 552(a)(4)(B)." ***City of Virginia Beach***, 995 F.2d at 1252; ***Ethyl Corp. v. U.S. EPA***, 25 F.3d 1241, 1245 (4th Cir. 1994), both cases citing ***United States Dep't of Justice v. Julian,*** 486 U.S. 1, 8 (1988).

"Intra-agency memoranda from 'subordinate' to 'superior' on an agency ladder are likely to be more 'deliberative' in character than documents emanating from superior to subordinate." ***NLRB v. Sears, Roebuck & Co.,*** 421 U.S. 132, 155 (1975); ***Renegotiation Board v. Grumman Aircraft Engineering Corp.,*** 421 U.S. 168, 184-85 & n. 22 (1975); ***Arthur Andersen & Co. v. IRS,*** 679 F.2d 254, 259 (D.C. Cir. 1982); ***Brinton v. Dept. of State,*** 636 F.2d 600, 605 (D.C. Cir. 1980), *cert. denied,* 452 U.S. 905 (1981); ***Taxation With Representation*** [***Fund v. IRS***], 646 F.2d [666] at 679-81 [(D.C. Cir. 1981)]; ***Coastal States,*** *supra,* 617 F.2d at 868. The converse is equally true." ***Schlefer v. United States***, 702 F.2d 233, 238 (D.C. Cir. 1983).

"[T]he privilege is a qualified one and courts apply a balancing test in determining whether the material at issue merits protection, even if it otherwise falls within the scope of the privilege. The balancing test weighs the benefit of preserving the integrity of internal governmental deliberations against the need for free and open discovery. *See, e.g.,* 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5690 (1992) (noting, for example, that courts have rejected the qualified deliberative process privilege when the government acts as plaintiff in a particular case)." ***F.D.I.C. v. Hatziyannis***, 180 F.R.D. 292, 293 (D. Md. 1998) (Legg, J).

"Because the deliberative process privilege is a qualified privilege, it may be overcome if the party seeking disclosure can demonstrate sufficient need. Courts have

used a four factor test in balancing the deliberative process privilege with the need of the party seeking disclosure: (1) the relevance of the evidence to the lawsuit, (2) the availability of alternative evidence on the same matters, (3) the government's role, if any, in the litigation, and (4) the extent to which disclosure would harm open and frank communication within the agency." ***Scott v. PPG Indus., Inc.***, 142 F.R.D. 291, 294 (N.D. W.Va. 1992), citing ***FTC v. Warner Communications, Inc.,*** 742 F.2d 1156, 1161 (9th Cir. 1984).

Stated differently, "the Privilege offers qualified, not absolute, protection. Thus, once it determines that the Privilege applies, a court must weigh a party's need for discovery against the government agency's need for confidentiality in the matter before it. *See* ***Torres v. C.U.N.Y.,*** 1992 WL 380561, *7 (S.D. N.Y. 1992) (citing ***In re Franklin National Bank Securities Litigation,*** 478 F.Supp. 577, 582 (E.D. N.Y. 1979)). Factors that should be considered include:

(i) the relevance of the evidence sought to be protected;

(ii) the availability of other evidence;

(iii) the "seriousness" of the litigation and the issues involved;

(iv) the role of the government in the litigation; and

(v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

[***Franklin Securities***, 478 F.Supp. at 583]." ***Scott v. Bd. of Educ. of City of E. Orange***, 219 F.R.D. 333, 337 (D. N.J. 2004).

Finally, the Court must agree with the Court in ***Coastal States Gas Corp. v. Dep't of Energy***, 617 F.2d 854, 867 (D.C. Cir. 1980), that "[t]he cases in this area are of limited

help to us, because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process."

The plaintiffs also contend that the defendant waived the deliberative process privilege by selectively providing excerpts from some email exchanges, citing ***United States ex. rel Figueroa v. Covan World-Wide Moving, Inc.***, 2014 WL 5461995 (D. S.C. Oct. 27, 2014). This Court has reviewed the email exchanges in question and found no selective disclosure or "cherry picking." Therefore the rule announced in ***United States v. Jones***, 696 F.2d 1069, 1072 (D.C. Cir. 1982), that "when a party reveals part of a privileged communication to gain an advantage in litigation, the party waives the attorney-client privilege as to all other communications relating to the same subject matter," does not apply.

Plaintiffs also claim the need for the information that overrides the deliberative process privilege. With one exception which will be discussed below, this Court's *in camera* review discloses no documents which would satisfy the test set forth in ***Scott v. PPG Indus., Inc.***, *supra*.

