**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **MARK CUBAN,** | |
| **Plaintiff,** | |
| **vs.** | **Case No. 1:09-cv-00996 (RWB)** |
| | **Judge Reggie B. Walton** |
| **SECURITIES AND EXCHANGE COMMISSION,** | |
| **Defendant.** | |

**PLAINTIFF'S REPLY TO DEFENDANT**
**SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO**
**PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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**ORAL ARGUMENT REQUESTED**

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## PRELIMINARY STATEMENT

The SEC's latest submission shows that it continues to ignore its statutory Freedom of Information Act ("FOIA") and Privacy Act obligations, as well as the President's January 21, 2009 Memorandum (the "Memorandum")[1] directing "[a]ll agencies" to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." Instead of applying the presumption of disclosure required by FOIA and the Memorandum, the SEC has consistently applied a presumption of *nondisclosure* with regard to Mr. Cuban's requests. The SEC continues to assert specious, overbroad, and factually unsupported claims of exemption and privilege, and even refuses to comply with its obligation to disclose non-exempt portions of allegedly exempt information.

The SEC appears determined to disclose no information to Mr. Cuban, despite its clear obligation to do so under FOIA and the Privacy Act, until it is forced to do so by judicial mandate. After Mr. Cuban submitted his requests to the SEC in December 2008, the SEC failed to provide timely responses, and to date has produced just two heavily redacted emails in response to the requests. The SEC has withheld hundreds or perhaps thousands of pages of responsive records, and refuses to even begin processing 107 boxes of potentially responsive documents. The SEC's blatant noncompliance and intransigence should not be condoned, and it should be ordered to comply with its statutory obligation to disclose the requested information to Mr. Cuban.

## ARGUMENT

In its latest submission, the SEC presents the Court with a "redo" of various arguments, declarations and the *Vaughn* Index it initially presented in its motion for partial summary

[1] "Memorandum for the Heads of Executive Departments and Agencies" dated January 21, 2009, *available at http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/*.

judgment. Yet these "new and improved" contentions and documents fail to remedy the infirmities inherent in the SEC's motion.

For instance, the SEC entirely fails to address whether any non-exempt portions of the records it is withholding should be released, rendering the withholding of these documents improper. As to those FOIA requests for which the SEC claimed it could not conduct an adequate search, the SEC failed to properly notify Mr. Cuban of his appeal rights. Moreover, its newly unveiled and contradictory position that it *has* conducted an adequate search is untimely and insufficient.

The SEC also still does not make a sufficient showing with respect to its assertion of FOIA Exemptions 2, 6, 7(A) and 7(C) to withhold records, and the SEC's revised declarations do not cure this deficiency. The SEC's revised *Vaughn* Index is similarly deficient, and cannot support the SEC's decision to withhold the records listed therein. The revised *Vaughn* Index and the SEC's contentions and supporting declarations do not establish a valid basis for asserting the attorney-client privilege, attorney work product, or the deliberative process privilege.

Finally, with regard to the Privacy Act, the SEC waived its blanket exemption by failing to abide by its own regulations. Indeed, the SEC entirely ignored Mr. Cuban's Privacy Act requests until well after this litigation was filed.

## I. The SEC Still Fails to Address Whether Any Non-Exempt Portions of the Withheld Records Should Be Released

In the SEC's reply in support of its partial summary judgment motion and response to Mr. Cuban's cross-motion ("Reply"), the SEC neglects to even mention whether any non-exempt portions of the records it is withholding should be released. This omission is significant, because in every FOIA case, the district court must make an express finding on the issue of segregability. *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007); *Rugiero v. DOJ*, 257 F.3d 534, 553 (6th

Cir. 2001). Yet the SEC completely ignores the statutory requirement that it release non-exempt portions of withheld records, and has made no showing that all the withheld records are exempt.

In a FOIA action, the focus is on the information sought, not the documents themselves. *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (citing *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The withholding of an entire document by an agency is not justifiable simply because some of the material therein is subject to an exemption. *Rugiero*, 257 F.3d at 553. Rather, non-exempt portions of documents must be disclosed unless they are "inextricably intertwined" with exempt portions. *Mead Data Cent.*, 566 F.2d at 260. Effectively, each document consists of "discrete units of information," all of which must fall within a statutory exemption in order for the entire document to be withheld. *Billington v. DOJ*, 233 F.3d 581, 586 (D.C. Cir. 2000).

The agency has the burden to show that the exempt portions of the documents are not segregable from the non-exempt material. *Davin v. DOJ*, 60 F.3d 1043, 1052 (3d Cir. 1995). If the agency's justification is inadequate, the district court may require an agency to submit a more specific affidavit. *See PHE, Inc. v. DOJ*, 983 F.2d 248, 253 (D.C. Cir. 1993). The agency's justification must be relatively detailed, correlating specific parts of the requested documents with the basis for the applicable exemption. *Schiller*, 964 F.2d at 1209-10 (citing *Schwartz v. IRS*, 511 F.2d 1303, 1306 (D.C. Cir. 1975) and *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987)). The requisite specificity of an affidavit and the reasonableness of segregation are dependent upon the proportion and distribution of non-exempt information in a given document:

> For example, if only ten percent of the material is non-exempt and it is interspersed line-by-line throughout the document, an agency claim that it is not reasonably segregable because the cost of line-by-line analysis would be high and

> the result would be an essentially meaningless set of words and phrases might be accepted. On the other extreme, if a large proportion of the information in a document is non-exempt, and it is distributed in logically related groupings, the courts should require a high standard of proof for an agency claim that the burden of separation justifies nondisclosure or that disclosure of the non-exempt material would indirectly reveal the exempt information.

*Mead Data Cent.*, 566 F.2d at 261. This detailed explanation and justification should allow the district court to conduct its review in open court, preserving the adversarial nature of the process and avoiding an undesirable, in camera line-by-line analysis. *Id*.

Here, the SEC has made no showing and produced no evidence concerning segregability or whether any portions of the withheld records are non-exempt. Plaintiff is therefore entitled to summary judgment that the withheld records are not exempt from disclosure and must be produced. Alternatively, the SEC should be ordered to undertake expeditiously the required review of the withheld records and produce evidence concerning whether each record withheld contains any reasonably segregable releasable portions.

## II. Plaintiff's Administrative Remedies Were Constructively Exhausted by the SEC's Failure to Notify Plaintiff of His Appeal Rights Regarding Certain Requests

The SEC did not notify Plaintiff of his right to appeal FOIA Letter Request Nos. 7, 11, 12, and 13.[2] The SEC only notified Mr. Cuban of the right to appeal (1) "the adequacy of [the SEC's] search" and (2) its "finding of no responsive information." (*See* Declaration of Margaret Celia Winter ("Winter Decl."), Exhibit 1 to the SEC's Motion for Partial Summary Judgment, at Att. C.) The SEC did not notify Mr. Cuban that he could appeal the SEC's refusal to search for certain records or its claim that it had "no means to conduct a reasonable search" (the SEC's sole response to Request Letter Nos. 7, 11, 12, and 13). This specific, limiting language is not, as the SEC would have it, a mere failure to use "magic words" (SEC Reply at 2), and Plaintiff never

[2] The SEC correctly notes that Plaintiff appealed the other FOIA requests addressed in the FOIA Office's January 30, 2009 letter. This is indicative of only one thing: that Plaintiff appealed the determinations for which the SEC properly notified Plaintiff of his appeal rights, unlike the requests at issue here.

contended that "magic words" were necessary for a proper notification of appeal rights. Here, the SEC's deliberate choice of words excluded from Plaintiff's appeal rights those records for which no search was conducted. The SEC should not now be heard to complain that Plaintiff should have known what the SEC *really* meant by its limited expression of appeal rights.[3]

In short, the SEC's notice of appeal rights was inadequate to inform Mr. Cuban that he could appeal *any* "adverse decision" (the statutory standard) to the SEC's General Counsel. Accordingly, because the SEC failed to adequately notify Plaintiff of the right to appeal the agency's determinations regarding Request Letter Nos. 7, 11, 12, and 13, he was entitled to file suit without the necessity of an administrative appeal regarding those requests.[4] *See Ruotolo v. DOJ*, 53 F.3d 4, 9 (2d Cir. 1995) (agency's FOIA response did not notify requesters of appeal rights and the requesters were thus deemed to have exhausted their administrative remedies); *Dinsio v. FBI*, 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (same).

Apparently recognizing the weakness of its position, the SEC now attempts to change the record.[5] The SEC submits with its Reply a Supplemental Winter Declaration ("Supp. Winter

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[3] The SEC cites *Kay v. FCC*, 884 F. Supp. 1, 2-3 (D.D.C. 1995) for the proposition that "[s]o long as a notice of appeal rights is given by the agency to the FOIA requester, notice is proper. There is no set of 'magic words' that the agency must employ in giving such notice." (SEC Reply at 2.) However, *Kay* is inapposite, and the SEC's description of *Kay*'s holding is inaccurate and misleading. In *Kay*, the only question before the court was whether an agency's notice of the right to appeal under FOIA "must specifically refer to the head of the agency" rather than the agency's general counsel in order to trigger the actual exhaustion of administrative remedies requirement. *Kay*, 884 F. Supp. at 2. Although the court overruled that argument, it did not, as the SEC misconstrues the holding, eliminate the agency's burden to adequately notify a FOIA requestor of the right to appeal "any adverse determination" as required by 5 U.S.C. § 552(a)(6)(A)(i). Nor did the court hold that any notice of appeal – however poorly worded – is sufficient to trigger the actual exhaustion of administrative remedies requirement. *Kay* simply held that an agency's notification of a right to appeal to the agency's general counsel rather than "the head of the agency" complied with FOIA. *Id*.

[4] The SEC's motion for partial summary judgment specifically requested dismissal of Plaintiff's claims regarding FOIA Letter Request Nos. 7, 11, 12, and 13 under Rule 12(b)(6), which, as Plaintiff noted in his Opposition (at 7 n.8) (and which the SEC now concedes), is untimely and must be denied. The SEC's motion did not request summary judgment under Rule 56 for these claims and did not suggest any other basis to support its request for dismissal. In its Reply, the SEC now belatedly suggests that Plaintiff's claims should be dismissed under Rule 12(c). (SEC Reply at 3 n. 3.) Courts "highly disfavor" parties creating new arguments at the reply stage. *Wright v. Metro. Life Ins. Co*., 618 F. Supp. 2d 43, 47 (D.D.C. 2009) (Walton, J.). The SEC should not be allowed to raise this new argument for the first time in a reply brief.

[5] In a transparent attempt at misdirection, the SEC also argues that Plaintiff should have "reformulated" the requests at issue. (SEC Reply at 3.) FOIA does not require a requester to "reformulate" a FOIA request at the agency's

Decl."), which contains inadmissible hearsay from an incompetent witness concerning an alleged (and irrelevant) telephone conversation with Plaintiff's counsel. (Supp. Winter Decl. ¶ 12.) Aside from the fact that it is an attempt to introduce the SEC's own alleged and self-serving out-of-court statements, Ms. Winter, the declarant, does not even pretend to have first-hand knowledge of this alleged telephone conversation. This feeble attempt to distort the record should be struck and not considered as summary judgment evidence. Moreover, because FOIA does not obligate a requester to tell the agency how or where to search for responsive records, it is irrelevant whether or not the SEC sought Plaintiff's guidance in searching for responsive records. Plaintiff's FOIA requests sufficiently identified the categories of records sought to enable the SEC to respond to the requests, which triggered the SEC's obligation to conduct a reasonable search and make the required response to Plaintiff. Further, the SEC's failure to timely respond to Plaintiff's requests (*see* Winter Decl. at Att. C (SEC response dated January 30, 2009)), combined with its clear failure to adequately notify Plaintiff of his appellate rights concerning those requests as required by 5 U.S.C. § 552(a)(6)(A)(i), is more than sufficient to merit constructive exhaustion of Plaintiff's administrative remedies. *See Ruotolo*, 53 F.3d at 9; *Dinsio*, 445 F. Supp. 2d at 311.

## III. The SEC's Belated Claim That it Conducted an Adequate Search Is Unavailing

The SEC repeatedly asserted in its FOIA response, appeal, and motion for partial summary judgment that it had no reasonable means to conduct a search for records responsive to FOIA Letter Request Nos. 7, 11, 12, and 13. Yet now, inexplicably, the SEC reverses itself to suddenly claim that it *did* conduct a search for records in response to FOIA Letter Request Nos. 7, 11, 12, and 13 and found no documents.

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behest, and this argument has no bearing on the SEC's statutory obligation to properly notify a FOIA requester of his appeal rights.

On a motion for summary judgment, "the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). With respect to FOIA Letter Request Nos. 7, 11, 12, and 13, the SEC has failed to meet that burden. It filed no declarations with its motion "indicating that the agency [had] conducted a thorough search and giving reasonably detailed explanations" regarding FOIA Letter Request Nos. 7, 11, 12, and 13. *Id*. (citing *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993)).

The SEC's newly-minted claim that it conducted a search, after claiming for more than a year that it had no means to conduct a reasonable search, lacks credibility and belies the SEC's assertions of good faith, which should warrant summary judgment for Mr. Cuban on this issue. *See Triestman v. DOJ*, 878 F. Supp. 667, 672 (S.D.N.Y. 1995) (presumption of good faith of agency affidavits is rebuttable).

Furthermore, the SEC's new supporting declarations, such as the Lenox Declaration, are conclusory and lack detail, and thus are insufficient to carry its burden. *See, e.g., SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (supporting declarations must be "relatively detailed and non-conclusory"). A satisfactory agency declaration should "'describe at least generally the structure of the agency's file system which makes further search difficult.'" *Maynard*, 986 F.2d at 559-60 (quoting *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986) (Scalia, J.)). Here, the Lenox Declaration does not even bother to state how the records are stored, e.g., on paper or electronically, and gives no other details about how the records are kept. If the reason the SEC gathers information on the securities trading of its employees is to monitor for potential abuses, then logic requires that the information be stored so that the SEC can make use of the data for that purpose. It is apparent from this new information in the SEC's Reply that it is not Plaintiff's FOIA requests that raise the specter of an "overly

burdensome and unreasonable search," but the fact that the SEC has apparently chosen to retain the information it gathers on its employees' securities trades in a very inefficient manner.[6]

The SEC's shifting claims establish that it made no effort to conduct a reasonable search or to investigate obvious leads to locate responsive documents, and its failure to do either of those things is further evidence of its bad faith with respect to its search obligations. Accordingly, because the SEC's evidence does not establish that it conducted an adequate search, Mr. Cuban, not the SEC, is entitled to summary judgment.[7]

## IV. Plaintiff Is Entitled to Summary Judgment on the SEC's Exemption 2 Claims

Exemption 2 is inapplicable to the "matters under investigation" ("MUI") forms withheld by the SEC. Records are not exempt unless they are "related solely to the internal personnel rules and practices of an agency," and these records contain valuable information of genuine public interest. 5 U.S.C. § 552 (b)(2); *see also Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (Exemption 2 distinguishes between trivial matters and matters "which might be the subject of legitimate public interest."). In fact, these records, which establish the dates an investigation was opened or closed, are exactly the kind of information Plaintiff sought by certain of his FOIA requests, thus rebutting the SEC's argument the material is of no genuine public interest.[8]

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[6] As for the SEC's new contention that it is "not feasible" to conduct searches for employees' trades in a specific security, Plaintiff notes that the SEC never notified Plaintiff that *any* search option was available for these records.

[7] *See Founding Church of Scientology of D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979) (Where the record reveals "positive indications of overlooked materials," or otherwise contains evidence refuting the government's claim that it conducted a complete search for responsive information, the government is not entitled to summary judgment).

[8] Courts use a two-step process to evaluate Exemption 2 claims. "First, the material withheld should fall within the terms of the statutory language." *Founding Church of Scientology*, 721 F.2d at 830 n.4. *Crooker* framed the initial test as one of "predominant internality." *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981). Second, the agency may defeat disclosure by proving that either "disclosure may risk circumvention of agency regulation," or "the material relates to trivial administrative matters of no genuine public interest." *Founding Church of Scientology*, 721 F.2d at 830.

The SEC's reliance upon *Schwaner v. Department of the Air Force*, 898 F.2d 793, 796, 799 (D.C. Cir. 1990) is misplaced. In *Schwaner*, the court held that the information withheld by the government in that case did not relate to purely internal rules and practices and thus did not fall under Exemption 2. Likewise, the information withheld by the SEC in this case is not "predominantly internal" because it contains information or details about particular agency activities involving the public, such as when or if the SEC opened and closed a particular investigation. Such information is a matter of genuine public interest because it sheds light on how the SEC conducts its activities or carries out its statutory responsibilities.[9] Exemption 2 is thus not applicable.

In addition to applying the "predominant internality" test, courts must also determine whether the material withheld constitutes "rules and practices" or is "related" to "rules and practices." *Schwaner*, 898 F.2d at 795. Here, the only "rule or practice" to which the withheld material relates is to the SEC's practice of collecting the data. Just as in *Schwaner*, such information does not qualify for Exemption 2 protection.

The SEC's Hall Declaration states the obvious when it points out that the withheld MUI files are not publicly available. The fact that a record is "not publicly available" is a reason to *require* its disclosure under FOIA, not a reason to withhold it, and the fact that the files are not considered "publicly available" cannot be a valid reason for the SEC's refusal to comply with FOIA. Moreover, the statement in the Hall Declaration illustrates the SEC's critical misunderstanding of Exemption 2.

The important factor in deciding the applicability of Exemption 2 is not that a document is simply "internal" (because if it were, almost every record that was not publicly filed would fall

[9] *See DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772, 109 S. Ct. 1468, 1480 (1989) ("the basic purpose of the Freedom of Information Act [is] 'to open agency action to the light of public scrutiny'") (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372, 96 S. Ct. 1592, 1604 (1976)).

into the SEC's Exemption 2 trap). Rather, it is the fact that the record predominately relates to "internal *personnel rules and practices*." In other words, the word "internal" only modifies "internal personnel rules and practices," and cannot be read alone as the SEC implies. *See Rose*, 425 U.S. at 362, 96 S. Ct. at 1600.

The SEC also argues that the withheld MUI files are "not of public interest just because Cuban wants to see them." In *Reporters Committee for Freedom of the Press*, the Court reaffirmed that "the basic purpose of the Freedom of Information Act [is] 'to open agency action to the light of public scrutiny.'" *Id*., 489 U.S. at 772, 109 S. Ct. at 1481. The Court went on to link that purpose to a public interest analysis, holding that the public interest in information sought under FOIA must be within "the ambit of the public interest that the FOIA was enacted to serve." *Id*., 489 U.S. at 775, 109 S. Ct. at 1483. Whether information sought under FOIA is a matter of genuine public interest will depend on whether the request serves FOIA's core purposes, i.e., "to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *Id*. In essence, the question is whether the information sought would improve the public's understanding of the way in which government operates. Here, Mr. Cuban is a member of the public and has an interest in knowing when the SEC began investigating him, and it serves the public interest to know the manner in which the SEC conducts investigations, not merely the substance of those investigations. Because the withheld records clearly relate to how the SEC conducts its activities and uses its resources, the information does not meet the requirements of Exemption 2 and must be released.

The SEC further argues that "[s]imilar Commission MUI files were recently ruled to be protected by FOIA Exemption 2" in *Gavin v. SEC*, No. 04-4522, 2007 WL 2454156, at *6 (D. Minn. Aug 23, 2007). (SEC Reply at 6.) However, *Gavin* undercuts the SEC's argument entirely and militates in favor of release. In *Gavin*, the SEC *produced* those "similar

Commission MUI files" to the FOIA requester. The dispute in *Gavin* over the MUI files only concerned the information that the SEC redacted prior to producing those MUI files. The court in *Gavin* held that the redactions of staff names and assignment dates was appropriate, but did not find (as the SEC implies) that the MUI files were completely immune from disclosure under Exemption 2. *Id.* That the SEC released substantially similar documents in another FOIA case defeats the SEC's argument that the MUI files are "of no genuine public interest," and highlights the SEC's failure to comply with its FOIA obligation to produce non-exempt portions of records also containing exempt information.

## V. The SEC's Revised *Vaughn* Index Is Inadequate

The SEC's Revised *Vaughn* Index is not only untimely, but it does nothing to correct the deficiencies of its original *Vaughn* Index. Instead of describing the documents and basis for the claimed exemption in more detail, which might allow Plaintiff and the Court to determine whether the documents met the criteria for exemption, the SEC merely added conclusory, non-descriptive statements to certain entries, for example, "deliberations" or "legal advice and guidance on." These boilerplate, conclusory declarations are inadequate to show that the claimed exemption applies to the withheld records. *See Miller v. U.S. Dep't of Agric.*, 13 F.3d 260, 263 (8th Cir. 1993) (government's "boilerplate, conclusory affidavits" inadequate to support exemption).

A *Vaughn* Index must "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *King*, 830 F.2d at 218. The requester and the trial judge must "be able to derive from the [*Vaughn*] index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 34 (D.D.C. 2000) (quoting *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir.1994)). A *Vaughn* Index should

describe the documents with "as much information as possible without thwarting the exemption's purpose." *King*, 830 F.2d at 224. Moreover, a *Vaughn* Index must provide "a relatively detailed justification, *specifically identifying the reasons* why a particular exemption is relevant and *correlating those claims with the particular part of a withheld document* to which they apply." *Mead Data Cent.*, 566 F.2d at 251 (emphasis added). In *Founding Church of Scientology*, the D.C. Circuit emphasized that the index must adequately describe the withheld documents or deletions, state the particular FOIA exemption, and explain why the exemption applies. 603 F.2d at 949. Finally, the index should also note if the agency has segregated any disclosable information from each withheld document. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973).

The SEC's Revised *Vaughn* Index provides no more information than did its grossly inadequate original *Vaughn* Index. Adding additional boilerplate terms does nothing to assist the Court in determining whether Exemption 5 applies. Instead, the SEC should have provided detailed descriptions of the withheld records and detailed explanations of exactly how the information falls under the claimed exemption. It did not, presumably because the SEC understands that more detailed descriptions would reveal that the documents should be disclosed.

**A. Attorney-Client Privilege**

The SEC has submitted two supplemental declarations (the Supplemental Pinansky Declaration and Supplemental Tyler Declaration) in an attempt to shore up its inadequate attorney-client privilege claims. Both supplemental declarations are deficient. These declarations, like their predecessors, are conclusory and lack sufficient detail to allow Plaintiff or the Court to determine whether the attorney-client privilege applies to each withheld record. Both supplemental declarations also make it clear that the SEC applies the wrong standard to determine the existence of attorney-client privilege, and that both Mr. Pinansky and Ms. Tyler

lack personal knowledge to aver whether the attorney-client privilege applies to each withheld record.

For example, both the Supplemental Pinansky Declaration and Supplemental Tyler Declaration contain the statement ( ¶ 3) "I have no information that would lead me to believe that the documents withheld under Exemption 5 were released outside the Commission," which shows that both Mr. Pinansky and Ms. Tyler lack personal knowledge of whether each document claimed to be privileged was in fact kept confidential, and both Mr. Pinansky and Ms. Tyler are thus incompetent to testify whether the attorney-client privilege applies to each withheld document. Moreover, both Mr. Pinansky and Ms. Tyler apply the wrong standard; as discussed below, the applicable standard is not whether the document was "released outside the Commission," but whether it was kept confidential *within* the SEC.

To demonstrate that the attorney–client privilege justifies withholding, the agency must establish that the information in the records was communicated (1) to or by an attorney (2) as part of a professional relationship (3) in order to provide the agency with advice on the legal ramifications of its actions. *Mead Data Cent.*, 566 F.2d at 254. In addition, the agency *must show* that the information is confidential, which means there must be confidentiality both at the time of the communication in question and since that time. *Id.* Such confidentiality requires limited access to the documents *within the agency itself. Canadian Javelin, Ltd. v. SEC*, 501 F. Supp. 898, 902 (D.D.C. 1980). The burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 863 (D.C. Cir. 1980).

To prove the continued confidential nature of the documents, the agency must "demonstrate that the documents, and therefore the confidential information contained therein,

were circulated no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.'" *Id*. (quoting *Mead Data Cent.*, 566 F.2d at 253 n.24). If the communication was shared with third parties, the privilege is lost. *Mead Data Cent.*, 566 F.2d at 254. Furthermore, documents based on facts acquired from outside persons and sources are not covered by the exemption. *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980).

The confidentiality requirement for the attorney-client privilege in the D.C. Circuit is not satisfied merely because the party invoking the privilege intended the overall communication to be private. *Eugene Burger Mgmt. Corp. v. U.S. Dep't of Hous. & Urban Dev*., 192 F.R.D. 1, 5 (D.D.C. 1999). Rather, the privilege "protects the communications made by the attorney to the client only insofar as the attorney's communications disclose confidential communications from the client." *Id*. at 5. "As the claimant of the privilege, [Defendants] must demonstrate with 'reasonable certainty . . . that the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure.'" *Alexander v. FBI*, 193 F.R.D. 1, 5 (D.D.C. 2000) (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)). This is the only interpretation of the confidentiality requirement that squares with the D.C. Circuit's emphatic statement: "the attorney-client privilege must be strictly confined within the narrowest possible limits." *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) (internal quotation omitted). The conclusory and vague statements contained in the SEC's declarations and Vaughn Index provide no insight as to whether each communication meets this standard of confidential disclosure. Even if some emails or portions of emails are subject to the attorney-client privilege, there is no way for the Court to know from the SEC's evidence whether the withheld emails contain other, non-privileged email chains or information that was not originally confidential communication for the purpose of obtaining legal advice.

### B. Attorney Work Product

The SEC's Revised *Vaughn* Index and Supplemental Pinansky Declaration also fail to remedy the gross inadequacies of the SEC's original *Vaughn* Index and declarations with respect to the SEC's claims of attorney-work product. As with the SEC's original submissions, they lack the specificity needed to permit Plaintiff and the Court to distinguish between those materials which were generated as a matter of ordinary business (such as whenever an employee disciplinary process is initiated) and those materials which were prepared at the specific direction of legal counsel in contemplation of litigation. *See, e.g.*, *Onwuka v. Fed. Express Corp*., 178 F.R.D. 508, 515 (D. Minn. 1997) (finding employer's claim of work product protection for all documents prepared in disciplinary investigation was overbroad and lacked required specificity). "In the corporate setting, all documents which are generated in the ordinary course of business hold some potential for serving as evidence in some future litigation. As a consequence, to allow legal counsel to promulgate a corporate policy, which would insulate the records of an internal investigation from discovery-no matter what their source or purpose-would expand the [work product] protections of Rule 26(b)(3), beyond their intended bounds." *Id*.

The D.C. Circuit has articulated the "testing question" for the work product privilege as "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting *Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987)). If so, and if the document embodies the mental impressions and thoughts of the attorney, then discovery of that document should generally be denied. *In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997). But if the documents are prepared by lawyers "in the ordinary course of business or for other nonlitigation purposes," the work product privilege is not applicable. *In re Sealed Case*, 146 F.3d at 887 (citations omitted).

If opinions and theories about the litigation are only part of a document that is otherwise discoverable, the court may require production of a redacted copy. *Nat'l Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc*., 967 F.2d 980, 985 (4th Cir. 1992).

The SEC cannot be allowed to make a blanket claim of work product protection for all records which have any connection to an employee disciplinary matter. To qualify as attorney work product, each document must have been prepared by an attorney, or at the specific direction of an attorney, and in anticipation of litigation. As the SEC has produced no emails concerning the alleged personnel matter that is the subject of the withheld emails and records, the SEC's assertion that the entirety of those materials was prepared "by OGC attorneys or . . . at the direction of these OGC attorneys in anticipation of litigation" defies logic and belief. (SEC Reply at 8.) One would have to believe that the very first email from a supervisor to Human Resources was not only "in anticipation of litigation" but "prepared . . . at the direction of . . . OGC attorneys," even though no OGC attorneys could have possibly been involved at that point. It is abundantly clear that the SEC is attempting to shield records which were "'prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Me. v. U.S. Dep't of Interior*, 298 F.3d 60, 70 (1st Cir. 2002) (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir.1998)). Moreover, as the SEC admits, these records involved an employee disciplinary matter – so the SEC's claim that every record withheld regarding this matter was prepared by or at the direction of an attorney in anticipation of litigation is simply not credible.

"Where . . . lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim represents just one factor that courts should consider in determining whether the work-product privilege applies." *In re Sealed Case*, 146 F.3d at 887. "In some cases, [however], the absence of a specific claim will suggest that the lawyer had not

prepared the materials 'in anticipation of litigation.'" *Id.* Notably, the SEC has identified no litigation between it and the employee who was the subject of the disciplinary matter. Documents that appear to have been created for some other purpose than to assist in reasonably foreseeable litigation are not properly withheld as work product. *Gen. Elec. Co. v. Johnson*, No. CV-00-2285, 2006 WL 2616187, at *13 (D.D.C. Sept. 12, 2006). Here, the documents were likely not created because of any reasonably foreseeable litigation, but as part of the routine resolution of an employee disciplinary issue. Therefore, the work product doctrine does not apply to these records.

**C. Deliberative Process Privilege**

Just as with the attorney-client privilege and work product claims, the Supplemental Pinansky Declaration and Revised *Vaughn* Index are conclusory and lack the necessary detail to allow Plaintiff or the Court to determine whether each document withheld subject to the deliberative process privilege is predecisional, deliberative, or otherwise qualifies for the claimed exemption. The Supplemental Pinansky Declaration also contains speculatory and unsubstantiated conclusions about the alleged "chilling effect" if any of the withheld documents were released, and whether individuals could nevertheless be identified even if personal identifying information were redacted from the documents. (*Id.* ¶¶ 6-7.) None of the Revised *Vaughn* Index entries contain sufficient detail to determine whether the deliberative process privilege applies. Furthermore, the SEC seems to have made no effort at all to determine whether any of the withheld records contain segregable factual information.

The deliberative process privilege is not nearly as broad as the SEC asserts here. The SEC invokes the deliberative process privilege here to cover a routine personnel matter, but the deliberative process privilege does not extend to recommendations regarding particular personnel matters. *See Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 163 (D.D.C. 2003). The

deliberative process privilege "should be invoked only in the context of communications designed to directly contribute to the formulation of important public policy." *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995) (emphasis added).[10] In *Soto*, the court determined that "[b]oth the internal affairs investigations as well as the records of witness/police officer statements are of the type that would be routinely generated by Defendants," making the deliberative process privilege *not* applicable. *Soto*, 162 F.R.D. at 612-13. Records concerning the proposed discipline of an SEC employee are likewise not exempt from disclosure by the deliberative process privilege.

## VI. Plaintiff Is Entitled to Summary Judgment on the SEC's Exemption 6 Claims

The SEC simply has not shown that disclosure of the information at issue would "constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Moreover, the SEC's suggestion that the naming of a specific employee in the circumstances present here improperly invades personal privacy creates a Catch-22, because if Mr. Cuban had *not* provided the name of the employee, the agency undoubtedly would have claimed the request was overbroad, and that it would be too burdensome to conduct a search. Finally, the SEC again fails to address whether any non-exempt information is segregable from the remainder of the records withheld. The SEC thus fails to meet its burden under FOIA, and Plaintiff is entitled to summary judgment ordering the release of the withheld records.

## VII. Plaintiff Is Entitled to Summary Judgment on the SEC's Exemption 7(C) Claims

### A. Documents Nos. 9, 16, 17, and 18

According to the SEC's Revised *Vaughn* Index, Document Nos. 9, 16, 17, and 18 are records of *internal* SEC investigations into whether an agency employee violated agency

[10] *See also Scott v. Bd. of Educ. of the City of East Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004) ("The Privilege is properly limited to 'communications relating to policy formulation at the higher levels of government; it does not operate indiscriminately to shield all decision-making by public officials.'") (citation omitted).

regulations. The SEC has therefore not shown that these documents were compiled for law enforcement purposes. It merely asserts that, because the Inspector General ("OIG") conducted an investigation, the documents responsive to Plaintiff's FOIA requests were compiled for law enforcement purposes. The SEC's assertion of a law enforcement purpose, however, does not comport with the record in this case. Although the OIG has the ability to conduct investigations as part of the prosecution of a civil or criminal violation, the OIG also investigates internal matters concerning agency inefficiency and mismanagement. Just as in *Cotton v. Adams*, 798 F. Supp. 22, 25 (D.D.C. 1992) (a case on which the SEC relies), the investigation to which these documents pertain only involves an alleged violation of the SEC's own rules. *Id.*[11] Therefore, the fact that the OIG conducted an investigation, without more, does not allow the Court to infer that the investigation had a law enforcement purpose and Exemption 7(C) does not apply.

Furthermore, Document Nos. 9, 16, 17, and 18, which are internal SEC emails created long before the alleged OIG investigation began, were not generated in connection with any law enforcement investigation. The SEC's Exemption 7(C) claim is therefore a ruse as to these documents – i.e., an attempt to cover up a mere personnel matter by claiming it is a law enforcement matter. The fact that old internal emails, which were not created for a law enforcement purpose, were later forwarded to the OIG as evidence for an investigation does not magically make the entire email chain a law enforcement record.

**B. Documents Nos. 78, 79 and 80**

The SEC blatantly misrepresents Plaintiff's position with regard to Documents Nos. 78, 79, and 80 when it claims that "Plaintiff concedes that Exemption 7(C) protects the names of Commission staff." (SEC Reply at 13.) Plaintiff made no such concession, and explicitly stated

[11] *See also Greenpeace, U.S.A., Inc. v. EPA*, 735 F. Supp. 13, 15 (D.D.C. 1990) (records pertaining to whether an EPA employee violated EPA regulations concerning appearances at industry-sponsored functions do not qualify as records compiled for law enforcement purposes under Exemption 7).

the opposite: "Even if it would be 'an unwarranted invasion of personal privacy' to release the SEC staff names found on these documents (*which Plaintiff does not concede*) the SEC has presented no evidence that these staff names are not segregable from the remainder of the documents." (Plaintiff's Opp. at 28 (emphasis added).)

However, the SEC presents only argument, and no evidence, that the release of staff names alone would constitute "a clearly unwarranted invasion of personal privacy." In the cases cited by the SEC, evidence was presented, unlike in this case. In *Edmonds v. FBI*, 272 F. Supp. 2d 35 (D.D.C. 2003), the agency provided declarations detailing how the privacy interests of FBI agents would be harmed by disclosure of their names in connection with a national security investigation. *Id.* at 53. The SEC presents no such evidence, and thus fails to show that Exemption 7(C) applies to the redacted staff names involved in a simple employee disciplinary matter, not a national security investigation or undercover police operation. Therefore, the SEC's Exemption 7(C) claims fail and Plaintiff is entitled to summary judgment on those claims.

## VIII. Plaintiff Is Entitled to Summary Judgment on the SEC's Exemption 7(A) Claims

### A. *SEC v. Cuban* Establishes the SEC's FOIA and Privacy Act Non-Compliance

On March 9, 2010, the SEC produced documents in *SEC v. Cuban* in connection with limited discovery underway in that litigation.[12] This production includes documents proving that the SEC did not properly process Mr. Cuban's FOIA and Privacy Act requests, or properly assert exemptions from disclosure. These documents support the granting of Mr. Cuban's cross-motion (and a denial of the SEC's motion for partial summary judgment).

[12] The discovery arises from Mr. Cuban's Motion for Attorneys' Fees and Expenses, which is pending in *SEC v. Cuban*, No. 3:08-cv-02050-D (N.D. Texas) (Mr. Cuban earlier prevailed on his Motion to Dismiss in the Northern District of Texas, and the SEC has appealed to the Fifth Circuit). The *SEC v. Cuban* court issued a December 4, 2009 Order permitting discovery in connection with Mr. Cuban's sanctions motion.

Mr. Cuban's FOIA/Privacy Act Letter Request No. 2 seeks records (excluding public SEC filings) "which mention or relate to Mr. Cuban." (*See* Winter Decl. ¶ 124, Att. B.) The SEC responded in a February 5, 2009 letter that potentially responsive documents had been located, but these records would be withheld pursuant to Exemption 7(A), as these were records "compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement activities." (*Id.* ¶ 128, Att. D.) Mr. Cuban appealed this decision to the SEC's Office of the General Counsel ("OGC"), pointing out that the SEC failed to specify what information was withheld, or explain how the information withheld was compiled or how its release would interfere with enforcement proceedings. (*Id.* ¶ 129, Att. E.) The appeal also recognized that the SEC ignored Mr. Cuban's Privacy Act request altogether. (*Id.* at Att. E.) In a June 29, 2009 letter, the OGC affirmed the SEC's assertion of Exemption 7(A). (*Id.* ¶ 130, Att. I.) In sum, the SEC's position is that all non-publicly filed documents relating to Mr. Cuban are protected by Exemption 7(A), and as such it has provided no documents in response to FOIA/Privacy Act Letter Request No. 2.

Documents recently produced by the SEC prove that, contrary to the SEC's assertions and representations to this Court, all records relating to Mr. Cuban were not properly withheld under Exemption 7(A). Examples of these documents are attached to the Declaration of David M. Ross ("Ross Decl."), attached as Exhibit 1. For instance, internal SEC email chains include pictures of Mr. Cuban, mention Mr. Cuban by name, contain articles about Mr. Cuban, and include commentary by SEC personnel about Mr. Cuban. (Ross Decl. at Att. A.) These documents unquestionably constitute records that "mention or relate to Mr. Cuban." Further, these documents, and in particular the pictures, articles and commentary contained therein (e.g., "charming," the "picture with the money is particularly helpful and certainly speaks a 1,000

words (if not more),") cannot rationally be represented as records encompassed by Exemption 7(A) or any other exemption.[13]

These documents demonstrate that the SEC's positions and representations are, at a minimum, incorrect and unreliable. The Winter Declaration represents, in a bold header above the section of her declaration discussing FOIA/Privacy Act Request No. 2, that the status of this request is "Processing Completed." (*Id.* at 32.) The SEC testified to this Court that *all* processing for this request was finished, and that *all* responsive documents were properly withheld pursuant to Exemption 7(A). (*Id.* ¶¶ 124-130.) However, despite the production of these documents in *SEC v. Cuban* showing this representation is incorrect, the SEC has made no attempt to correct the Winter Declaration, recognize that its processing was certainly not "complete" (or correct), or otherwise acknowledge to this Court its incorrect assertions in its submissions or this declaration.

The SEC cannot explain these documents away by claiming that SEC personnel involved in this litigation had no knowledge of the documents produced in *SEC v. Cuban*. Indeed, in the SEC's Motion for Extension of Time filed February 23, 2010 with this Court, the SEC stated:

> Cuban's discovery and document requests in [*SEC v. Cuban*] overlap in many respects with the FOIA requests at issue in this FOIA litigation. Given this considerable overlap, the Commission's discovery and document responses to Cuban in the Texas securities ligation may impact this FOIA matter. . . . Also, the Commission's discovery responses in [*SEC v. Cuban*] due on March 9, 2010 could readily affect the response of the SEC in this FOIA case because of the overlapping documents at issue.

(*Id.* ¶¶ 2-3.) This admission only magnifies the SEC's failure to properly follow FOIA and the Privacy Act. The produced documents belie the SEC's asserted FOIA exemptions, and also belie the SEC's contentions that it conducted a reasonable and adequate search. The SEC obviously

[13] Notably, the SEC produced all of the documents attached to the Ross Declaration in unredacted form in *SEC v. Cuban*. The SEC did not list the records on any privilege or redaction log in that case.

did not conduct such a search and summarily asserted a one size fits all exemption to entire categories of records. The stark and unsettling reality is that had Mr. Cuban not been able to take discovery in *SEC v. Cuban* for his attorneys' fees motion, these documents may well have never seen the light of day and SEC noncompliance may have remained hidden. Consequently, the documents produced by the SEC present a sufficient basis to grant Mr. Cuban's cross-motion and deny the SEC's motion for partial summary judgment.[14]

### B. The SEC Has Failed to Fulfill Its Obligation to Conduct a Meaningful Review of Documents

As shown above, and contrary to the Riewe declarations, the SEC has failed to fulfill its obligation to conduct a meaningful review of documents withheld under Exemption 7(A). The SEC's conclusory statements in the Riewe Declaration and overbroad categories mock the law. Instead of determining what is releasable, as required by FOIA, the SEC has hidden everything in its files under an Exemption 7 blanket without so much as a cursory review. The SEC's recent production in *SEC v. Cuban* of documents it apparently claims are exempt under 7(A), described above, abundantly proves that the SEC failed to conduct the required review.

In *Gavin v. SEC*, a case on which the SEC repeatedly relies, the court forced the SEC to conduct a document-by-document review to establish its reliance on Exemption 7, and even considered sanctions against the government for repeatedly failing to conduct the ordered review. No. 04-4522, 2007 WL 2454156, at *15 (D. Minn. Oct. 24, 2005). The SEC is required to separate records into meaningful categories, and conduct a document-by-document review, in order to provide the Court with sufficient information to determine whether Exemption 7(A) applies to all records in each category. The SEC has completely failed to do so. The agency has the burden to demonstrate that Exemption 7(A) may be applied categorically. *Bevis v. Dep't of*

[14] Given that the SEC also relies upon this unreliable Winter Declaration as its *sole* evidentiary support for its motion to bifurcate and stay proceedings, that motion should also be denied.

*State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986); *see also In re DOJ*, 999 F.2d 1302, 1309 (8th Cir. 1993) (discussing *Bevis* and *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 235-36, 98 S. Ct. 2311, 2323-24 (1978)).

In order to apply an exemption categorically, there must be some indicia that the individual documents within the category of documents are similar; and that the agency has reviewed and ensured that the individual documents it seeks to include in the category of documents are indeed similar. *See id.* The SEC's functional categories are inadequate because (1) the SEC did not conduct the required document-by-document review to determine the appropriate categories of documents, and (2) the categories used do not divide the withheld documents into discrete groups that would allow the Court to trace a rational link between the nature of the documents withheld and the alleged likely interference with a prospective enforcement proceeding. *Bevis*, 801 F.2d at 1389; *Crooker*, 789 F.2d at 67. In other words, the SEC's categories are overbroad and fail to provide sufficient information to allow the Court to determine if the exemption applies. Indeed, the SEC admits that it has not conducted the required document-by-document review of the withheld files in order to rely on the functional category approach. (SEC Reply at 16); *cf. Bevis*, 801 F.2d at 1389. Therefore, the SEC may not use the categorical approach to substantiate its reliance on Exemption 7(A), and must provide a *Vaughn* Index or similarly detailed evidence to substantiate its Exemption 7(A) claims. *See Gavin v. SEC*, 2007 WL 2454156 at *4 (to rely on a categorical approach instead of providing a *Vaughn* Index, the SEC was required to prove it conducted a document-by-document review of documents for categorization). The SEC has thus failed to carry its burden.

## IX. The SEC Waived Its Blanket Exemption Under the Privacy Act

The SEC's own Privacy Act regulations (17 C.F.R. § 200.301, *et seq*.) require that a Privacy Act request be acknowledged in writing within ten (10) days of the request, and that a

response be given within thirty (30) days of receiving the request, which the SEC completely ignored in this case. The SEC never acknowledged Mr. Cuban's Privacy Act request, never responded to his Privacy Act request, never informed him that access to his records under the Privacy Act was denied or why access was denied, and never advised him of his right to appeal the SEC's denial of access. In fact, the SEC did not assert that its own regulations exempted the records sought by Mr. Cuban from the access requirements of the Privacy Act until over one month *after* Mr. Cuban filed this lawsuit seeking access under the Privacy Act. (*See* Winter Decl., Att. J.) Unless this Court compels it, Plaintiff will be left with no remedy for the SEC's deliberate violation of the law and disregard of its own regulations. Fortunately, "courts do have the power to compel agencies to follow their own regulations." *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988). In this case, given the SEC's deliberate and inexcusable failure to abide by the Privacy Act and its own regulations, the SEC should be deemed to have waived any blanket Privacy Act exemption it granted to itself under those same regulations.

**CONCLUSION**

Based on the foregoing, the SEC's Motion for Partial Summary Judgment must be denied and Mr. Cuban's Cross-Motion for Summary Judgment, which seeks disclosure of all documents not shown to be exempt, must be granted. In light of the arguments raised by the SEC, Plaintiff believes that oral argument would assist the Court.

Dated: March 29, 2010

Respectfully submitted

/s/ Lyle Roberts

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# APPENDIX OF CITED ON-LINE CASES

PURSUANT TO
GENERAL ORDER AND GUIDELINES FOR
CIVIL CASES ¶ 10 n. 5

Not Reported in F.Supp.2d, 2005 WL 2739293 (D.Minn.)
**(Cite as: 2005 WL 2739293 (D.Minn.))**

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
J. Patrick GAVIN, a/k/a John P. Gavin, also doing business as SEC Insight, Inc., Plaintiff,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.
**No. 04-4522 (PAM/JSM).**

Oct. 24, 2005.

Rachel B. Rosen, Ramsay Devore & Olson, PA, Roseville, MN, Scott A. Hodes, Attorney at Law, Washington, DC, for Plaintiff.

Donna S. McCaffrey, Kathleen Cody, US Securities & Exchange Commission, Washington, DC, Perry F. Sekus, US Attorney, Minneapolis, MN, for Defendant.

MEMORANDUM AND ORDER

MAGNUSON, J.

***1** This matter is before the Court on cross-Motions for Summary Judgment. For the reasons that follow, Plaintiff's Motion is denied and Defendant's Motion is granted in part and denied in part.

BACKGROUND

The ultimate issue in this case is whether Defendant United States Securities and Exchange Commission ("SEC") improperly withheld agency records. Plaintiff J. Patrick Gavin is the President and Owner of SEC Insight, Inc., a private investment research entity. Plaintiff submits approximately 1,500 Freedom of Information Act ("FOIA") requests annually. At issue in this litigation is the SEC's denial of twenty-six FOIA requests made by Plaintiff.

The SEC denied five of these requests with a "Glomar" response and twenty of these requests under the FOIA Exemption 7(A). A "Glomar" response is one in which the agency refuses "to confirm or deny the existence of materials requested under the FOIA." *See Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1012 (D.C.Cir.1976). FOIA Exemption 7(A) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information [ ] could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). One of the FOIA requests, as it pertained to an entity named Dynacq, was denied based on both FOIA Exemption 7(A) and FOIA Exemptions 2, 5, and 7(C). (Compl. Count XI.)

Plaintiff contends that the SEC improperly denied Plaintiff's FOIA requests. He seeks injunctive relief releasing the requested documents and barring the SEC from further using the Glomar denial in response to Plaintiff's FOIA requests. The SEC filed a cross-Motion for Summary Judgment asserting that it has properly withheld agency records.

DISCUSSION

A. Standard of Review

In a FOIA case, the standards articulated in Federal Rule of Civil Procedure 56 still apply. *See Miller v. U.S. Dep't of Agric.*, 13 F.3d 260, 262 (8th Cir.1993). That is, summary judgment is proper if, viewing the record in the light most favorable to the non-moving party, there are no genuine issues of material fact. *See id.; see also* Fed.R.Civ.P. 56.

The Court reviews an agency denial of a FOIA request *de novo.* 5 U.S.C. § 552(a)(4)(B). "Summary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Miller,* 13 F.3d at 262 (quoting *Miller v. U.S. Dep't of State,* 779 F.2d 1378, 1382 (8th Cir.1985)).

Exemptions to the FOIA should be construed narrowly. *See id* . When an agency denies a FOIA request, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). An agency may meet its burden by "submitting affidavits and other evidence to the court to show that the documents are properly classified and thus clearly exempt from disclosure." *Hayden v. Nat'l Sec. Agency,* 608 F.2d 1381, 1386 (D.C.Cir.1979); *see also Barney v. Internal Revenue Serv.,* 618 F.2d 1268, 1272 (8th Cir.1980).

***2** A court's primary role ... is to review the adequacy of the affidavits and other evidence presented by the Government in support of its position ... If the Government fairly describes the content of the material withheld and adequately states its ground for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

*Barney,* 618 F.2d at 1272 (quoting *Cox v. U.S. Dep't of Justice,* 576 F.2d 1302, 1312 (8th Cir.1978)). If the agency sustains this burden, the Court is not required to review the documents *in camera* or require the agency to submit a detailed *Vaughn* index. *See Barney,* 618 F.2d at 1274. "If, on the other hand, the agency is unable to adequately support its decision to withhold [material], the court must release that material." *Cox,* 576 F.2d at 1312. If the Court cannot evaluate the propriety of the claimed exemptions on the record before it, it may order the agency to submit more detailed affidavits or a *Vaughn* index, or even review documents *in camera. See Barney,* 618 F.2d at 1272; *Maricopa Audubon Soc. v. U.S. Forest Serv.,* 108 F.3d 1089, 1093 n. 2 (9th Cir.1997); *see also NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 224, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) ("*in camera* review ... is designed to be invoked when the issue before the District Court could not be otherwise resolved").

B. Mootness

The SEC submits that it is no longer claiming a FOIA Exemption 7(A) to seven of Plaintiff's requests, and no longer claiming a Glomar response to three of Plaintiff's requests because such investigations are closed.[FN1] Specifically, the SEC contends that Plaintiff must resubmit these FOIA requests because such documents may now be available. According to the SEC, the Court should dismiss these Counts from the Complaint because they are moot.

> FN1. These requests pertain to Counts 2, 3, 5, 6, 8, 9, 10, 17, 19, and 20 of the Complaint.

Even if the investigatory proceedings that involved the subjects of these ten requests have since closed, the Court does not believe that dismissal on mootness grounds is appropriate. In FOIA litigation, "mootness occurs when requested documents have already been produced." *Urban v. United States,* 72 F.3d 94, 95 (8th Cir.1995) (quoting *In re Wade,* 969 F.2d 241, 248 (7th Cir.1992)). Here, the SEC has not disclosed any documents in response to these requests. Rather, the SEC maintains that since internal investigations have closed, circumstances have changed to permit Plaintiff to resubmit these FOIA requests. Indeed, Plaintiff may file a new FOIA request, and if he does, "he will stand in line behind other FOIA requesters." *Bonner,* 928 F.2d at 1153. This ensures that the agency need not follow "an endlessly moving target ." *Id.; Meeropol v. Meese,* 790 F.2d 942, 959 (D.C.Cir.1986). However, if the agency unlawfully withheld documents in its prior responses, then the Court may have "warrant" to place the requester at the "head of the current [ ] FOIA queue." *Bonner,* 928 F.2d at 1153. In this case, the record is completely devoid of any evidence regarding the propriety of the SEC's prior withholdings. Therefore, in light of the specific circumstances of this case, the Court finds that the more appropriate remedy is to remand these ten requests for reprocessing. *Meeropol,* 790 F.2d at 959-60 (agency improperly withheld responsive documents and Court thus remanded to agency for reprocessing).[FN2]

> FN2. Furthermore, the Court notes that Plaintiff's claims aren't entirely moot. The issue in this litigation is whether the SEC improperly withheld responsive documents to Plaintiff's FOIA requests. The Court's review "properly focuses on the time the determination to withhold is made." *Bonner,* 928 F.2d at 1152. The fact that these documents may now be available does not moot Plaintiff's claim for costs and attorneys' fees sustained when he made the original requests. *See* 5 U.S.C. § 552(a)(4)(E); *GMRI, Inc. v. EEOC,* 149 F.3d 449, 451 (6th Cir.1998) (citing cases) ("[a]lthough plaintiff's claim for production of information is moot, its motion for attorney fees and costs is not" (internal quotations and citations omitted)); *DeBold v. Stimson,* 735 F.2d 1037, 1040 (7th Cir.1984) (claim for relief under FOIA is moot if agency produces records but request for fees and costs is not moot); *Education/Instruccion, Inc. v. U.S. Dep't of Housing & Urban Develop.,* 471 F.Supp. 1074, 1077 (D.Mass.1979) (holding that issue of costs and attorneys' fees not moot even though law enforcement proceedings upon which the FOIA Exemption 7(A) were based were at an end). Although Plaintiff's request for attorneys' fees and costs is ancillary to the underlying action, *see GMRI, Inc.,* 149 F.3d at 451, this issue will nevertheless require the Court to evaluate the merits of Plaintiff's claims. *See Miller,* 779 F.2d at 1389 (even though FOIA plaintiff did

not receive favorable judgment, FOIA plaintiff is nevertheless entitled to attorneys' fees and costs if FOIA plaintiff "substantially prevailed" through his lawsuit). From the record, the Court cannot determine the propriety of the SEC's denials. However, because the issue of attorneys' fees and costs exists independently from the merits of Plaintiff's FOIA claim, summary judgment is not denied on this ground. Rather, as noted above, the Court denies Defendant's Motion on these ten requests and remands to the SEC for reprocessing within the limits prescribed the FOIA.

C. FOIA Exemption 7(A)

***3** Plaintiff's FOIA requests sought "any documents or records regarding any informal and/or formal investigations and/or inquiries" of particular entities. The SEC claims that the withheld records were compiled to investigate possible federal securities law violations, and that disclosure of such documents would impede enforcement proceedings. The SEC classifies the withheld documents into five general categories. Plaintiff objects to the SEC's categorical approach and further contends that the affidavits submitted by the SEC are insufficient.

"To sustain its burden of showing documents were properly withheld under exemption 7(A) the [agency] ha[s] to establish only that [the documents] were investigatory records compiled for law enforcement purposes," *Barney*, 618 F.2d at 1272-73, and that production "could reasonably be expected to interfere with law enforcement proceedings," *In re Dep't of Justice*, 999 F.3d 1302, 1307 (8th Cir.1993). The agency "is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." *Barney*, 618 F.2d at 1273. Rather, the Court must focus on "the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings." *In re Dep't of Justice*, 999 F.2d at 1309.

As a threshold matter, Plaintiff's argument that a categorical approach is improper is meritless. Numerous courts, including the Eighth Circuit, hold that the agency may utilize the categorical approach to justify its burden with regard to FOIA Exemption 7(A). *See id.*[FN3]

FN3. Plaintiff claims that the categorical approach is limited to circumstances in which the requester is the subject of the underlying enforcement proceeding. According to Plaintiff, the categorical approach was adopted to ensure that normal discovery channels were not circumvented. The Court is unpersuaded by Plaintiff's argument as the clear mandate of the Eighth Circuit allows agencies to utilize the categorical approach when asserting FOIA Exemption 7(A), regardless of who the requester is. *See In re Dep't of Justice*, 999 F.2d 1302.

1. *Categorical Approach*

Proper utilization of the categorical approach requires the SEC to: (1) define functional categories of documents; (2) conduct a document-by-document review to assign documents to proper categories; and (3) explain to the court how the release of each category would inter-

fere with enforcement proceedings. *See id.* The SEC has divided the requested documents into five functional categories: (1) documents produced by third parties; (2) SEC correspondence with potential witnesses; (3) testimony transcripts; (4) attorney notes and trial preparation materials; and (5) memoranda by SEC staff.

Plaintiff first contends that the categories are not functional because they merely classify how the documents were obtained. However, a category is functional so long as "it allows the court to trace a rational link between the nature of the document and the alleged likely interference." *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C.Cir.1986). After careful review of the record, the Court finds that the declarations submitted by the SEC provide this rational link. Each declaration specifies the category, the kinds of documents or records in that category, how those documents assist in the particular enforcement proceeding, and the likely interference that would result from disclosure of those documents. Thus, the declarations contain functional categories and explain to the Court the anticipated interference with pending enforcement proceedings.

***4** However, the declarations do not attest that document-by-document reviews were completed by the SEC when categorizing the documents, as required. *See In re Dep't of Justice*, 999 F.2d at 1309-10. Rather, the declarations attest that "[a]s the attorney principally responsible for the litigation resulting from the [ ] investigation, I have personal knowledge of the types of records contained in the related investigatory and litigation files, and the information contained in those records." (*See e.g.*, Kase Decl. ¶ 6; Smith Decl. ¶ 6; Herm Decl. ¶ 6; Miller Decl. ¶ 6; Baughman Decl. ¶ 7; Frohlich Decl. ¶ 6; McKinley Decl. ¶ 6; Dixon Decl. ¶ 6; Meier Decl. ¶ 6; Finkel Decl. ¶ 6; Echavarria Decl. ¶ 6; Anagnostis Decl. ¶ 6; Mashburn Decl. ¶ 6; Paul Decl. ¶ 6; Galloway Decl. ¶ 6; Silverstein Decl. ¶ 6.) In *Kay v. FCC*, the agency attested in affidavits that a document-by-document review was conducted, and specifically identified how many documents it actually withheld within each category. 976 F.Supp. 23, 36 (D.D.C.1997). The same process was conducted in *Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau*, No. 04-1919, 2005 WL 913268, at *8 (D.D.C. Apr.30, 2005). "Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions." ' *Bevis*, 801 F.2d at 1389 (quoting *NLRB*, 437 U.S. at 236). Based on the record, the Court cannot conclude that such process was conducted in this case, clearly undermining the functionality of the categories and the relationship of the withheld documents to the purported enforcement proceedings. While the SEC does not need to present a *Vaughn* index to the Court, it nevertheless must attest to and assure the Court that it conducted a document-by-document review of responsive documents for categorization. *See In re Dep't of Justice*, 999 F.2d at 1309-10. The Court is not convinced that such analysis occurred in this case. Accordingly, to comply with the FOIA, the SEC must conduct a document-by-document review and provide affidavits that attest that such a review took place. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 31 (D.C.Cir.1998) (if agency affidavits are facially inadequate, the district court should require the agency to provide a new affidavit or declaration rather than order *in camera* review).

2. *Segregability*

Plaintiff contends that FOIA Exemption 7(A) is inapplicable in some instances because some of the withheld documents will not interfere with enforcement proceedings. In particular, Plaintiff contends that disclosure of "initial correspondence" documents and "subpoenas" from investigatory files will not harm enforcement proceedings. The SEC contends that because it has categorized the documents into five groups, no further segregation is required.

FOIA requires that "any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "[A]ny reasonably segregable information must be released after deleting the exempt portions, unless the non-exempt portions are inextricably intertwined with exempt portions." *Delta Ltd. v. U.S. Customs & Border Prot. Bureau*, 384 F.Supp.2d 138, 153 (D.D.C.2005), *vacated in part on other grounds*,-F. Supp.2d-, 2005 WL 2605599 (D.D.C. Oct.14, 2005); *see also* 5 U.S.C. § 552(b). "A court errs if it simply approves the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Delta Ltd.*, 384 F.Supp.2d at 153 (internal quotations omitted).[FN4] Plainly, there is no declaration or affidavit that even, at a minimum, attests that the entirety of the documents are exempt, or that the non-exempt portions of the documents are inextricably intertwined with the exempt portions. The record is simply insufficient to allow the Court to determine whether the SEC has sustained its burden of reasonable segregability under the FOIA. Thus, summary judgment on this point is denied. Again, the SEC shall submit new affidavits or declarations on this issue.

> FN4. The SEC contends that its categorization of responsive documents eliminates its duty to segregate the record. *See Parker/Hunter. Inc. v. SEC*, No. 80-3034, 1981 WL 1675, at *4 (D.D.C. Apr.29, 1981). However, more recent case law suggests that the law requires that the agency disclose segregable material-regardless if the categorical approach is used. *Cangzhou Laosan Group*, 2005 WL 913268, at *7-8 (discussing categorization under FOIA Exemption 7(A), and that document or "redaction" of document were properly categorized and that agency satisfied reasonable segregability requirement). Although agencies are not required to submit a document-by-document analysis of material claimed exempt under FOIA Exemption 7(A), agencies nevertheless must actually conduct a document-by-document review of responsive material. This document-by-document review enables the agency to properly categorize each responsive document exempt under FOIA Exemption 7(A), and also enables the agency to determine the segregability of each document. The express language of the statute requires that reasonably segregable portions of responsive materials not exempt must be disclosed, and the Court thus finds that the utilization of the categorical approach does not eliminate the agency's duty to determine segregability.

3. *Conclusion*

***5** In sum, the SEC is entitled to withhold documents utilizing the categorical approach. However, the record fails to assure the Court that the SEC conducted a document-by-document review for categorization purposes. Further, the record fails to attest that the SEC complied with its reasonable segregability requirement. Thus, Defendant's Motion is denied as it pertains to the propriety of FOIA Exemption 7(A). However, the Court cannot say

from this record that Defendant improperly withheld documents pursuant to this exemption, and accordingly, Plaintiff's Motion is denied on this point.

D. Exemptions 2, 5, and 7(C): Dynacq Corporation

The SEC contends that it properly withheld four pages of internal reports concerning the SEC's opening and closing of its informal investigation of Dynacq under FOIA Exemptions 2, 5, and 7(C). The SEC further claims that the other information responsive to this request was properly withheld under Exemption 7(A).

Exemption 2 protects material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 2 generally applies to two types of materials: internal agency matters so routine or trivial that they could not be "subject to ... a genuine and significant public interest"; and internal agency matters of some public interest "where disclosure may risk circumvention" of agency regulation or of the law. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 369-70, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). The SEC argues that these four pages of documents are purely internal and of no public interest. It attests that these documents are merely opening and closing reports for the SEC's investigation of Dynacq, which are prepared on internal SEC forms that are available only to SEC staff, and completely ministerial in nature. (Henderson Decl. ¶ 4.) The Court finds that this material falls within Exemption 2.

Exemption 5 permits an agency to withhold "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. § 552(b)(5). This exemption includes "[p]redecisional staff papers," and is "intended to protect the decision making processes of government." *See Canadian Javelin, Ltd. v. SEC*, 501 F.Supp. 898, 902 (D.D.C.1980) (citing *NLRB*, 421 U.S. at 150). Indeed, the information on these internal forms "reveals the Commission staff's recommendations to the Commission regarding the opening and closing of investigations." (Henderson Decl. ¶ 5.) This material is likewise exempt under FOIA Exemption 5 to the extent that it reflects staff judgment.

Finally, FOIA Exemption 7(C) permits agencies to withhold material to protect personal privacy. 5 U.S.C. § 552(b)(7)(C). The SEC contends that since these documents contain the names of SEC staff working on the particular investigation, disclosure is exempt under 7(C). Indeed,

[o]ne who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

***6** *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir.1978). "Unless there is a public interest in the disclosure of personal information, Exemption 7(C) deletions are appropriate." *Canadian Javelin, Ltd.*, 501 F.Supp. at 904. Plaintiff has shown no legitimate interest in the release of this information, and therefore Exemption 7(C) properly applies to this information.

Accordingly, these four pages of documents that pertain to Dynacq were properly withheld under the claimed exemptions, and Defendant is entitled to summary judgment on this point. However, as noted above, because the SEC claimed that remaining Dynacq documents were exempt under 7(A), the SEC has failed to demonstrate that Exemption 7(A) was properly utilized. Thus, summary judgment is denied on this point.

E. Glomar Response

Plaintiff contends that the SEC's Glomar response was unlawful. The SEC originally claimed that five of Plaintiff's requests were subject to the Glomar response. Since its original declaration, the SEC: (1) has changed its response from Glomar to Exemption 7(A) on one of the five requests; (2) claims that it has no documents responsive to one of the five requests (*see infra* Part F); and (3) claims that the issue is moot as to the other three requests because the investigations are closed (*see supra* Part B). Plaintiff also requests that the Court enjoin the SEC from utilizing the Glomar response in the future in response to Plaintiff's FOIA requests.

As it pertains to the SEC's change in response from Glomar to Exemption 7(A), the issue now is whether the SEC is properly withholding documents under Exemption 7(A). From this record and as noted above, the Court cannot conclude that SEC has satisfied its burden that it has properly withheld documents. Thus, both Plaintiff's and Defendant's Motions are denied on this point.

Plaintiff also wants the Court to enjoin the SEC from utilizing the Glomar response in the future. Plaintiff contends that the SEC employs a policy that improperly utilizes the Glomar response. Regardless, future harm is merely speculative in nature, and injunctive relief is inappropriate. Therefore, Plaintiff's Motion on this point is denied and Defendant's Motion is granted.

F. Proctor and Gamble

The SEC originally asserted a Glomar response to Plaintiff's request for Proctor and Gamble records. However, the SEC now contends that it has no records that pertain to such request. The SEC has the burden to demonstrate that it conducted an adequate search for responsive documents. *See Miller,* 779 F.2d at 1384-85. The adequacy of the search is judged by the reasonableness standard and depends on the facts of each case. *See id.* "[T]he standard of reasonableness [applied] to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Id.* If the requester can show "circumstances indicating that further search procedures were available without the [agency] having to expend more than reasonable effort, then summary judgment [in favor of the agencyr] would be improper." *Id.* at 1385.

***7** The SEC relies on the declaration of Celia Jacoby, who attests that the SEC possessed no relevant documents. She asserts that a paralegal searched the database concerning investigations or inquiries and found one Proctor and Gamble reference. Jacoby contacted the attorney working on that matter and the attorney assured her that Proctor and Gamble was not the sub-

ject of the inquiry, but rather was contacted during the inquiry of another entity. (*See* Jacoby Decl. ¶¶ 1-4.) Thus, the SEC asserts that it conducted an adequate search in good faith and that it has no responsive documents.

Plaintiff does not object to the adequacy of this declaration, but rather contends that the SEC has failed to adequately explain and disclose its search procedures, and therefore the SEC has not demonstrated that it search was "reasonably calculated to uncover all relevant documents." However, Plaintiff offers no evidence to indicate that the SEC's search was inadequate, and indeed, the search of the SEC database that contains information about "all Commission investigations or inquiries" is clearly adequate in light of the facts of this case. Thus, the SEC's Motion on this point is granted and Plaintiff's Motion is denied.

CONCLUSION

Because the SEC fails to submit sufficiently detailed affidavits regarding the propriety of FOIA Exemption 7(A), the Court cannot evaluate whether the SEC complied with its duties to conduct a document-by-document review or disclose reasonably segregable material. Accordingly, the Court orders the SEC to provide additional and more detailed affidavits that specifically address the deficiencies in the record. This evidence must be submitted by January 1, 2006. When this evidence is presented to the Court, the parties may renew their motions for summary judgment on these claims. Thus, the SEC's Motion for Summary Judgment is denied on these claims.

Moreover, although the SEC claims that investigations are no longer pending on ten of Plaintiff's FOIA requests, the Court finds that remand, rather than dismissal, is appropriate. Thus, these counts are remanded to the SEC for reprocessing.

The Court finds that the SEC has properly invoked Exemptions 2, 5, and 7(C), as they pertain to the four pages of internal reports regarding the SEC's investigation of Dynacq. The Court further finds that the SEC has sustained its burden regarding the sufficiency of its search for Proctor and Gamble records. Accordingly, the SEC's Motion for Summary Judgment is granted on these claims.

However, based on the record, the Court cannot conclude that the SEC improperly withheld documents. Moreover, the Court finds that Plaintiff's request for injunctive relief as it pertains to the SEC's prospective use of the Glomar response is inappropriate. Therefore, Plaintiff's Motion for Summary Judgment is denied.

Accordingly, based on all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment (Clerk Doc. No. 15) is GRANTED in part and DENIED in part;

***8** A. Count 4 of the Complaint is DISMISSED and Count 6 is DISMISSED in part;

B. Counts 2, 3, 5, 6 (the 7(A) portion), 8, 9, 10, 17, 19, and 20 are REMANDED to the SEC

for reprocessing;

C. The SEC must submit detailed affidavits addressing the deficiencies identified by the Court by January 1, 2006;

i. If appropriate, the parties may renew their motions for summary judgment and file briefs in support by February 1, 2006;

ii. Opposition papers are due February 20, 2006; and

iii. Replies are due March 1, 2006. These renewed motions will be decided without oral argument; and

2. Plaintiff's Motions for Summary Judgment (Clerk Doc. No. 37, 41) are DENIED.

D.Minn.,2005.
Gavin v. U.S. S.E.C.
Not Reported in F.Supp.2d, 2005 WL 2739293 (D.Minn.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2007 WL 2454156 (D.Minn.)
**(Cite as: 2007 WL 2454156 (D.Minn.))**

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Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
J. Patrick GAVIN, a/k/a John P. Gavin, also doing business as SEC Insight, Inc., Plaintiff,
v.
UNITED STATES SECURITIES and EXCHANGE COMMISSION, Defendant.
**Civil No. 04-4522 (PAM/JSM).**

Aug. 23, 2007.

Rachel B. Rosen, Hellmuth & Johnson, PLLC, Eden Prairie, MN, Scott A. Hodes, Attorney at Law, Washington, DC, for Plaintiff.

Donna S. McCaffrey, Kathleen Cody, U.S. Securities & Exchange Commission, Washington, DC, Perry F. Sekus, United States Attorney's Office, Minneapolis, MN, for Defendant.

## MEMORANDUM AND ORDER

PAUL A. MAGNUSON, United States District Judge.

***1** This matter is before the Court on the following Motions: a second renewed Motion for Summary Judgment and Attorneys' Fees filed by Plaintiff J. Patrick Gavin, a renewed Motion for Sanctions and Attorneys' Fees filed by Gavin, and a second renewed Motion for Summary Judgment filed by Defendant United States Securities and Exchange Commission (SEC). For the reasons that follow, the Court grants the SEC's Motion and denies both of Gavin's Motions.

## BACKGROUND

This case arises from allegations that the SEC improperly withheld agency records. In the Complaint, Gavin claimed that the SEC wrongly denied twenty-six requests he made under the Freedom of Information Act (FOIA). Specifically, he alleged that the SEC inappropriately used a Glomar response [FN1] and improperly withheld records under Exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A).

FN1. A Glomar response is one in which the agency refuses "to confirm or deny the existence of materials requested under the FOIA." *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C.Cir.1976).

This is the third time the parties have filed cross-motions for summary judgment. Both parties first moved for summary judgment in 2005. In his initial motion, Gavin challenged the Glomar responses and categorical approach of classifying withheld documents. He contended that the SEC urged the Court to order the release of the requested documents and to bar the SEC from further using the Glomar response to his requests. In its initial motion, the SEC withdrew its Glomar responses and invoked Exemption 7(A) to withhold records relating to ongoing SEC investigations.[FN2] It also argued that Gavin must resubmit his FOIA requests relating to these investigations because documents possibly were available.

FN2. The SEC also submitted a declaration relating to Count 4 in which it previously asserted a Glomar response. The declaration confirmed that the SEC possessed no relevant documents relating to that request.

On October 24, 2005, the Court denied Gavin's motion and granted in part and denied in part the SEC's motion. Specifically, the Court ruled that the SEC could use a categorical approach to withhold documents under Exemption 7(A). However, the Court required the SEC to review each document for categorization and segregation purposes. The Court therefore ordered the SEC to submit affidavits relating to its ongoing investigations, attest-

ing that it had conducted a document-by-document review and addressing whether withheld documents contained reasonably segregable, non-exempt information. The Court also remanded ten requests for reprocessing.[FN3]

FN3. The Court dismissed Count 4 because the SEC established that it had no records responsive to Gavin's request for information. *See supra* note 2.

Thereafter, both parties filed renewed summary judgment motions.[FN4] On October 16, 2006, the Court granted in part and denied in part the SEC's motion and denied Gavin's motion. Specifically, the Court granted the SEC summary judgment on Counts 1, 7, 13, and 22, which related to requests for which the SEC relied on Exemption 7(A) and had conducted a document-by-document review. The Court denied summary judgment on Counts 11, 14, 15, 23, and 26, which related to requests for which the SEC continued to rely on Exemption 7(A) but had not conducted a document-by-document review. However, the Court also ruled that Gavin had to pay for the document-bydocument review. Therefore, the Court ordered the parties to confer about review costs and the scope of the requests. The Court directed the SEC to conduct the review within ninety days of receiving Gavin's payment. Finally, for the remainder of the requests, which had been remanded for reprocessing, the Court ordered the SEC to file a *Vaughn* index by November 16, 2006.[FN5]

FN4. Gavin also filed a motion for sanctions and attorneys' fees, but the Court deferred ruling on that motion.

FN5. A *Vaughn* index is a submission including detailed affidavits or declarations identifying the records in question and explaining why the records were withheld. *See Vaughn v. Rosen,* 484 F.2d 820, 826-28 (D.C.Cir.1973); *see also In re DOJ,* 999 F.2d 1302, 1314 (8th Cir.1993) (explaining the two-fold purpose of a *Vaughn* index: to ensure that the right to information "is not submerged beneath governmental obfuscation and mischaracterization" and to allow courts to evaluate effectively and efficiently the factual nature of disputed information).

***2** Thereafter, Gavin narrowed his requests regarding the open investigations and agreed to pay for the review of documents responsive to his requests. The SEC timely filed a *Vaughn* index. In January 2007, the SEC provided Gavin more a detailed *Vaughn* index.

Requests relating to twenty-one counts of the Complaint remain at issue. The requests can be grouped into two groups. The first includes requests for which the SEC continues to rely on Exemption 7(A) and has conducted a document-by-document review of responsive documents. The SEC has submitted declarations attesting that SEC staff conducted a document-by-document review of these documents to determine whether the documents fell within the categories previously identified and whether the documents contained any reasonably segregable, non-exempt information. The second group includes requests for which the SEC no longer relies on Exemption 7(A) and have been remanded for reprocessing. The SEC has released documents relating to these requests, but now relies on other exemptions to withhold some information.

## DISCUSSION

### A. Summary Judgment Standard of Review

In a FOIA case, the standards articulated in Federal Rule of Civil Procedure 56 apply. *See Miller v. U.S. Dep't of Agric.,* 13 F.3d 260, 262 (8th Cir.1993). Thus, summary judgment is proper if, viewing the record in the light most favorable to the nonmoving party, there are no genuine issues of material fact. *See id.; see also* Fed.R.Civ.P. 56. "Summary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged

its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Miller,* 13 F.3d at 262 (quoting *Miller v. U.S. Dep't of State,* 779 F.2d 1378, 1382 (8th Cir.1985)).

The Court reviews an agency denial of a FOIA request *de novo.* 5 U.S.C. § 552(a)(4)(B). An agency may withhold information that falls within one of the exemptions identified in 5 U.S.C. § 552(b) but must provide any reasonably segregable portion of a record after exempt portions are redacted. 5 U.S.C. § 552(a)-(b). Exemptions should be construed narrowly. *Miller,* 13 F.3d at 262.

When an agency denies a FOIA request, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). An agency may meet its burden by "submitting affidavits and other evidence to the court to show that the documents are properly classified and thus clearly exempt from disclosure." *Hayden v. Nat'l Security Agency,* 608 F.2d 1381, 1386 (D.C.Cir.1979); *see also Barney v. IRS,* 618 F.2d 1268, 1272 (8th Cir.1980).

> A court's primary role ... is to review the adequacy of the affidavits and other evidence presented by the Government in support of its position.... If the Government fairly describes the content of the material withheld and adequately states its ground for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

***3** *Barney,* 618 F.2d at 1272 (quoting *Cox v. DOJ,* 576 F.2d 1302, 1312 (8th Cir.1978)); *see also Meeropol v. Meese,* 790 F.2d 942, 952 (D.C.Cir.1986) (quoting *Perry v. Block,* 684 F.2d 121, 127 (D.C.Cir.1982) ( "in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.")).

If the Court cannot evaluate the propriety of the claimed exemptions on the record before it, it may order the agency to submit more detailed affidavits or a *Vaughn* index, or review documents *in camera. See Barney,* 618 F.2d at 1272; *Maricopa Audubon Soc. v. U.S. Forest Serv.,* 108 F.3d 1089, 1093 n. 2 (9th Cir.1997); *see also NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 224 (1978) ( "*in camera* review ... is designed to be invoked when the issue before the District Court could not be otherwise resolved"). Ultimately, if the agency does not adequately support its decision to withhold the information, the Court must release the records. *Cox,* 576 F.2d at 1312.

**B. Ongoing Investigations**

The SEC continues to rely on Exemption 7(A) to withhold records sought in Counts 11, 23, and 26 of the Complaint.[FN6] Exemption 7(A) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information [ ] could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); *see also In re DOJ,* 999 F.3d 1302, 1307 (8th Cir.1993); *Barney,* 618 F.2d at 1272-73. The agency "is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." *Barney,* 618 F.2d at 1273. Rather, the Court focuses on "the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings." *In re DOJ,* 999 F.2d at 1309. Proper utilization of the categorical approach requires the SEC to: (1) define functional categories of documents, (2) conduct a document-by-document review to assign documents to proper categories, and (3) explain to the Court how the re-

lease of each category would interfere with enforcement proceedings. *See id.*

> FN6. Count 11 requests documents relating to an investigation of Cablevision Systems Corporation. Count 23 requests documents relating to an investigation of Interpublic Group of Companies. Count 26 requests documents relating to an investigation of Citigroup, Inc. The SEC has contended consistently that ongoing investigations of Dynegy and Enron Corporation include documents that fall within the request relating to Citigroup, Inc.

The SEC claims that the withheld records were compiled to investigate possible federal securities law violations, and that their disclosure would impede enforcement proceedings. Initially, the SEC divided the requested documents into five functional categories: (1) documents produced by third parties, (2) SEC correspondence with potential witnesses, (3) testimony transcripts, (4) attorney notes and trial preparation materials, and (5) memoranda by SEC staff. The Court previously approved of this categorization, finding that the declarations submitted by SEC attorneys provided sufficient information to show a rational link between the categories and alleged likely interference. (Oct. 22, 2005 Order at 7-8.) However, because the declarations did not attest that the SEC attorneys completed document-by-document reviews when categorizing the records, the Court denied summary judgment. (*Id.*)

***4** On April 2, 2007, the SEC filed supplemental declarations relating to investigations at issue in Counts 11, 23, and 26. In the supplemental declarations, the SEC attorneys aver that they performed a document-by-document review of the withheld investigatory documents. (*See* Mar. 23, 2007 Herm Decl. ¶ 4; Mar. 28, 2007 Finkel Decl. ¶ 4; Mar. 28, 2007 Galloway Decl. ¶ 4; Mar. 29, 2007 Silverstein Decl. ¶ 4; Mar. 30, 2007 Gresenz Decl. ¶ 4.) In addition, most attorneys aver that all the withheld investigatory documents fit into the categories identified in their prior declarations. (See Mar. 23, 2007 Herm Decl. ¶ 5; Mar. 28, 2007 Galloway Decl. ¶ 5; Mar. 29, 2007 Silverstein Decl. ¶ 5; Mar. 30, 2007 Gresenz Decl. ¶ 5.) The only exception is that an attorney involved in the Interpublic Group of Companies investigation avers that all withheld investigatory documents fit either into the categories identified in his prior declaration or into a new category: correspondence with other government agencies. (Mar. 28, 2007 Finkel Decl. ¶ 5.) He further explains how the correspondence with other government agencies was compiled for law enforcement purposes and how disclosing the correspondence likely would interfere with ongoing enforcement proceedings. (*Id.*)

All supplemental declarations also address whether the reviewed documents contain any reasonably segregable, non-exempt information. Attorneys involved in three investigations averred that the documents responsive to Gavin's requests contain no reasonably segregable, non-exempt information. (Mar. 23, 2007 Herm Decl. ¶ 6; Mar. 29, 2007 Silverstein Decl. ¶ 6; Mar. 30, 2007 Gresenz Decl. ¶ 6.) Attorneys involved in the two other open investigations discovered documents that contain reasonably segregable, non-exempt information. (Mar. 28, 2007 Finkel Decl. ¶ 6; Mar. 28, 2007 Galloway Decl. ¶ 6.)

Gavin lodges several attacks relating to the ongoing investigations. First, he contends that the affidavits are too conclusory. To the contrary, the initial and supplemental declarations of the SEC attorneys specifically explain how the release of documents in each functional category will interfere with pending law enforcement proceedings, that the document-by-document review revealed that each document fell within a functional category identified in the declarations, and either that no document contained information that could be segregated and released without risking interference with ongoing enforcement proceedings or that reasonably segregable, non-exempt information existed and would be released. Thus, the initial and supplemental declara-

tions satisfy the requirements for withholding the records under Exemption 7(A).

Second, Gavin asserts that the SEC failed to submit declarations for investigations intertwined with the investigation of Citigroup, Inc. The record belies this contention. (*See* Mar. 14, 2005 Silverstein Decl.; Mar. 29, 2007 Silverstein Decl.; Mar. 28, 2007 Galloway Decl.; Mar. 30, 2007 Gresenz Decl.) Thus, Gavin's argument on this point fails.

***5** Third, Gavin asks the Court to order the SEC to release all formal orders of investigation, Wells notices,[FN7] and subpoenas from the ongoing investigations. He insists that none of these documents contains any information that could harm the investigations. However, the Court previously approved the functional categorization the SEC used in reviewing the documents, finding sufficient information to show a rational link between categories of records involved and likely interference with enforcement proceedings. (Oct. 22, 2005 Order at 7-8.) Moreover, the supplemental declarations specifically state that, except for the few documents that contain reasonably segregable, non-exempt information,[FN8] releasing the documents could harm the ongoing investigations. The Court therefore rejects Gavin's argument on this point.

FN7. A Wells notice apprises the recipient of charges that the SEC intends to bring and affords the recipient the opportunity to submit a written statement. *Riel v. Morgan Stanley*, No. 06-524, 2007 WL 541955, at *3 (S.D.N.Y. Feb. 16, 2007).

FN8. After redacting material exempt from disclosure, the SEC released to Gavin non-exempt portions of formal orders.

The SEC has satisfied all requirements for withholding records under Exemption 7(A) and has identified records that contain reasonably segregable, non-exempt information.[FN9] The Court therefore grants the SEC summary judgment on Counts 11, 23, and 26.

FN9. Gavin raised another point in his initial memorandum supporting his summary judgment motion: that the SEC had not released documents identified as containing reasonably segregable information. The SEC responded that it contacted Gavin's counsel in April 2007 to inquire whether the SEC should release the segregable information. Gavin's counsel responded in July 2007, advising the SEC that she wanted an estimate of the review cost to allow Gavin to determine how to proceed. In August 2007, she specifically identified the documents Gavin sought. Thus, it appears the parties have resolved this issue. If the SEC has not yet released the requested records containing the segregable, non-exempt information, it must do so within ten days of this Order.

**C. Remanded Requests**

In its October 24, 2005 Order, the Court remanded for reprocessing ten requests related to closed investigations.[FN10] On December 30, 2005, the SEC informed the Court that four additional investigations had concluded, and the SEC remanded those requests for reprocessing.[FN11] On July 7, 2006, the SEC informed the Court that two additional investigations subsequently had closed, and the SEC remanded those requests as well.[FN12] The SEC now informs the Court that Exemption 7(A) no longer applies to two additional investigations, and the SEC also remanded those requests.[FN13]

FN10. These requests pertain to Counts 2, 3, 5, 6 (the Exemption 7(A) portion), 8, 9, 10, 17, 19, and 20 of the Complaint. These requests consist of seven requests for which the SEC no longer relies on Exemption 7(A) and three requests for which the SEC no longer claims a Glomar response.

FN11. These investigations relate to Counts 12, 16, 21, and 24.

FN12. These investigations relate to Counts 18 and 25.

FN13. These investigations relate to Counts 14 and 15. In his summary judgment motion, Gavin submits that the SEC failed to release the documents. He therefore asks the Court to order the release of all documents relating to Counts 14 and 15. However, the SEC released the documents in June 2007, with redactions of staff names, third-party names, and identifiers under Exemption 7(C). As explained below, the Court approves of these redactions. Thus, Gavin's argument on this point is moot.

The Court previously ordered the SEC to submit a *Vaughn* index for the remanded requests by November 15, 2006. The SEC complied. It supplemented the *Vaughn* index on June 5, 2007, when it filed its second renewed summary judgment motion.[FN14] The *Vaughn* index identifies each document that the SEC either completely or partially withheld, describes the withheld information, and identifies the exemption asserted. In addition, the SEC submitted declarations that detail how each exemption identified in the *Vaughn* index applies. The parties now dispute whether the SEC has met its burden of showing how each exemption applies.

FN14. Gavin urges the Court not to consider the supplemental index because it is untimely. However, the SEC timely filed its initial *Vaughn* index. Thereafter, the parties conferred to resolve Gavin's objections to the initial index. The revised *Vaughn* index provides more details as to what and why information was withheld. Deciding the motions based on a more complete *Vaughn* index and record is appropriate.

*1. Exemption 2*

The SEC relies on Exemption 2 to redact internal information used to administer and manage its investigations and to withhold online complaint forms and e-mail exchanges. Exemption 2 covers matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). To rely on the exemption, an agency must make a threshold showing that the materials are predominantly internal and relate to trivial, administrative matters of no genuine public interest. *Sussman v. U.S. Marshals Serv.*, ---F.3d ----, 2007 WL 2176117, at *4 (D.C.Cir.2007) (citing *Schwaner v. Dep't of the Air Force*, 898 F.2d 793, 795 (D.C.Cir.1990)).

***6** The Assistant Chief Counsel in the Division of Enforcement for the SEC explains that the redacted information includes administrative information such as case names and numbers; dates investigations were opened and closed; dates of recommendations and reports; checklists; internal classification codes and keywords; and staff names, telephone numbers, and assignment dates. (Hall Decl. ¶¶ 5, 10, 12, 14, 17, 19, 21, 26, 34, 43.) He describes the withheld documents as online complaint forms that SEC staff reviewed to determine whether the SEC should investigate particular entities, as well as internal email exchanges identifying potential financial irregularities and outstanding FOIA requests in four investigations. (*Id.* ¶¶ 40-42.)

The redacted information clearly falls within the scope of Exemption 2. The information is used to facilitate the administration and management of SEC investigation and provides no insight on substantive contents of the investigations. Nonetheless, Gavin contends that there is a substantial public interest in knowing staff assignment dates. The Court disagrees. Revealing staff assignment dates will not expose how the SEC used its resources. Merely knowing that a particular staff member was assigned to an investigation provides no indication as to what the staff member did on the investigation or how much time was devoted to the investigation. The redacted information is purely trivial, adminis-

trative information to which Exemption 2 applies. The Court therefore grants summary judgment as it relates to the redacted information withheld under Exemption 2.

The withheld documents are a different matter, however. The supporting declaration establishes that the documents are internal. However, the Court cannot discern whether the documents contain purely trivial, administrative information. Thus, the Court rejects the SEC's reliance on Exemption 2 to withhold the online complaint forms and e-mail exchanges.[FN15]

> FN15. However, as explained below, the Court finds that the documents are covered by the deliberative process privilege and therefore may be withheld under Exemption 5.

*2. Exemption 4*

The SEC relies on Exemption 4 to withhold five documents that purportedly contain confidential commercial or financial information. Of the documents withheld by the SEC, one was submitted pursuant to a subpoena and the others were submitted voluntarily. Exemption 4 of the FOIA prohibits public disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). When analyzing the applicability of Exemption 4, courts distinguish between information submitted to the agency under compulsion and information provided to the agency voluntarily. *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861-62 (8th Cir.2001). When the agency compels the submission, it may not disclose the information if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 861 (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974)). If information is provided voluntarily to the agency, the agency must withhold the information if "it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 862 (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F .2d 871, 879 (D.C.Cir.1992)).

***7** The document that eFunds Corporation produced pursuant to a subpoena is a data purchase agreement. The General Counsel and Secretary of eFunds submitted a declaration requesting that the agreement remain confidential. Gavin contends that the declaration is too conclusory and fails to identify any specific harm. To the contrary, the declaration explains that the agreement contains "detailed information regarding eFunds' proprietary debit data, as well as details regarding the fees and software licenses negotiated between the parties for sale of this data." (Coleman Decl. ¶ 6.) The declaration further specifies how eFunds would suffer substantial competitive harm if the information was released:

> By disclosing the agreement to the public, the SEC would also disclose eFunds' selling price for its debit data, payment details, and other negotiated terms of the agreement. The disclosure of this confidential information could adversely affect eFunds' competitive position in subsequent transactions. eFunds' partners and competitors could use this information to undermine eFunds' competitive position in the debit data marketplace.

(*Id.*¶ 7.) The declaration sufficiently details the substantial harm eFunds would suffer if the SEC disclosed the agreement. The SEC properly invoked Exemption 4 to withhold the agreement.

The SEC withheld documents that were provided voluntarily from two sources: the Market Surveillance Division of the New York Stock Exchange (N.Y.SE) and Orthodontic Centers of America. The head of the NYSE Marketing Trading Analysis De-

partment avers that the NYSE deems its documents "to be highly confidential in their entirety." (Bryngil Decl. ¶ 3.) She explains that "these materials contain confidential and sensitive surveillance information, and disclose methods by which NYSE surveils or investigates anomalous trading." (*Id.* ¶ 4.) In addition, she explains the documents "contain confidential financial data of private parties and/or sensitive surveillance data whose disclosure may significantly impair the effectiveness of NYSE self-regulatory practices and its obligations, under federal law to enforce compliance with applicable rules and regulations by persons and/or entities subject to its jurisdiction." (*Id.*)

The remaining documents are letters that counsel prepared for Orthodontic Centers of America. The documents relate to its business and operations and "constitute commercial and financial information that is confidential ... and is not of the kind that would be ordinarily released by the company to the public." (Centola Decl. ¶ 1.) In particular, the documents contain "specific amounts, dates and values on a name-by-name basis regarding securities issued by the company in connection with privately and individually negotiated transactions with orthodontists affiliated with the company," as well as "sensitive commercial and financial aspects of a privately and individually negotiated contractual arrangement ... and ... the specific terms of the parties' financial relationship." (*Id.*¶ 2.)

***8** These declarations clearly explain that the information contained in the documents consists of confidential commercial or financial information and that the companies do not customarily release the information to the public. The SEC properly withheld the voluntarily provided documents pursuant to Exemption 4.

*3. Exemption 5*

The SEC relies on Exemption 5 to withhold documents purportedly covered by evidentiary privileges. Exemption 5 permits nondisclosure of "inter-agency or intraagency 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. § 552(b)(5). The exemption allows an agency to withhold materials that would be privileged from discovery in civil litigation, such as those shielded by the attorney-client privilege, the work product doctrine, and the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C.Cir.2002) (citation omitted).

a. Attorney-Client Privilege

The SEC relies on the attorney-client privilege to withhold one request-for-action form and three internal memoranda. The Assistant Chief Counsel in the Division of Enforcement for the SEC avers that the memoranda contain attorney recommendations, identify potential securities law violations, and provide legal advice as to whether the SEC should take action. (Hall Decl. ¶ 35.) These documents fall within the attorney-client privilege and therefore fall within Exemption 5.

b. Work Product Doctrine

The SEC relies on the work product doctrine to withhold several types of documents: case opening reports, case closing reports, matter-under-inquiry summaries, investigation summaries, access reports, internal memoranda, and attorney research and notes.

The attorney work product doctrine protects "the files and the mental impressions of an attorney ... reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways" prepared in anticipation of litigation. *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir.1994) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). Although factual information falling within the scope of attorney work product generally is discovered upon a showing of

"substantial need" under Federal Rule of Civil Procedure 26(b)(3), under Exemption 5 the test is whether information "would 'routinely be disclosed' in private litigation." *Id.* (quoting *Sears, Roebuck & Co.,* 421 U.S. at 149 n. 16). Thus, to rely on the work product doctrine, an agency must show that the document was "prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind." *SafeCard Servs., Inc. v.. SEC,* 926 F.2d 1197, 1202 (D.C.Cir.1991) (citation omitted).

> An agency may meet this standard by demonstrating that one of its lawyers prepared a document in the course of an investigation that was undertaken with litigation in mind. Such an investigation would have to be, and typically would be, based upon a suspicion of specific wrongdoing and represent an attempt to garner evidence and to build a case against the suspected wrongdoer. The existence of an active investigation, therefore, is strong circumstantial evidence that the agency lawyer prepared the document with future "litigation in mind."

***9** *Id.; see also A. Michael's Piano, Inc.,* 18 F.3d at 146 ("courts have taken a flexible approach in determining whether the work product doctrine is applicable, asking not whether litigation was a certainty, but whether the document was created 'with an eye toward litigation.' ") (citation omitted).

In this case, SEC attorneys prepared the documents in question in the course of active investigations into potential securities law violations. The *Vaughn* index and supporting declaration detail how the work product doctrine applies to each withheld document. Specifically, the case opening reports are internal reports that contain recommendations to open and manage the SEC investigations. (Hall Decl. ¶¶ 5-6.) The reports identify possible securities law violations, potential legal and factual issues, proposed areas of investigatory focus, and mental impressions regarding the issues and conduct to be investigated. (*Id.* ¶¶ 7-8.) The case closing reports are internal reports that contain recommendations to close SEC investigations. (*Id.* ¶¶ 10-11.) The reports include legal analyses, mental impressions, and legal conclusions regarding the investigation. ( *Id.* ¶ 11.) The matter-under-inquiry summaries are internal reports and forms that SEC supervisors use to manage cases. (*Id.* ¶¶ 12, 21.) The summaries contain information relevant to closing an investigation and identify possible securities law violations. (*Id.* ¶¶ 13, 15, 22.) The investigation summaries are internal reports that SEC supervisors use to manage cases. (*Id.* ¶ 17.) The summaries contain information that SEC attorneys prepared, including identification of possible securities law violations and recommendations on closing specific investigations. ( *Id.* ¶ 18 .) The access reports include formal access requests used by regulatory and law enforcement agencies that need non-public information obtained from another agency's investigation. (*Id.* ¶ 24.) The reports contain inter-agency law enforcement communications regarding the investigations, including insight into the individuals and entities that were examined or investigated. (*Id.* ¶¶ 25, 28-29, 32-33.) The reports also contain information that SEC attorneys considered when determining whether to grant the inter-agency access. (*Id.* ¶ ¶ 27, 31.) The internal memoranda contain attorney recommendations to the SEC, identify potential securities law violations, and provide legal advice on whether the SEC should take action. (*Id.* ¶ 35.) The attorney research and notes reveal SEC attorneys' mental impressions regarding interviews and examinations conducted during an investigation, as well as legal research relating to the investigation. (Davis Decl. ¶¶ 4-10.)

SEC attorneys prepared these documents in the course of active investigations focusing on specific actions and possible securities law violations. The documents also contain reports and recommendations with respect to the status of an ongoing investigation. As such, the documents were prepared in anticipation of litigation and qualify as attorney work product. The SEC properly relied on Exemption 5 to withhold the records.

c. Deliberative Process Privilege

***10** The SEC relies on the deliberative process privilege to withhold case opening reports, case closing recommendations, matter-under-inquiry summaries, investigation summaries, access reports, internal memoranda, public complaint reports, and three miscellaneous documents.

"The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny." *Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs,* 147 F.3d 708, 710 (8th Cir.1998) (citation omitted). Thus, an agency may withhold an inter- or intraagency memorandum that is both pre-decisional and deliberative. *Id.* A pre-decisional document is one that assists the decision-making process and contains personal opinions rather than agency policy. *Id.* A document is deliberative if its disclosure would discourage candid discussion in agency decision making. *Id.*

The case opening reports contain recommendations to open specific investigations, as well as the bases for the recommendations. (Hall Decl. ¶¶ 5-8.) The case closing reports contain recommendations and reasons to close the investigations. (*Id.* ¶¶ 10-11.) Similarly, the matter-under-inquiry summaries and investigation summaries contain information and recommendations relating the closing of specific investigations. (*Id.* ¶¶ 12-13, 15, 17-18, 21-22.) The access reports contain analyses and recommendations on whether the SEC should grant inter-agency access to investigatory documents. (*Id.* ¶ 27.) The internal memoranda contain legal advice and recommendations regarding what action the SEC should take. (*Id.* ¶¶ 30-31, 34-35.) The public complaint reports contain information used to determine whether the SEC should investigate a particular entity. (*Id.* ¶¶ 37-41.) The miscellaneous documents include an internal e-mail exchange regarding outstanding FOIA concerns in four SEC investigations, an internal report used to manage SEC investigations, and an internal e-mail regarding a potential conflict of interest in a particular investigation and identifying several issues in the investigation. (*Id.* ¶¶ 42-44.)

The *Vaughn* index and supporting declaration establish that each document contains pre-decisional and deliberative information. The declaration describes documents that are prime examples of the deliberative process, as they include personal impressions as to how the investigation should proceed. Premature disclosure of those recommendations or comments "would discourage free ranging criticism and consideration of alternatives within an agency and would not be in the public interest." *Shorr,* 147 F.3d at 710. The deliberative privilege process applies to the documents.

Gavin criticizes the SEC for its apparently inconsistent responses to his requests and surmises that the SEC could redact information and release the segregable portion of the documents. He suggests that the court conduct an *in camera* review to confirm whether all information falls within Exemption 5. An *in camera* review is unnecessary. The SEC provides a reasonable explanation for the manner in which it released information. (Aug. 1, 2007 Winter Decl. ¶¶ 3-4.) Moreover, the *Vaughn* index and supporting declarations provide detailed descriptions of the withheld documents, and explain how Exemption 5 applies to each document. Specifically, the Assistant Chief Counsel in the Division of Enforcement for the SEC avers that the documents "consist entirely of the types of information" covered by Exemption 5, indicating that no segregable information exists. (Hall Decl. ¶ 3 .) The index and affidavits describe the documents and withholding justifications in sufficient detail to demonstrate that Exemption 5 applies. *See Mace v. EEOC,* 197 F.3d 329, 330 (8th Cir.1999) (courts may rely on affidavits to determine whether Exemption 5 applied); *see also Boyd v. DOJ,* 475 F.3d 381, 391 (D.C.Cir.2007) (district did not abuse its discretion by failing to conduct *in camera* review of withheld documents when the agency provided sufficiently detailed affidavits and the requestor presented no evidence of bad faith). The SEC has established

proper reliance on Exemption 5 to withhold these documents.

*4. Exemption 7(C)*

***11** The SEC relies on Exemption 7(C) to redact personal information regarding SEC staff and third parties, including the individuals' names, contact information, and account numbers. The SEC contends that releasing the information "would potentially subject staff and third parties to harassment, embarrassment, and/or unnecessary public scrutiny" and that the information provides "no insight into the SEC's conduct or discharge of its responsibilities." (June 4, 2007 Winter Decl. ¶ 4.)

Exemption 7(C) allows an agency to withhold information compiled "for law enforcement purposes" if that information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). To determine whether release of particular information is an "unwarranted" invasion of privacy, the Court must balance the compromised privacy interests against the public interest in releasing the information requested. *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C.Cir.2001) (citing *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 (1989)). Where a legitimate privacy interest is implicated, the requester must "(1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest." *Sussman*, 2007 WL 2176117, at *6 (citations omitted).

Exemption 7(C) authorizes nondisclosure of staff names, as well as information in law enforcement investigation files that identify third parties. *See Kuehnert v. FBI*, 620 F.2d 662, 665-66 (8th Cir.1980); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 767-68 (D.C .Cir.1990) (persons involved in law enforcement investigations "even if they are not the subject of the investigation-have a substantial interest in seeing that their participation remains secret") (internal quotations and citations omitted); *Sussman*, 2007 WL 2176117, at *6 ("Names of private individuals are thus generally exempt from disclosure except, for example, where they are required to confirm or refute allegations of improper government activity.") (citations omitted). The SEC has established sufficient privacy interests to warrant nondisclosure.

Moreover, releasing the personal information would not advance the fundamental purpose of FOIA "to open agency action to the light of public scrutiny." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 (citation omitted). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Id.* at 773. In this case, the SEC released the documents and redacted only personal information. The disclosure of the personal information would neither allow the public to know "what their government is up to" nor enlighten the public on the conduct, scope, or purpose of the SEC investigations. *Id.*

***12** Gavin contends that the SEC waived reliance on Exemption 7(C) by submitting declarations of individuals involved in the investigations and thereby disclosing their identities. However, the prior, public disclosure of the individuals' names does not waive Exemption 7(C) applicability. *Id.* at 762-63 (individual's privacy interest was not diminished even though some information in rap sheets was previously available to the public); *Fiduccia v. DOJ*, 185 F.3d 1035, 1046-47 (9th Cir.1999) (prior publicity regarding law enforcement search of individual's residence and public availability of search documents did not preclude assertion of Exemption 7(C)); *Kiraly v. FBI*, 728 F.2d 273, 279-80 (6th Cir .1984) (individual did not waive privacy interest in law enforcement investigation records by testifying at trial relating to the investigation). Similarly, it is

inconsequential that Gavin or the public could deduce the identities of staff members and third parties whose name and personal information have been redacted. *See Shores v. FBI,* 185 F.Supp.2d 77, 83 (D.D.C.2002) (where requestor may deduce individual's identity through other means or where their identities already have been disclosed, privacy interests are not diminished).

Because reasonable privacy interests outweigh any public interest in the personal information's disclosure, the SEC properly redacted the information under Exemption 7(C).

*5. Exemption 8*

The SEC relies on Exemption 8 to withhold documents relating to investigation of Charles Schwab Corporation and Nucor Corporation. Exemption 8 covers information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). The purpose underlying Exemption 8 is to ensure financial institutions' security. *Consumers Union of United States, Inc. v. Heimann,* 589 F.2d 531, 534 (D.C.Cir.1978). Specifically, Congress enacted Exemption 8 to address "concern that the disclosure of examination, operation and condition reports containing frank evaluations of investigated banks might undermine public confidence and cause unwarranted runs on banks." *Id.* Congress also enacted Exemption 8 to promote communication between banks and regulating agencies. *Id.* Thus, the broad scope of Exemption 8 provides "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports." *Gregory v. FDIC,* 631 F.2d 896, 898 (D.C .Cir.1980).

Gavin challenges the withholding of three documents concerning the investigation of Charles Schwab Corporation. He notes that the documents originated from federal and state banking regulators and contends that those regulators must determine whether the documents are exempt and provide a declaration justifying the nondisclosure.[FN16] The case law on which he relies does not support that requirement. Rather, *Paisley v. Central Intelligence Agency,* 712 F.2d 686, 691 (D.C.Cir.1983) and *Williams v. Federal Bureau of Investigation,* No. 92-5176, 1993 WL 157679, at *1 (D.C.Cir. May 7, 1993) hold that an agency that receives a document from another agency may not refuse to process a FOIA request on the ground that the document originated elsewhere and may not simply refer the request to the originating agency. Instead, the receiving agency must present a justification for withholding the document.

> FN16. Gavin identifies the documents as Schwab Index Document Nos. 2, 3, and 7. However, Document 7 is another agency's request for access to SEC investigative files. (June 4, 2007 Winter Decl. Ex. A .; Hall Decl. ¶ 25.) Documents 1 and 18 are SEC requests for access to other agencies' investigation files. (Hall Decl. ¶ 25.) Documents 2 and 17 are letters from the other agencies notifying the SEC of decisions regarding the SEC requests. (*Id.* ¶ 28.)

***13** Gavin also submits that the SEC has not segregated and released factual information contained within the documents. "Purely factual information does not fall within Exemption 8." *Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin.,* No. 96-478, 1996 WL 33497625, at *5 (E.D.Va. Dec. 24, 1996) (citing *In re Subpoena Served upon Comptroller of Currency & the Sec'y of the Bd. of Governors of the Fed. Reserve Sys.,* 967 F.2d 630, 634 (D.C.Cir.1992)).

> However, facts cannot be considered in isolation. They must be considered with respect to the overall context of the documents in which they are contained. Otherwise, the "purely factual information" exception would swallow the entire exemption in piecemeal fashion. In considering the

> factual information withheld ..., the Court [must be] mindful of a key purpose underlying Exemption 8, *i.e.*, fostering communication between banks and regulating agencies.

*Id.*

In this case, the Assistant Chief Counsel in the Division of Enforcement for the SEC specifically avers that Exemption 8 covers the documents in their entirety. (Hall Decl. ¶ 3.) Moreover, to compel the SEC to release the information would "undermine the spirit of cooperation between banks and regulating agencies that Exemption 8 attempts to foster." *Marriott Employees' Fed. Credit Union*, 1996 WL 33497625, at *5. The documents are access requests to the bank regulator investigation files regarding Charles Schwab Corporation, responses to the access requests, and letters from the Federal Reserve Bank to the SEC regarding the investigation. The documents were produced in connection with an ongoing SEC examination or investigation and provide insight into the information and entities the SEC attorneys were examining and investigating. (Hall Decl. ¶ 25; Farrell Decl. ¶¶ 4-5.) As such, the documents fall within the scope of Exemption 8.

The record establishes that the SEC has properly relied on various exemptions to withhold records and has identified all reasonably segregable, non-exempt information. Because the SEC has established it fully discharged its FOIA duty as it relates to the remanded requests, the Court grants summary judgment on Counts 2-3, 5-6, 8-10, 12, 14-21, and 24-25 of the Complaint.

**F. Attorneys' Fees under FOIA**

Gavin submits that the Court should award him attorneys' fees incurred in litigating this action. A court may award "reasonable attorney fees and other litigation costs reasonably incurred in any case ... in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). The purpose of § 552(a)(4)(E) is "to remove the often insurmountable financial barriers the average citizen face[s] when attempting to force governmental compliance with FOIA, not to provide an award to any plaintiff who successfully force[s] the government to disclose the requested information." *Ginter v. IRS*, 648 F.2d 469, 470 (8th Cir.1981) (citations omitted).

***14** Nonetheless, courts within the Eighth Circuit do not require the claimant to receive a favorable judgment in order to "substantially prevail." *Id.*; *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir.1985); *but see Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 470 F.3d 363, 368-69 (D.C.Cir.2006) ("to 'substantially prevail,' a party must obtain court-ordered relief on the merits of its FOIA claim"). However, if the plaintiff does not receive a favorable judgment, then he must establish two elements: (1) that the prosecution of the action could reasonably be regarded as necessary to obtain the information, and (2) that the litigation caused the release of the information. *Miller*, 779 F.2d at 1389 (citing *Ginter*, 648 F.2d at 471).

Despite the Court denying his summary judgment motions, Gavin substantially prevailed in this action because his vigorous prosecution of the action compelled the SEC either to produce the requested records or apply proper FOIA exemptions. *See id.* The SEC contends that it released most documents because it closed the investigations in the normal course of business-not because Gavin sued. The Court disagrees. When Gavin commenced this action, he had received no information on any request at issue. Only after the parties filed three rounds of summary judgment motions did the Court find that the SEC finally sustained its burden of establishing that exemptions applied. During that time, the SEC withdrew its use of the Glomar response, remanded several requests for reprocessing, relied on several exemptions not previously asserted, and finally conducted a document-by-document review. Furthermore, the SEC ultimately was forced to submit a *Vaughn* index and prove that its reliance on the newly asserted exemptions was proper. Gavin's vig-

orous and persistent prosecution of the action-not the mere passage of time-forced the SEC to release the documents and comply with FOIA.

Nonetheless, eligibility for fees does not necessarily mean that a party is entitled to attorneys' fees under FOIA. *Id.* Rather, the Court must consider several factors to determine whether the prevailing party is entitled to fees: "(1) the benefit to the public to be derived from the case; (2) commercial benefit to the complainant; (3) the nature of the complainant's interest in the records which he seeks; and (4) whether the government's withholding of the records had a reasonable basis in law." *Id.*

The first factor weighs against a fee award. Because the purpose of FOIA is to promote public disclosure of government records and information, the first factor is significant. *Id.* Of course, "the successful FOIA plaintiff always acts in some degree for the benefit of the public, both by bringing government into compliance with the FOIA disclosure policy and by securing for the public at large the benefits assumed to flow from the public disclosure of government information." *Aviation Data Serv. v. FAA,* 687 F.2d 1319, 1323 (10th Cir.1982) (internal quotations and citation omitted). Thus, when weighing this factor, courts "take into account the degree of dissemination and likely public impact that might be expected from a particular disclosure" so that disclosure will "add to the fund of information that citizens may use in making vital political choices." *Id.* (citation omitted). Gavin uses the information to advise subscribers on investment options. He does not seek the information to disseminate to the general public; he seeks the information to sell it to his subscribers. Although the subscribers may benefit from making more informed investment decisions, FN17 the public benefit is minimal and incidental.

> FN17. The Court further notes that the subscribers seek this information for commercial gain, not because they want to know how the SEC operates.

***15** The second and third factors also weigh against a fee award. "To the extent that the requester seeks government information primarily for private gain, his FOIA action is a matter of his own concern and expense and not of advocacy to serve a public interest." *Id.* at 1390; *see also Tax Analysts v. DOJ,* 965 F.2d 1092, 1095 (D.C.Cir.1992) ("when a litigant seeks disclosure for a commercial benefit or out of other personal motives, an award of attorney's fees is generally inappropriate"). As a commercial requestor, Gavin seeks the information for a newsletter that he publishes and sells to subscribers. His benefit is purely commercial and his primary interest is to advance a purely personal goal.

Finally, the fourth factor is neutral. This factor is "intended to weed out those cases in which the government was recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Tax Analysts,* 965 F.2d at 1097 (internal quotations and citation omitted). The SEC steadfastly refused to conduct a document-bydocument review despite clear orders from the Court. However, it ultimately proved that nondisclosure of much of the requested information was proper. Weighing all these factors, the Court finds that Gavin has failed to show that he is entitled to attorneys' fees under § 552(a)(4)(E) .

**G. Motion for Sanctions and Attorneys' Fees**

Gavin also seeks sanctions and attorneys' fees against the SEC for failure to comply with court orders, repeatedly asking for relief previously denied by the Court, and other purportedly nefarious acts.

The Court previously chastised the SEC for how it proceeded in this case. Specifically, the Court recognized that the SEC "has continually and deliberately stalled in fulfilling its obligations to conduct a document-by-document review of material it seeks to withhold pursuant to Exemption 7(A). In doing so, the SEC has attempted to play by its own rules and disregard the law." (June 20, 2006 Order.) The Court further stated:

> The Court adamantly disapproves of the manner in which the SEC has conducted itself as it relates to Gavin's requests. The SEC has shirked its responsibility by brazenly refusing to conduct a document-by-document review-despite a direct order from the Court. Moreover, it raises the cost issue as an after-the-fact argument to circumvent the requirements of FOIA. The SEC should have completed the document-by-document reviews from the outset before ever relying on Exemption 7(A). Instead, it arbitrarily relied on the Exemption without first determining whether the Exemption truly applies.

(Oct. 16, 2006 Order at 12-13.)

Gavin has not specifically identified a rule or statute on which he bases his Motion for Sanctions. He cannot rely on FOIA, as FOIA does not authorize sanctions as a remedy for failure to disclose documents. *O'Meara v. IRS,* 142 F.3d 440 (7th Cir.1998) (citations omitted) (table opinion). *Eltayib v. U.S. Coast Guard,* 53 Fed. Appx. 127 (table opinion) (D.C.Cir.2002) (affirming denial of motion for sanctions because FOIA does not authorize the collection of damages). Nor can he rely on Federal Rule of Civil Procedure 11, which authorizes the Court to impose sanctions on a party who files motions for an improper purpose such as unnecessary delay or needless increase in litigation costs, because he did not comply with the safe harbor provisions of Rule 11(c). *Gordon v. Unifund CCR Partners,* 345 F.3d 1028, 1029 (8th Cir.2003). Finally, he has not moved to hold the SEC in contempt of a court order. *See, e.g., Landmark Legal Found. v. EPA,* 272 F.Supp.2d 70, 85-87 (D.D.C.2003) (holding the EPA in contempt and ordering it to pay sanctions equaling legal fees and costs the plaintiff incurred because of "contumacious conduct").

***16** Courts have imposed sanctions under 28 U.S.C. § 1927 against a government agency that shirked its FOIA responsibilities. *See, e.g., Pac. Fisheries, Inc. v. IRS,* No. 04-2436, 2006 WL 1635706, at *5 (W.D.Wash. Jun. 1, 2006). Section 1927 provides: "Any attorney or other person admitted to conduct cases in any court of the United States who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The imposition of sanctions under § 1927 is discretionary. *Clark v. United Parcel Serv., Inc.,* 460 F.3d 1004, 1011 (8th Cir.2006). Before awarding sanctions under § 1927, however, the Court must conclude that counsel intentionally or recklessly disregarded their duties to the Court. *Id.*

The Court has expressed great frustration with the SEC's litigation tactics in this action. As the Court has previously identified, the most glaring example is the filing of several motions to challenge the clear order that the SEC conduct a document-by-document review of records withheld in the ongoing investigations.[FN18] Clearly the SEC should have raised the review cost issue early on, since the order that Gavin pay the review costs precipitated the narrowing of the requests and ultimately the document-bydocument review. However, the delay in raising the issue was neither clearly unreasonable nor vexatious. Nor was any other conduct for which Gavin complains. Thus, the Court will not impose sanctions.

> FN18. The Court also notes that Gavin has been steadfast in his position that the declarations filed by the SEC were inadequate, despite the Court clearly finding that the declarations were sufficient.

**CONCLUSION**

The SEC has established that it properly withheld information pursuant to several exemptions under FOIA. It also has identified reasonably segregable, non-exempt information. Although this litigation compelled the SEC to satisfy FOIA requirements, Gavin is not entitled to attorneys' fees. Finally, although the Court disapproves of the SEC's litigation tactics, they were not so outrageous as to war-

rant sanctions. Accordingly, **IT IS HEREBY ORDERED** that:

1. Gavin's Second Renewed Motion for Summary Judgment and Attorneys' Fees (Docket No. 132) is **DENIED;**

2. Gavin's Renewed Motion for Sanctions and Attorneys' Fees (Docket No. 135) is **DENIED;** and

3. The SEC's Second Renewed Motion for Summary Judgment (Docket No. 147) is **GRANTED.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

D.Minn.,2007.
Gavin v. U.S. S.E.C.
Not Reported in F.Supp.2d, 2007 WL 2454156 (D.Minn.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 2616187 (D.D.C.), 63 ERC 1854
**(Cite as: 2006 WL 2616187 (D.D.C.))**

H

United States District Court, District of Columbia.
GENERAL ELECTRIC CO., Plaintiff,
v.
Steven JOHNSON, Administrator, United States Environmental Protection Agency, and the United States Environmental Protection Agency, Defendants.
**No. Civ.A.00-2855(JDB).**

Sept. 12, 2006.

Donald W. Fowler, Eric Gordon Lasker, Spriggs & Hollingsworth, Michael Dana Warden, Sidley Austin, LLP, Thomas G. Echikson, Carter G. Phillips, Sidley Austin Brown & Wood, LLP, Washington, DC, Laurence H. Tribe, Harvard Law School, Cambridge, MA, for Plaintiff.

Catherine Wannamaker, John David Gunter, II, Angeline Purdy, U.S. Department of Justice, Environment & Natural Resources Division Environmental Defense Section, Raymond B. Ludwiszewski, Gibson, Dunn & Crutcher, L.L.P., Robert J. Kafin, Proskauer Rose, LLP, Michael W. Steinberg, Morgan, Lewis & Bockius, L.L.P., Lisa Emily Heinzerling, Washington, DC, for Defendants.

*MEMORANDUM OPINION*

BATES, J.

***1** Presently before the Court is plaintiff General Electric Company's ("GE") motion to compel production of approximately 6,177 documents that defendants Environmental Protection Agency ("EPA") and Steven Johnson, in his capacity as administrator of EPA, claim are covered by the deliberative process privilege, attorney-client privilege, and work product doctrine. GE has also requested the appointment of a special master to conduct an *in camera* review of these documents. A motions hearing was held with the Court on June 2, 2006, following which the Court ordered the parties to make two additional submissions. Specifically, defendants were required to utilize a statistically-reliable method to generate a sample of approximately 100 documents that is representative of the various withholding claims and geographic regions at issue, to facilitate the Court's *in camera* review. GE, on the other hand, was ordered to submit a list (organized by stamped document numbers) and a copy of all documents with respect to which it claims that defendants have, by virtue of disclosing those documents, effected subject-matter waiver of any otherwise applicable privilege. Based upon its *in camera* review of these documents in light of applicable law, and for the reasons that follow, the Court will grant GE's motion in part and deny it in part.

*BACKGROUND*

I. *Factual and Procedural Background.*

This action was originally filed against defendants on November 28, 2000 as a challenge to the facial constitutionality of certain provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a) *et seq.*, and to EPA's method of administering § 106(a) of that statute. Section 106(a) empowers EPA to require responsible parties to clean up a contaminated site if it finds "that there may be an imminent substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). The usual course of conduct is for EPA to send the responsible party a "Section 106 order," also referred to as a "UAO." Defs.' Mem. Opp'n at 3.[FN1] If the recipient fails to comply with the UAO, then EPA may bring an action in federal court seeking to compel compliance, during which the recipient may present all of its challenges to the UAO. If the court determines that the recipient lacked "sufficient cause" for refusing to comply, then the court may impose penalties and punitive damages. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); Defs.' Mem. Opp'n at 3. A recipient that chooses to comply with a

UAO may petition EPA to reimburse the response costs from the Superfund, *see* 42 U.S.C. §§ 9606(b)(2)(A), (C-D); Defs.' Mem. Opp'n at 3, and, in the event that EPA denies the petition, may file an action for reimbursement in federal district court, *see* 42 U.S.C. §§ 9606(b)(2)(B), (E); Defs.' Mem. Opp'n at 3.

> FN1. The Court has chosen the following scheme for referencing the various memoranda of the parties: (1) "GE's Memorandum in Support of Motion to Compel" is cited as "Pl.'s Mem. Supp.;" (2) "Defendants' Memorandum in Opposition to the Motion to Compel" is cited as "Defs.' Mem. Opp'n."; (3) "GE's Reply Memorandum in Further Support of the Motion to Compel" is cited as "Pl.'s Reply;" (4) the memorandum filed by GE concurrently with its submission of waiver documents is cited as "GE's 2d Mem. Supp.;" and (5) "Defendant's Response to GE's Submission Regarding Waiver" is cited as "Defs.' Surreply."

***2** On March 31, 2003, this Court granted EPA's motion to dismiss GE's amended complaint on the ground that § 113(h) of CERCLA barred pre-enforcement review of GE's constitutional challenge to CERCLA. *See General Electric Co. v. Johnson*, Civil Action No. 00-2855, dkt. no. 54 (D.D.C. Mar. 31, 2003) (Order). That decision was overturned on appeal, and the case was remanded to this Court. *See General Electric Co. v. EPA*, 360 F.3d 188 (D.C.Cir.2004). Thereafter, discovery was stayed to allow the Court to rule on EPA's motion for summary judgment. *See General Electric Co. v. Johnson*, Civil Action No. 00-2855, dkt. no. 69 (D.D.C. Nov. 22, 2004) (Order). In its motion, EPA argued that GE's constitutional challenge to CERCLA was a facial challenge limited to review of the statute's text and, accordingly, that GE was required to establish that CERCLA is unconstitutional in every application, consistent with *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). EPA contended that GE could not carry its burden under *Salerno* because CERCLA plainly was constitutional as applied in emergency situations.

GE vigorously opposed EPA's motion, arguing that the complaint advanced not only a facial due process challenge based on CERCLA's text, but also a challenge based upon EPA's pattern and practice of administering § 106, which, it asserted, was not foreclosed by the jurisdictional bar of § 113(h) as interpreted by the D.C. Circuit on appeal. *See General Electric Co.*, 360 F.3d at 193-94. Accordingly, GE moved the Court to permit discovery as to both of its claims. In its Memorandum Opinion of March 30, 2005, this Court held that although the challenged statutory provisions are not unconstitutional "on their face," *see General Electric Co. v. Johnson*, 362 F.Supp.2d 327, 330 (D.D.C.2005), GE had nonetheless sufficiently alleged a "pattern and practice" challenge to the procedure that EPA employs in administering § 106, *id.* at 334, 337, 344. The crux of GE's pattern and practice claim is that EPA's "enforcement first" policy and administration has deprived GE of its constitutional right to procedural due process of law. The Court allowed the parties to begin discovery regarding this claim.

II. *The Current Discovery Dispute*.

On June 17, 2005, GE served a broad discovery request upon EPA, seeking tens of thousands of documents dating as far back as 1980. Defs.' Mem. Opp'n at 4. The parties worked together to narrow the scope of the requests, but these issues were not fully resolved until August 29, 2005, through the Court's order. *Id.; see General Electric Co. v. Johnson*, Civil Action No. 00-2855, dkt. no. 93 (D.D.C. Aug. 29, 2005) (Order). Thereafter, EPA conducted a five-month nationwide search for, and then review and retrieval of, approximately 20,000 documents, which occupied hundreds of employees and required 14,000 personnel hours to complete. Defs.' Mem. Opp'n at 4. To date, EPA has produced a total of 12,866 documents from multiple regions, but claims that the remaining 6,177 documents are protected by the deliberative process privilege, attorney-client privilege, and/or work product doctrine. FN2 *See id.* at 1 n .1; Defs.' Exh. 2 (EPA's revised and cumulative privilege log). GE argues that EPA's privilege assertions are overly broad and inapplicable, and that EPA has implicitly waived some protections through its disclosure of other documents that are simil-

ar in character and subject matter. *See, e.g.,* Pl.'s Mem. Supp. at 1. Because these documents are allegedly "crucial" to the "core issues" of its pattern or practice claim, GE requests that the Court issue an order forcing EPA to produce all remaining documents. *Id.* at 1, 3. Moreover, GE seeks the appointment of a special master to conduct an *in camera* review of any documents that remain the subject of dispute following the Court's rulings as to the proper scope of the protections and privileges asserted. *Id.* at 1.

> FN2. When GE filed its motion to compel, EPA was already undertaking an independent review of its initial privilege determinations. That review has resulted in the disclosure of additional documents to GE that were initially indicated as privileged or protected. These additional disclosures are reflected in the totals provided here.

***3** The Court held a motions hearing on June 2, 2006. That same day, the Court ordered GE to submit a copy of all documents that it alleges were inadvertently disclosed by EPA and therefore form the basis of GE's arguments for subject-matter waiver. EPA was ordered to use a statistically-viable method to generate a sampling of approximately 100 documents drawn from the updated privilege log for the Court to review *in camera.* EPA has generated that sampling after first removing from its privilege log those documents that GE does not seek to obtain. In order to comply with the Court's direction that the sampling be a fair cross-section of the various privilege assertions, geographic regions, and classes of documents included in EPA's privilege log, EPA decided to include a total of ninety-nine documents in the following distribution: twenty-five documents from the Office of Site Remediation and Enforcement; ten documents from each of two other EPA Headquarters Offices (designated as "OGC" and "FFEO"); five documents from the Department of Justice; eight documents from each of the EPA Regional Offices for Regions Two, Five, and Nine; and five documents from each of the EPA Regional Offices for Regions One, Three, Four, Six, Seven, Eight and Ten. Defs.' Cover Letter of 06/14/2006 at 1. To determine which documents would comprise this distribution, EPA assigned random numbers to each privilege log entry using the computer program Microsoft Excel. *Id.* GE agreed that this sampling method was fair. *Id.* Following the *in camera* submission, the parties conferred further and decided that the documents designated as P.L. No. 975, P.L. No. 5002, P.L. No. 2215, and P.L. No. 2290 should be removed from the privilege log and, hence, the *in camera* sampling. Defs.' Cover Letter of 6/16/2006. In their place, the parties added four new documents, identified as P.L. No. 1042, P.L. No. 6535, P.L. No. 1724, and P.L. No. 546. *Id.*

Based upon its *in camera* review of the documents submitted by the parties, the various legal memoranda, and EPA's most recent privilege log, the Court will grant GE's motion in part and deny it in part. This Memorandum Opinion sets out the legal framework to be applied in making privilege determinations as to the over 6,000 documents for which EPA has claimed privilege. Table T-1, attached hereto, summarizes the Court's privilege findings with respect to the sampling of documents reviewed *in camera.* Table T-2, also attached, indicates the Court's determinations regarding the inadvertently-disclosed documents that form the basis for GE's subject-matter waiver arguments. Because there is no evidence of bad faith or noncompliance on the part of EPA, the Court denies GE's request for the appointment of a special master. However, in light of the errors identified by the Court during its *in camera* review, the Court directs EPA to perform the following tasks: (1) review all withholdings in light of the principles and findings set forth herein regarding the scope and possible waiver of the protections asserted; (2) make additional disclosures to GE consistent with the Court's analysis; (3) prepare an updated privilege log; and (4) submit a new statistically-representative sampling (consisting of no more than 50 of the documents identified on the final privilege log) for the Court to review *in camera.*

*ANALYSIS*

I. *The Deliberative Process Privilege*

A. *Parameters of the Privilege*

***4** The deliberative process privilege "serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). To this end, the privilege protects documents or communications that are "predecisional" and "deliberative" in nature. *See, e.g.*, *Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 207 (D.C.Cir.1990). One important inquiry is whether the document constitutes "secret law" actually applied by the agency in its dealings with the public. *See Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C.Cir.1997); *Coastal States*, 617 F.2d at 867. The existence of "secret law" is ordinarily evidenced by documents that "serve as 'law' in the specific case to which they are addressed" or "serve as 'law'-like precedent in subsequent cases." *Schlefer v. United States*, 702 F.2d 233, 237 (D.C.Cir.1983).

To be considered predecisional, the material must " 'precede, in temporal sequence, the 'decision' to which it relates." ' *Hinckley v. United States*, 140 F.3d 277, 284 (D.C.Cir.1998) (quoting *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C.Cir.1987)). " 'Accordingly, to approve exemption of a document as predecisional, a court must be able to pinpoint an agency decision or policy to which the document contributed." ' *Id.* (quoting *Senate of Puerto Rico*, 823 F.2d at 585); *see also Wilderness Society v. United States Dep't of the Interior*, 344 F.Supp.2d 1, 12 (D.D.C.2004) (ordering disclosure because agency failed to identify a specific, final agency decision). As with all privilege assertions, the agency bears the burden of demonstrating the final policy or decision that was reached at the end of the particular deliberative process that the document plays into. *See SafeCard Servs., Inc. v. Securities Exchange Comm'n*, 926 F.2d 1197, 1204 (D.C.Cir.1991). "Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States*, 617 F.2d at 866.

The purpose of the privilege is to protect the consultative process by guarding against the deterrence of deliberative candor in future discussions. *See id.* At the very instant that an agency aligns its policy or program congruently with the views expressed in a particular document, the document is no longer seen as "reflect[ing] the personal opinions of the writer"; rather, it reflects the position of the *agency*. *See Tax Analysts*, 117 F.3d at 617-18; *Coastal States*, 617 F.2d at 868, 869. Under such circumstances, the document is no longer considered "predecisional," *see Coastal States*, 617 F.2d at 866, and the purpose of the privilege is not implicated-it is the agency, not the individual drafter, that may thereafter be exposed to ridicule or criticism if the policy proves ill-advised. *See Sterling Drug, Inc. v. Fed. Trade Comm'n*, 450 F.2d 698, 670 (D.C.Cir.1971). The law is unconcerned with scorn directed at the agency because "[w]henever an agency's actions are opened to public view, the agency exposes itself to pressure and criticism." *Tax Analysts*, 117 F.3d at 618.

***5** Hence, the agency must establish that it has never implemented the opinions or analyses contained in the document, incorporated them into final agency policy or programs, referred to them in a precedential fashion, or otherwise treated them as if they constitute agency protocol. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); *see also Tax Analysts*, 117 F.3d at 617-18; *SafeCard*, 926 F.2d at 1205; *Coastal States*, 617 F.2d at 866, 869. The labels assigned to the documents by the agency (*e.g.*, "formal," "binding," "precedential," "final," "adopted," "draft," or "deliberative") are not dispositive in this regard, and conclusory or general assertions contained in declarations are insufficient. *See Schlefer*, 702 F.2d at 240-44; *Coastal States*, 617 F.2d at 867-68; *see also Tax Analysts*, 117 F.3d at 617. The mere fact that the agency has accepted a document's conclusion, however, does not mean that the document is postdecisional. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir.2005). Rather, the agency must have adopted the document's *rationale*. *See Renegotiation Bd. v.*

*Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975); *see also La Raza*, 411 F.3d at 359; *Afshar v. Dep't of State*, 702 F.2d 1125, 1143 n. 22 (D.C.Cir.1983). The Supreme Court has recognized that agencies are engaged in a constant process of policy evaluation and revision. *Sears*, 421 U.S. at 153 n. 18; *see also Wilderness Society*, 344 F.Supp.2d at 13. Accordingly, a document that, in a "follow-up" capacity, discusses or analyzes a policy that was previously adopted by the agency will not be considered postdecisional unless its recommendations and assessments form the basis for the agency's continued maintenance, or subsequent abandonment or revision, of the pre-existing policy. *See Wilderness Society*, 344 F.Supp.2d at 13.

Generally, material is considered deliberative if it " 'reflect[s] the give-and-take of the consultative process." ' *See Tax Analysts*, 117 F.3d at 617 (quoting *Coastal States*, 617 F.2d at 866). There is some overlap between the "predecisional" and "deliberative" requirements, however. Accordingly, the assessment of a document's deliberative nature may be a function of whether it is properly deemed predecisional. *Id.* Despite this seeming circularity, the D.C. Circuit has held that documents that evaluate the relative "strengths and weaknesses of alternative views" are not protected-despite appearing, at first blush, to qualify as deliberative-if they constitute an agency's statement of the law. *See id.* This is because "[t]he government's opinion about what is not the law and why it is not the law is as much a statement of government policy as its opinion about what the law is." *Id.* Hence, a document that "reflects a view eventually rejected by a field [employee may] ... still represent[ ] the opinion of the [agency]," in which circumstance "the public can only be enlightened by knowing what the [agency] believes the law to be." *Id.* It is incumbent upon the agency, then, to establish " 'what deliberative process is involved, and the role played by the documents in issue in the course of that process." ' *Coastal States*, 617 F.2d at 869; *see also Senate of Puerto Rico*, 823 F.2d at 585-86. Documents that do not provide advice to a superior, suggest the disposition of a case, discuss the relative pros and cons of a specific approach, or constitute "one step of an established adjudicatory process," but rather constitute "straightforward explanations" of an agency's pre-existing policy or regulations against the backdrop of specific or hypothetical factual situations, are not deliberative. *Coastal States*, 617 F.2d at 868.

***6** To determine whether a document is recommendatory in nature, courts often consider the following traits: language; tone; circulation stream; apparent purpose; relative hierarchical positions of the drafter and recipients; depth and extent of subsequent adherence or reference to, or citation of, the document; and whether the agency has ever used the document to train personnel, treated it as precedential, or described it as having been "amended" or "rescinded," for example. *See, e.g., Coastal States*, 617 F.2d at 860, 868; *see also Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257 (D.C.Cir.1982) ("The designation of ... documents as 'drafts' does not end the inquiry."); *Wilderness Society*, 344 F.Supp.2d at 13 (citing the agency's failure to tie the documents to particular authors and recipients, and to provide their titles, as a partial basis for ordering disclosure). As a general rule, the party invoking the deliberative process privilege is only entitled to withhold the deliberative and predecisional portions of the document-that is, purely factual information is ordinarily considered segregable. This is not the case, however, when the disclosure of the factual material would inappropriately expose the deliberative process, or when the material is otherwise incapable of being extracted without compromising the deliberative process. *See Heartwood, Inc. v. United States Forest Serv.*, 431 F.Supp.2d 28, (D.D.C.2006) (citing *Wash. Res. Project, Inc. v. Dep't of Health, Ed. & Welfare*, 504 F.2d 238, 249 (D.C.Cir.1974)); *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C.Cir.1992)).

"The [deliberative process] privilege was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit." *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C.Cir.), *modified*, 156 F.3d 1279 (D.C.Cir.1998) (citing *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630 (D.C.Cir.1992)). Accordingly, the privilege may not apply if the plaintiff's cause of action is

"directed at the government's intent." *Id.; see also Dep't of Econ. Dev. v. Fetherston,* 139 F.R.D. 295, 299 (S.D.N.Y.1991); *Grossman v. Schwarz,* 125 F.R.D. 376, 385 (S.D.N.Y.1989); *United States v. AT & T Co.,* 524 F.Supp. 1381, 1389-90 (D.D.C.1981). Quite simply, under such circumstances, "the privilege's raison d'etre evaporates." *In re Subpoena Duces Tecum,* 145 F.3d at 1424; *see also* 156 F.3d at 1280. Here, GE submits that the privilege "is a nonsequitur" because the pattern and practice claim is squarely directed at EPA's intent. Specifically, GE points to its supporting allegations, which it claims assert that

> EPA intentionally uses its UAO authority so as to (1) impose an immediate deprivation on UAO recipients; (2) to prolong UAOs to deprive respondents of any meaningful opportunity to be heard on challenges to EPA's action; (3) to penalize [potentially responsible parties] that seek to pursue judicial review of UAO decisions; and (4) to compel respondents to take actions that are not justified by any environmental emergency.

***7** Pl.'s Mem. Supp. at 11, 12.

GE notes that the applicable legal standard under which the merits of its pattern and practice claim will ultimately be evaluated is the test set forth in *Mathews v. Eldredge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under this test, the Court must balance the private interest affected by the enforcement-first program, the risk of an erroneous deprivation of that interest (along with the value of any additional or substitute safeguards), and the value of the program to the government. GE contends that *Mathews* directly calls for a demonstration of EPA's subjective intent because the pattern and practice claim alleges that EPA has misused its UAO authority in order to

> pursue less weighty interests, such as shifting the bill to 'deep pockets' with little or no connection to a site, alleviating political pressures by compelling [PRPs] to take actions that are not justified by environmental needs, and protecting its effectively unreviewable UAO authority by strategically leveraging and maximizing potential penalties to discourage if not preclude any meaningful opportunity for a hearing.... EPA's intentional decisions to use its UAO authority for political and strategic purposes without regard to any true environmental emergency has resulted in an increased risk and actuality of erroneous environmental response decisions.

Pl.'s Mem. Supp. at 12.

Despite the surface appeal of GE's argument, the Court disagrees. Although the nature of a pattern and practice claim is somewhat different from a plain vanilla procedural due process claim, the challenge nevertheless remains directly focused on procedure, the deprivation that has resulted from the procedure, and the value of the procedure to the government. It may well be that EPA's subjective intent is relevant to the "value" inquiry, but it is certainly not the essence of GE's challenge. Even assuming that exposure of EPA's subjective intent might assist GE in making a more convincing case, such a showing is not *required* in order for GE to prevail. Quite simply, the program either does or does not have certain characteristics; it either does or does not deprive PRPs of property or liberty; it either does or does not have a certain value to the government; and that value either is or is not greater than the PRPs' interest in an alternative or more traditional procedure. That assessment does not turn on EPA's subjective intent. At no point, then, is the Court called upon directly to probe EPA's actual motivation.

Indeed, the fact that the D.C. Circuit has chosen to use discrimination claims as illustrative of the type of case in which the privilege is rendered inert is particularly telling. *See In re Subpoena Duces Tecum,* 145 F.3d at 1424. In a cause of action arising under Title VII, for example, the employer's motivation is "*the* issue." *Id.* at 1424; *cf. Jones v. City of Modesto,* 408 F.Supp.2d 935, 963 (E.D.Cal.2005) (stating that "a due process claim does not consider the [d]efendant's motive," but suggesting that motive is relevant to whether punitive damages are a proper remedy for a due process violation); *Williams v. Wilkinson,* 122 F.Supp.2d 894, 904 (S.D.Ohio 2000) (stating, with respect to a claim of deliberate indifference brought pursuant to 42 U.S.C. § 1983, that "subjective intent is not an element of a claim

of deprivation of procedural due process under the Fourteenth Amendment," although intent must be considered objectively); *Howard v. Grinage*, 82 F.3d 1343, 1352 (6th Cir.1996) (finding, in the context of a deliberate indifference claim under § 1983, that "[i]f the conduct resulting in the deprivation [meets the objective standard for deliberate indifference, then] a constitutional violation results even if the decision to deprive was made with the best of motives"); *Franco v. Moreland*, 805 F.2d 798, 801 (8th Cir.1986) (holding that "[n]either justification nor good motive is a defense when a liberty interest gives one a right to notice of charges and an opportunity to explain"). In this case, the Court cannot say that the procedural due process claim, dressed in the garb of a pattern and practice challenge, is sufficiently analogous to an action focused on the government's intent so that the deliberative process privilege is unavailable to EPA.

***8** Where, as here, the deliberative process privilege does apply, it is still only a qualified protection, however, and it yields in the face of a party's overriding need. *See Hinckley*, 140 F.3d at 285; *see also In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997). A "key insight[ ]" that underscores the privilege is that "governmental decisionmakers will frequently disagree and debate many options before they reach any final conclusion, and that such predecisional and deliberative discussions and disputes should be protected from public review." *Hinckley*, 140 F.3d at 285-86. A sufficient showing of need may be found " 'where there is reason to believe the documents sought may shed light on governmental misconduct ... on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." ' *Id.* at 285 (quoting *In re Sealed Case*, 121 F.3d at 738). However, the privilege is not denied whenever someone seeking the information at issue establishes that "there was disagreement within the governmental entity at some point in the decisionmaking process." *Id.* at 285. Rather, the Court must engage in " 'a balancing of the competing interests, taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity [that would compromise deliberative candor] by government employees." ' *Id.* at 286 (quoting *In re Sealed Case*, 121 F.3d at 737-38).

B. *EPA's Sampling*

In an effort to carry its burden to establish that the documents at issue are deliberative and predecisional, EPA has submitted declarations from senior officials at the Office of Enforcement Compliance Assistance (hereinafter "OECA") and each of EPA's ten regions. *See, e.g.*, Defs.' Exh. 10 ("Nakayama Decl."); Defs.' Exh. 13 ("Varney Decl."). From the declarations, the Court has ascertained that lower-level officials reviewed all of the documents for which their regions or offices claimed the privilege, while higher-level officials typically reviewed a smaller representative sampling generated by the lower-level officials. The declarations of the higher-level officials address the documents by category, describing their general nature, listing the particular documents in that category that comprise the sampling, reciting the elements of the deliberative-process privilege, and stating that the elements are satisfied with respect to the documents in the sampling (and, accordingly, with respect to all documents in that category). Documents that do not comfortably fit within the enumerated categories are addressed individually, in similar fashion. Within and among regions and offices, the declarations are nearly identical in terms of language, structure, and approach.

It is, of course, undeniable that categorical declarations may only go so far in establishing the applicability of the privilege. The deliberative-process privilege is extremely document-specific, and, as EPA has repeatedly asserted in its memoranda, it is difficult to assess the propriety of privilege determinations based just on categorical assertions. To be sure, some of the documents addressed in the declarations are included in the sampling that EPA has provided to the Court, but that is not true for the entirety of the sampling.

***9** One deficiency in the declarations is their conclusory analysis. The declarations frequently attempt to satisfy the elements of the privilege merely by using those ele-

ments as "buzz words" in their privilege assertions. For example, the Ergener Declaration for OECA states that "the[ ] documents reflect the personal opinions of Agency staff and the internal, pre-decisional deliberation of Agency staff and officials leading to the development of final Agency positions on policy and case-specific CERCLA enforcement issues." Defs.' Exh. 20 ("Ergener Decl.") at 4. But this statement does not by itself establish that the documents are predecisional as contemplated by the deliberative process privilege. *See also* Ergener Decl. at 5. Specifically, the broad assertion fails to identify the particular CERCLA enforcement policy (or some step in the development thereof) that the documents relate to, and makes clear that the agency has (as confirmed by the Court's *in camera* review) withheld documents as predecisional and deliberative simply because they precede and relate to a decision in a particular case. This is insufficient, because straightforward applications of pre-existing law or policy to particular factual situations are not considered deliberative. *See Coastal States,* 617 F.2d at 868. Documents that simply "play into" a case- or investigation-specific decision do not fall under the privilege's protective umbrella because the final decision in the specific case or investigation is reached by applying policies, procedures, and laws that have already been established. *Id.* The deliberative-process privilege is concerned with the development and revision of the policies, procedures, or laws that would be used to shape case-specific determinations.

Moreover, the law is clear that declarations containing conclusory or general assertions that certain materials "have no official or binding effect," "are not treated as authority or precedent in other matters under consideration", "can be freely rejected by decision-making officials," or are created by persons who "do not have authority to make final decisions on the matters," *e.g.*, Ergener Decl. at 4, are insufficient alone to satisfy the burden of establishing that the documents are deliberative. *See Schlefer,* 702 F.2d at 240-44; *Coastal States,* 617 F.2d at 867-68; *see also Tax Analysts,* 117 F.3d at 617. Even assuming that the assertions in the declarations are correct, they do not establish that agency employees have not implemented the viewpoints in the documents or acted pursuant to them. When a specific rationale forms the basis for an employee's dealings with the public, it has become the "law" at least with respect to those particular dealings, whether or not the agency has formally adopted it, intended to follow it, or assigned it "precedential" or "binding" status. *See Schlefer,* 702 F.2d at 237. Quite simply, agencies act only through their employees. If the recommendations in the documents have actually been routinely followed by agency employees, they do not qualify for protection under the deliberative-process privilege, because they have become the agency's position by virtue of their implementation in specific cases against members of the public. EPA's declarations do not convince the Court that although its employees are theoretically free to reject the positions articulated in many of the documents, they have actually done so.

***10** The insufficiency of the declarations is particularly evident with respect to those documents that use authoritative, rather than suggestive, language and tone, with an apparent purpose of establishing or articulating policy rather than merely recommending it. In a similar vein, the fact that a document is a draft, rather than final, memorandum does not (standing alone) establish that it is not a statement of agency policy or position. The drafting process is not always substantive in nature, often concerning such technical, minor matters as whether to use a comma rather than a semi-colon. Finally, there is an insufficient indication that EPA has withheld only those portions of the documents that fit within the privilege. Not only does the Court's *in camera* review suggest that no segregability analysis has been undertaken, but EPA has never challenged GE's assertion that it failed to engage in such a process. Hence, EPA must reassess its deliberative-process privilege assertions regarding the material identified by the Court in Table T-1 as possibly protected.[FN3] The Court has, wherever possible, otherwise made determinations, as reflected in Table T-1, on assertions of deliberative process privilege for the sample documents based on the legal principles set forth in this Memorandum Opinion.

FN3. Because the Court cannot determine, at this juncture, whether some documents are ac-

> tually covered by the deliberative process privilege, it would be premature to assess GE's assertion that the privilege should yield to its showing of sufficient need. If, after reassessing its privilege assertions, EPA fails to convince the Court that the privilege applies, then the Court need not consider whether GE has made a sufficient showing to overcome it. On the other hand, however, if EPA does satisfy the Court as to the privileged nature of the documents, then GE would need to establish that its need for the privileged material is, when viewed in light of the *Hinckley* factors, greater than the interests the privilege is designed to protect. At that time, the Court will consider the arguments already made by the parties.

II. *The Work-Product Doctrine*

A. *Parameters of the Doctrine*

The purpose of the work-product doctrine is to ensure that "a lawyer [can] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," and to permit attorneys to "assemble information, sift what [they] consider[ ] to be the relevant from the irrelevant facts, prepare [their] legal theories and plan [their] strateg[ies] without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 91 L.Ed. 451 (1947). To this end, it "provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories," *Coastal States*, 617 F.2d at 864, so long as the document at issue was "created for use at trial or because a lawyer or party reasonably anticipated that specific litigation would occur and prepared [it] to advance the party's interest in the successful resolution of that litigation," *Willingham v. Ashcroft*, 228 F.R.D. 1, 4-5 (D.D.C.2005); *see Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C.Cir.1987) (identifying "the function of the documents as the critical issue"). To determine whether a document was "prepared in anticipation of litigation," a court must examine the nature of the document, the factual situation in the particular case, and whether the lawyer had a subjective and reasonable belief (as judged by objective standards) that "litigation was a real possibility." *In re Sealed Case*, 146 F.3d 881, 884 (D.C.Cir.1998). If the document "would have been prepared in essentially similar form irrespective of the litigation[,] ... it [cannot] fairly be said that [it was] created because of actual or impending litigation." *Id.*

***11** Because the purpose of the doctrine is to protect the integrity of the adversarial process, documents should not be withheld if their disclosure would not fairly be expected to impact pending or impending litigation. *See Evans v. Atwood*, 77 F.R.D. 1, 8 (D .D.C.1997). Documents prepared for some purpose other than litigation, moreover (for example, material generated in the ordinary course of business), likewise do not fall within the doctrine's ambit. *See Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1515 (D.C.Cir.1993). With respect to a document that was generated for more than one purpose, the work-product doctrine will only apply if litigation played a substantial role in its creation. *See Willingham*, 228 F.R.D. at 4 (citing *Jumpsport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329, 347-48 (N.D.Cal.2003)). Under the work-product doctrine's shield, materials prepared by or for parties, or by or for the parties' representatives (including attorneys, consultants, sureties, indemnitors, insurers, and agents), are protected. *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C.Cir.2005). The term "litigation" is interpreted broadly to encompass not only trials and other judicial proceedings, but also adversarial administrative matters, settlement negotiations, and the *avoidance* of anticipated litigation. *See, e.g., Public Citizen, Inc. v. Dep't of State*, 100 F.Supp.2d 10, 30 (D.D.C.2002), *overruled in part on other grounds*, 276 F.3d 634 (D.C.Cir.2002); *Cities Serv. Co. v. FTC*, 627 F.Supp. 827, 832 (D.D.C.1984); *Carey-Canada, Inc. v. Aetna*, 118 F.R.D. 250, 251-52 (D.D.C.1987). Although one must be cautious not to sweep all attorney efforts on the entire § 106 program at EPA within the umbrella of the work-product doctrine, presumably "litigation" includes the issuance and enforcement of specific UAOs, the development and enforcement of specific

Consent Decrees, and other specific CERCLA-related regulatory proceedings or actions.

The documents need not have been prepared in anticipation of a particular claim, *see Schiller v. NLRB,* 964 F.2d 1205, 1209 (D.C.Cir.1992) (citing *Delaney,* 826 F.2d at 127), but there must be some specificity to an assertion of work-product protection. It is not enough for the documents to relate to some unspecified claim that may conceivably be brought by some unidentified party at an unknown point in the future. Hence, documents that relate only generally to a broad agency program that is investigatory or adversarial in nature are not properly considered to have been "prepared in anticipation of litigation." *See Coastal States,* 617 F.2d at 865 ("To argue that every audit is potentially the subject of litigation is to go too far. While abstractly true, the mere possibility is hardly tangible enough to support so broad a claim of privilege."). Such a broad interpretation of the doctrine would shield all materials prepared by lawyers working for agencies that have significant law enforcement or investigatory duties, and, therefore, would foreclose the liberal discovery contemplated by the Federal Rules of Civil Procedure. *Id.* The focus, then, is whether, under the totality of the circumstances surrounding the document, it may fairly be said to have been created with an eye toward advancing the client's interest in *specific* litigation. *See Willingham,* 228 F.R.D. at 4.

***12** Accordingly, a work-product assertion must be supported by some articulable, specific fact or circumstance that illustrates the reasonableness of a belief that litigation was foreseeable. *Compare In re Sealed Case,* 146 F.3d at 885-86 (protecting documents created with awareness that the FEC was investigating and initiating civil actions concerning possible statutory violations where press coverage indicated that litigation against specific party was probable); *Schiller,* 964 F.2d at 1208 (protecting an internal NLRB memorandum that "contain[ed] advice on how to build an [Equal Access to Justice Act] defense and how to litigate EAJA cases," as well as other documents that outlined instructions for preparing and filing pleadings, contained legal arguments, and identified supporting authorities); *Delaney,* 826 F.2d at 126-27 (protecting IRS documents that identified the "types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome"); *and SafeCard,* 926 F.2d at 1202-03 (protecting documents prepared by SEC lawyers "in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party"), *with Coastal States,* 617 F.2d at 864-66 (refusing to shield advice memoranda prepared by agency attorneys in response to requests from agency auditors investigating regulatory compliance because they only contained interpretations of agency law, not advice regarding how to proceed with particular investigations), *and Evans,* 177 F.R.D. at 7 (refusing to shield agency manual and guidelines that were "promulgated as general standards to guide the Government lawyers in determining whether or not to bring an individual to trial in the first place"). Sufficient specificity is typically inferred from, for example, the document's identification or discussion of a particular violation, alleged violator, investigation, or legal challenge, defense, strategy, or argument. *See Equal Employment Oppty. Comm'n v. Lutheran Social Servs.,* 186 F.3d 959, 968-69 (D.C.Cir.1999). This is particularly important when the document was created by a government lawyer who was acting as a prosecutor or investigator. *See In re Sealed Case,* 146 F.3d at 885-88. "Where ... lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim represents just one factor that courts should consider in determining whether the work-product privilege applies." *Id.* at 887. "In some cases, [however], the absence of a specific claim will suggest that the lawyer had not prepared the materials 'in anticipation of litigation .' " *Id.*

When the work-product doctrine applies, its reach is broad. Even the factual portions of a document may be withheld, so long as the document as a whole was created in anticipation of litigation. *See Tax Analysts,* 117 F.3d at 620 (citing *Martin v. Office of Special Counsel,* 819 F.2d 1181, 1184-87 (D.C.Cir.1987)); *see also Tax Analysts v. Internal Revenue Serv.,* 391 F.Supp.2d 122, 129 & n. 8 (D.D.C.2005). In contrast, if a document was not as a whole created in anticipation of litigation, but a

specific portion of that document was, then a court may order disclosure of the document with the work-product material redacted. *See Tax Analysts,* 117 F.3d at 620; *see also Willingham,* 228 F.R.D. at 6 & n. 3. A party may only overcome the doctrine's protection by making a sufficient showing of need. *See* Fed.R.Civ.P. 26. Opinion work product-defined as an attorney's thoughts, impressions, interpretations, and analysis-is guarded with particular fervor. *See Willingham,* 228 F.R.D. at 5. Accordingly, a much higher threshold showing of necessity is required to obtain this type of protected material. *See id.*

B. *EPA's Sampling*

***13** The Court concludes that EPA has withheld documents that are akin to broad, general training manuals and guidelines. *See, e.g.,* P.L. No. 83; P.L. No. 678. Those are not protected work product and must be disclosed. *See Evans,* 177 F.R.D. at 7, 8. Similarly, *Coastal States* forecloses EPA from invoking the doctrine with respect to documents that relate only to broad agency programs or policies. *See, e.g.,* P.L. No. 93; P.L. No. 160; P.L. No. 2814. These documents lack the requisite specificity to have been created in anticipation of litigation that was foreseeable to a reasonable attorney. Essentially, they are the very documents this Circuit has indicated a reluctance to protect. *See In re Sealed Case,* 146 F.3d at 887 (stating that although a specific claim is not always required, its absence in certain cases may illustrate that the document was not prepared in anticipation of litigation). In accordance with the D.C. Circuit's decision in *SafeCard,* however, documents that were created with a particular site, PRP, investigation, event, or violation in mind are generally protected because they possess a reasonable nexus to the anticipation of foreseeable and specific litigation. *See, e.g.,* P.L. No. 2304; P.L. No. 2358; P.L. No. 1425. Documents which are less specific, but nonetheless analyze legal claims, arguments, strategies, or defenses for future litigation, may be withheld in accordance with the decisions in *Delaney* and *Schiller. See, e.g.,* P.L. No. 4771. Finally, the documents that appear to have been created for some other purpose than to assist in reasonably foreseeable litigation are not properly withheld as work product. *See, e.g.,* P.L. No. 1094; P.L. No. 5638. Any portions of documents that satisfy the doctrine's elements, however, may be withheld. Table T-1 includes the Court's determinations on the application of the work-product doctrine to the representative sample of EPA documents.

III. *The Attorney-Client Privilege*

A. *Parameters of the Privilege*

"The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." *In re Lindsey,* 158 F.3d at 1267. It "reflects society's judgment that promotion of trust and honesty within the relationship is more important than the burden placed on the discovery of truth." *Coastal States,* 617 F.2d at 862. The underlying purpose of the privilege is to protect a client's disclosures so as to foster the full and frank communications that are necessary for effective legal representation, and its protective umbrella extends to written, as well as spoken, communications. *Id* . In this vein, the privilege only extends to " 'those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." ' *Id.* The scope of the privilege is not limited to the litigation context or to specific disputes; rather, it encompasses "all situations in which an attorney's counsel is sought on a legal matter." *Id.*

***14** The protections of the privilege "are not lost because an attorney consults other attorneys about the subject-matter of the communication," and will extend to "communications between attorneys and all agents or employees of the organization[al client] who are authorized to act or speak for the organization in relation to the subject-matter of the communication." *Mead Data Central, Inc. v. Air Force,* 566 F.2d 242, 253 n. 24 (D.C.Cir.1977). To be protected under the privilege, the information must have been confidential at the time of the communication, and that confidentiality must have been preserved since. *Coastal States,* 617 F.2d at 863. The agency bears the burden "to demonstrate that confidentiality was expected in the handling of the [ ] com-

munications, and that it was reasonably careful to keep this confidential information protected from general disclosure." *Id.* Information that is obtained from third parties and communicated to agency lawyers by agency employees is not protected if "no new or confidential information *concerning the Agency* is imparted in the process." *See Schlefer*, 702 F.2d at 245. Under such circumstances, the purpose of the privilege is not furthered because the communication between the agency and its attorneys does not "contain private information concerning the agency." *Coastal States*, 617 F.2d at 863. Likewise, the legal conclusions of the agency or its lawyers are not protected if they rest on such third-party information. *See id.* at 862-63; *see also Tax Analysts*, 117 F.3d at 619; *Schlefer*, 702 F.2d at 245. Just as in the context of the deliberative process privilege, the attorney-client privilege dissolves if the communication has been adopted as agency policy. *See La Raza*, 411 F.3d at 360-61. Presumably, this rule is a hybrid outgrowth rooted in the privilege's purpose (to protect *confidential* matters), the law's intolerance for the maintenance by a federal agency of a body of "secret law," and the fact that the privilege applies only when attorneys are acting *as attorneys.*

GE's contention that government lawyers are categorically less entitled than private lawyers to invoke the attorney-client privilege as a basis for withholding information is without merit. *See* Pl.'s Mem. Supp. at 8-10; Pl.'s Reply at 3-4. GE's reliance on *In re Lindsey* to this end is misplaced. That case addressed a unique situation not presented here: whether White House counsel could invoke attorney-client privilege during an ongoing grand jury investigation in order to shield information concerning possible criminal activity by a government officer. *In re Lindsey* has a far more limited scope, then, than GE acknowledges. Indeed, that decision clearly confirms that "government officials will still enjoy the benefit of fully confidential communications with their attorneys *unless the communications reveal information relating to possible criminal wrongdoing.*" *In re Lindsey*, 158 F.3d at 1276 (emphasis added); *id.* at 1273 (stating that the "obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege *to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government"* ) (emphasis added).

***15** To be sure, GE is correct that when government attorneys are "in effect ... making law," they may not properly invoke the protections of the attorney-client privilege. In that context, the communications are made not for the purpose of securing legal advice or services, but rather for the purpose of developing policy. When government attorneys are functioning in the same capacity as do private attorneys, however, then the ordinary protections available to private clients and attorneys apply no differently to government agencies and attorneys. *See, e.g., In re Lindsey*, 158 F.3d at 1269 (quoting *Coastal States*, 617 F.2d at 863; *Mead Data Central*, 566 F.2d at 249, 253, 255 n. 32). If an agency " 'is dealing with its attorneys as would any private party seeking advice to protect personal interests, [then it] needs the same assurance of confidentiality so [that] it will not be deterred from full and frank communications with its counselors," ' *In re Lindsey*, 158 F.3d at 1269 (quoting *Coastal States*, 617 F.2d at 863), and confidentiality of the communication may be inferred, *see, e.g .*, *Electronic Privacy Information Ctr. v. Dep't of Homeland Security*, 384 F.Supp.2d 100, 116 (D.D.C.2005) (citing *Coastal States*, 617 F.2d at 863). In this context, " 'the 'client' [is] ... the agency and the attorney [is] ... the agency lawyer." *Tax Analysts*, 117 F.3d at 618. There is no authority or justification, then, for extending the principle established in *In re Lindsey* beyond the narrow context that it was meant to address.[FN4]

> FN4. To the extent that GE also argues that *In re Lindsey* dilutes the availability of the work-product doctrine and deliberative process privilege for agency lawyers, the Court rejects those arguments as well.

With respect to organizational clients (such as government agencies), attorneys often have more than one role, and the line between those functions is not always easily ascertainable. For example, no private attorney has the power to regulate the rights, responsibilities, or conduct of the public by setting policy. Private attorneys do, however, perform functions that evaluate the

legality (or legal advisability) of actions proposed by the client (as when a company asks its attorney to assess whether a particular method of calculating its federal taxes comports with the law, or whether it would be prudent and legal to deal with its business partners in a specific manner). Quite simply, to be protected under the privilege, the communication must relate to some legal strategy, or to the meaning, requirements, allowances, or prohibitions of the law. Accordingly, a memorandum from an agency attorney that assesses whether the facts surrounding a particular alleged violation satisfy the applicable legal standards for pursuing a PRP, or whether the provisions in a draft UAO are consistent with the law, may be protected. A draft UAO created by an attorney, however, may not be protected by the attorney-client privilege because it is not legal advice; instead, it amounts to an affirmative determination by the agency that the party is legally responsible for a specific violation, and assigns certain attendant responsibilities and penalties.[FN5]

FN5. Due to the unique nature of EPA's enforcement-first regime, EPA attorneys do not function as ordinary prosecutors. Ordinary prosecutors certainly "enforce" the law in that they decide to initiate proceedings against a suspected violator. In doing so, however, they advocate for the agency (or the public) against the suspected violator, with a neutral third-party as the arbiter-they do not themselves regulate or adjudicate liabilities, rights, responsibilities, or penalties. Prosecutors, then, do not function in any materially different way from private attorneys-it is the nature of their client that differs. EPA attorneys in UAO proceedings, however, may function in a materially different way. UAOs may essentially be viewed as condensed prosecutions and adjudications: they initiate adversary proceedings against a PRP, but simultaneously constitute a statement that the PRP is legally responsible for the violation and require the PRP to remedy wrongs through the fulfillment of certain responsibilities and penalties (*i.e.*, UAOs regulate the conduct of PRPs).

***16** It is the province of a lawyer within the bounds of the privileged attorney-client relationship to weigh the legal risks associated with certain undertakings, tailor those undertakings to the requirements of the law, prevent a client from running afoul of the law, and zealously represent the client's legal interests. But the privileged role of an attorney does not encompass the establishment of broad agency policy, adjudication of responsibilities, assessment of penalties, or other functions that create the law. Hence, when an attorney is acting more in the nature of a business advisor, legislator, adjudicator, or regulator, the attorney-client privilege generally does not apply. *See In re Lindsey*, 158 F.3d at 1269; *Coastal States*, 617 F.2d at 863; *Mead Data Central*, 566 F.2d at 249, 253, 255 n. 32. Tellingly, these types of communications also would not commonly reflect confidential information concerning the client agency. *See, e.g.*, P.L. No. 3211; P.L. No. 5995; P.L. No. 767; P.L. No. 2408.

B. *EPA's Sampling*

Some of the documents EPA has withheld do not involve agency attorneys functioning in the same fashion as do private attorneys. Rather, they involve agency attorneys drafting or establishing broad policy, recommending a regulatory action or determination, or otherwise performing tasks that are in the nature of adjudication or regulation. *See, e.g.*, P.L. No. 2358; P.L. No. 2408; P.L. No. 2814; P.L. No. 2831; P.L. No. 3211. In the context of this case and GE's pattern or practice due process challenge, such documents do not reflect the provision of confidential legal advice to the client agency, they do not concern legal strategy, and they do not reflect information that is confidential with respect to the client agency. To the contrary, when they reflect any confidential information at all, it is most often information provided by a third-party-the PRP.

EPA has failed to identify recipients for some of the documents in the sampling. *See, e.g.*, P.L. No. 5239; P.L. No. 1094. The purpose of the attorney-client privilege is to foster the full and frank communication required to enable effective legal representation through the protection of client confidences. When non-essential

third-parties (for example, agency personnel who are not authorized to act or speak on behalf of the agency with respect to the subject matter addressed in the document and who are not lawyers providing legal advice) are made privy to protected material, the privilege dissolves. EPA-the party that bears the burden of establishing its privilege assertions-has provided the Court with little information to support a finding that certain documents have been shielded from exposure to non-essential third-parties.

It is worth reiterating that the privilege protects *communications*, not necessarily the underlying subject matter of the communications. For example, a conversation, a recording of a conversation, or a written communication may be protected, but an attorney's notes regarding the subject matter may not be protected if they do not reflect the confidential communication. Put another way, it is not necessarily the case that when a client contacts an attorney for legal advice, anything the attorney has produced regarding the subject matter of that contact is covered by the attorney-client privilege. Accordingly, for documents that do not take a form that is apparently communicative, or that do not by themselves reflect the fact of a confidential communication, some showing that the documents were prepared for transmission to someone else-even if they were never actually sent-will ordinarily be required. For some documents, EPA has failed to identify any intended or actual recipients. *See, e.g.*, P.L. No. 1482; P.L. No. 1724; P.L. No. 1823; P.L. No. 5009. Again, the Court's application of attorney-client privilege law to the sample of EPA documents is found in Table T-1.

***17** With respect to the particular documents and unique factual context of this case, application of the attorney-client privilege and work product doctrine have occasionally produced results that may, on the surface, seem inconsistent because some documents (involving specific UAOs, for example) are protected work product but do not come within the attorney-client privilege. To be sure, there is some tension inherent in this result. However, it is an odd but unavoidable consequence of the distinct purposes and requirements of the two protections-where one is generous, the other is restrictive. Although the attorney-client privilege does not require that a document have been created in anticipation of specific litigation, it does require that the attorney act in a legal (rather than, for example, a regulatory or business) capacity. The work product doctrine, on the other hand, does not so constrain an attorney who fills more than one role, so long as the document at issue was created in anticipation of "litigation." The doctrine broadly defines "litigation" to include nearly any adversarial agency proceeding as long as there is some specificity regarding a particular party, offense, or proceeding. Hence, some materials can be work product (*i.e.*, created by an attorney in anticipation of broadly-defined litigation) yet not be within the attorney-client privilege because the attorney is performing a regulatory or enforcement role at the agency.

IV. *Subject-Matter Waiver*

GE argues that, based upon the concept of subject-matter waiver, EPA's inadvertent disclosure of documents that are "substantively identical" to other documents that have been withheld has waived any otherwise-applicable privilege or protection with respect to withheld documents of the same type. The Court ordered GE to submit the documents that were allegedly disclosed inadvertently by EPA. Of the ninety-two documents submitted, EPA actually asserts privilege over just twenty-four.[FN6]

> FN6. Because the remainder of the documents were intentionally produced without any privilege claim, their disclosure does not effect any subject-matter waiver as to other documents for which a privilege is asserted. Nonetheless, EPA must be consistent and principled in its privilege assertions, and cannot claim privilege for another document that is in all relevant respects identical to the one that it now asserts is not privileged and thus was intentionally produced.

A. *Waiver of the Deliberative Process Privilege*

The 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. Defs.' Mem. Opp'n at 19. Interestingly, GE acknowledges this, but then subtly attempts to persuade the Court that, based upon principles and considerations that apply in the context of other privileges and protections, the waiver rule should be expanded to encompass the deliberative-process documents at issue here. However, there is no indication that EPA has attempted to manipulate the discovery process, or has acted inequitably or otherwise in bad faith. To the contrary, the record shows that EPA carefully considered its privilege claims, has acquiesced in GE's requests that it reconsider those claims, and has even made additional disclosures when warranted. This demonstrates a good faith effort to work with GE and to operate within the confines of the deliberative process privilege's contours. The fact that EPA has also sought to protect its interests by using available privileges to avoid disclosing anything more than it reasonably believes necessary does not persuade the Court otherwise. This case, then, does not present circumstances that would justify the unprecedented action of importing the waiver rule into the realm of the deliberative process privilege.

B. *Waiver of the Work-Product Doctrine*

***18** "[A] waiver of the ... work product [doctrine] as to particular documents does not extend to other documents addressing the same subject matter." *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 310-11 (D.D.C.1994); *see Hertzberg v. Veneman*, 273 F.Supp.2d 67, 81-82 & n. 8 (D.D.C.2003); *Mineba Co., Ltd. v. Pabst*, 228 F.R.D. 34, 36-37 (D.D.C.2005). To be sure, notions of implicit waiver have, on occasion, surfaced in the work-product case law with respect to inequitable conduct by the disclosing party. But the doctrine's protective umbrella is only compromised when setting it aside would directly further its underlying policy. *See, e.g., U.S. ex rel. Fago v. M & T Mort. Corp.*, 235 F.R.D. 11, 16-17 (D.D.C.2006); *Bowles v. Nat'l Ass'n of Home Builders*, 224 F.R.D. 246, 258-59 (D.D.C.2004); *In re United Mine Workers*, 159 F.R.D. at 312. Hence, if a party seeks to use the doctrine not as the "shield" that it was intended to be, but rather as a "sword" to unfairly influence the outcome of the proceedings, then the integrity of the adversarial system is most effectively preserved by removing the doctrine from that party's litigation arsenal. *See In re Sealed Case*, 676 F.2d 793, 818 (D.C.Cir.1992). That, however, is not the factual setting presented here. The Court will not ignore the purpose and function of the work-product doctrine simply because doing so would make it easier for GE in this litigation. In this case, the integrity of the adversarial system is furthered not by rendering the work-product doctrine inert, but rather by allowing it to function reasonably. As discussed above, there are no circumstances presented here that would justify an unprecedented extension of the waiver rule to the work-product context.

C. *Waiver of the Attorney-Client Privilege*

"[T]he confidentiality of communications covered by the [attorney-client] privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *In re Sealed Case*, 877 F.2d 976, 980 (D.C.Cir.1989). Hence, a privilege holder's inadvertent disclosure of privileged materials will effect a waiver that " 'extends to all other communications relating to the same subject matter." ' *Id.* at 980-81 (citing *In re Sealed Case*, 676 F.2d at 809). Of the twenty-four inadvertently-disclosed documents, EPA