Finally, the plaintiffs claim that as to documents which have been disclosed, the disclosure constitutes a waiver of the privilege as to all documents relating to the same subject. The cases cited by the plaintiffs do not support plaintiffs' claimed entitlement to a subject matter waiver. In support of their argument, the plaintiffs cite a number of cases which state the rule that there is entitlement to a subject matter waiver. These cases, however, did not deal with the deliberative process privilege or executive privilege. ***Flo Pac, LLC v. Nutech, LLC***, 2010 WL 5125447 (D. Md. Dec. 9, 2010) (attorney-client

privilege); ***E.I. DuPont De Nemours & Co. v. Kolon Industries***, 269 F.R.D. 600 (E.D. Va. 2010) (attorney work-product); ***United States v. Jones***, *supra* (attorney-client privilege); ***United States v. Bolander***, 722 F.3d 199 (4th Cir. 2013) (psychotherapist-patient privilege).

The plaintiffs concede that the Fourth Circuit has not specifically ruled upon the waivability of the deliberative process privilege. Other courts have. In ***Commonwealth of Puerto Rico v. United States***, 490 F.3d 50, 66 (1st Cir. 2007), the Court stated that "[c]ourts have held in the context of executive privilege that 'release of a document only waives these privileges for the document or information specifically released, and not for related materials.' ***In re Sealed Case***, 121 F.3d 729, 741 (D.C. Cir. 1997); *see also* ***Smith v. Cromer***, 159 F.3d 875, 880 (4th Cir. 1998) (explaining that 'disclosure of factual information does not effect a waiver of sovereign immunity as to other related matters'). This limited approach to waiver serves important interests in open government by 'ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.' ***In re Sealed Case***, 121 F.3d at 741."

In ***General Electric Co. v. Johnson***, 2006 WL 2616187, *17 (D.D.C. Sept. 12, 2006) (Bates, J), the Court held that "[t]he concept of subject-matter waiver is almost uniquely a function of the attorney-client relationship. There is no authority for applying the waiver rule to the deliberative process privilege. As EPA argues, disclosure of a deliberative document waives the privilege only as to that document, not as to others dealing with the same subject matter."

Similarly, in ***Ford Motor Co. v. United States***, 94 Fed.Cl. 211, 218 (2010), the Court held that "[t]here is no subject-matter waiver associated with the deliberative process privilege. As courts have recognized, '"[t]he concept of subject-matter waiver is almost uniquely a function of the attorney-client relationship. There is no authority for applying the waiver rule to the deliberative process privilege."' ***Blue Lake Forest Prods. v. United States,*** 75 Fed.Cl. 779, 791 n. 21 (2007) (quoting ***Gen. Elec. Co. v. Johnson,*** No. 00-5855, 2006 U.S. Dist. LEXIS 64907, at *55-56 (D.D.C. Sept. 12, 2006)). Thus, the Government's release of a document waives the privilege only for the document specifically released, not for related materials. ***In re Sealed Case,*** 121 F.3d 729, 741 (D.C. Cir. 1997).

This Court finds a significant distinction between the attorney-client, work product, and psychotherapist-patient privileges and the deliberative process privilege, in that with the former there is a client or patient for whom the privilege exists and who is authorized to make a waiver of that privilege. On the other hand, the deliberative process privilege exists for the protection of numerous persons within the Government who may participate in the deliberations. In such case, there is no specific person to make the waiver. Accordngly, this Court finds that there is no subject matter waiver of the deliberative process privilege.

The defendant has argued that the Motion should be denied due to its lateness and due to some stipulation between the parties that was not approved by this Court. This Court finds the Motion to be well-taken, in part, due to the late disclosure of certain emails. The Court will not allow these technical arguments to stand in the way of fair discovery.

Subsequent to this Court's hearing on June 29, 2016, the parties submitted the

documents in question for *in camera* review. Having now conducted and completed, painfully, an *in camera* review of all of the contested documents, this Court finds as follows:

1. This Court concurs with the defendant that the following documents presented for review are predecisional and deliberative and not subject to disclosure:

Tab Number	Bates Begin[1]
01	07865797
02	01951525[2]
05	04619879
06	04689016
07	04689026
08	07046206
09	07046215
10	07864707[3]
11	07864715
12	07864723

[1] This Court will omit the first letters of the Bates number "EPAII."

[2] This document is covered by ***Sierra Club v. U.S. Dept. of Interior*** inasmuch as it contains a discussion on how to "address inquiries regarding [a] speech." 384 F.Supp.2d 1, 23 (D.D.C. 2004), citing ***Judicial Watch v. Reno***, 2001 WL 1902811, *3 (D.D.C. March 31, 2009) (privilege applies with respect to decisions regarding "how to handle press inquiries and other public relations issues").

[3] The redactions in Documents 10 through 17 solely redact personal identifying information.

Tab Number	Bates Begin
13	01059531
14	07865854
15	08517943
16	08517991
17	08517993
18	EPA2730299
19	EPA4862392
20	EPA4863128
21	EPA4863257
22	EPA4863297
23	EPA4863330
24	EPA4863799
25	EPA4863966
26	EPA4879571
28	EPA8509838
29	00899070
30	00899077
31	00899079
32	00899081
33	00899084
34	00899087
35	00899089

Tab Number	Bates Begin
36	01406012
37	01861997
38	01952221
39	01952222
40	02043637
41	02043643
42	02075221
43	02075697
44	02075716
45	02138501
46	04648181
47	04648201
48	04681467
49	04681469
50	04681470
51	04681471
52	07022207
53	07022216
54	07517819
55	07751330
56	07751333
57	07864283

Tab Number	Bates Begin
58	07864286
59	07864288
60	07864290
61	07864292
62	07864294
63	07865319
64	07865429
65	07865432
66	07865795
67	07869860
68	07869861
69	07869869
70	07871240
71	07872543
72	07872545
73	07872555
74	07872564
75	07872565
76	07872567
78	07872571
79	07872603
80	07872605

Tab Number	Bates Begin
81	07872615
82	07872616
83	08506866
84	08511214
85	08516971
86	08521312
87	08535925
88	12914274
89	12914438

The Court finds that the following documents must be produced in whole or in part:

Tab Number	Bates Begin	
03	01951527	Produce the portion of the email beginning "We may want to supply . . ." and produce that portion beginning "Can we try to get . . .." These comments are not predecisional, but rather are aimed at explaining or protecting a previously made decision.
04	02037151	Produce the portion of the email beginning "We're going to need to do it . . .." This comment is not predecisional. Rather it announces a decision that Ms. McCarthy has made.

27	EPA4882124	This Court directs that the entire document entitled "Guidelines for Preparing Economic Analysis" be produced under the balancing test described in ***Scott v. PPG Indus., Inc.***, 142 F.R.D. 291, 294 (N.D. W.Va. 1992). The document is highly relevant to the issues presented, especially the portion found at pp. 9-11, to the effect that employment impacts should not be included in a benefit-cost analysis; the Court is not aware of the availability of alternative evidence on the same matters; the Government has a large role in the litigation as the defendant; and the disclosure would in no way harm open and frank communication within the agency.
77	07872569	Produce that portion beginning "And for what it's worth" through the entire Markell "note." The contents of the email from a non-Governmental person are neither predecisional nor deliberative.

There also is controversy surrounding additional documents which were provided to plaintiffs in redacted form. These documents, in redacted form, are found in CM/ECF as Documents 226-18 through 226-35. The unredacted versions were provided to the Court by the defendant. Where a portion of an email is required to be produced, this Court will only order it produced once, rather than each time it appears in the email chain. The

following need not be produced:

Letter (as provided to the Court)	CM/ECF No.
C	226-24
E	226-30
F	226-31
H	226-18
I	226-28
K	226-33
L	226-35
M	226-34
O	226-20
P	226-21

The Court finds that the following documents must be produced in whole or in part:

A	226-22	Produce portion beginning "The reason we do an analysis" through "which is a good thing." Recites facts, not deliberations.
B	226-23	Produce portion beginning "Our economic guidelines" through "never stopped doing it." Recites facts, not deliberations.
D	226-29	Produce entire email. Contains a directive and facts.
G	226-19	Produce paragraph beginning "Al, last

		week . . ..” Contains a decision.
J	226-32	Produce from “Please note . . .” through “refining the analysis.”
N	?	Produce entire email from Donnalee Jones to Sharon Nizich, et al.

With respect to the plaintiffs’ request that this Court compel production of documents containing directives and decisions responsive to plaintiffs’ discovery requests, the defendant is or should already be aware of her obligations. In the absence of some more concrete issues, there is nothing for the Court to rule upon. In addition, it is simply too late in the process for some generalized order.

This Court will permit the continued depositions of defendant’s Rule 30(b)(6) witness, James DeMocker, and Albert McGartland, due to the late production of documents.

For the reasons stated above, Plaintiffs’ Motion for In Camera Review, to Compel Production of Documents, and to Permit Depositions [**Doc. 223 & 226**] is **GRANTED IN PART AND DENIED IN PART**.

The defendant is directed to produce the documents required to be produced under this Order within ten (10) days of the entry of this Order;

The plaintiffs are authorized to take the continued depositions of defendant’s Rule 30(b)(6) witness, James DeMocker, and Albert McGartland;

The plaintiffs shall file their response to the Motion for Summary Judgment [Doc. 204] on or before August 19, 2016. The defendant shall file her reply memorandum on or

before September 9, 2016.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record herein.

DATED: July 20, 2016.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE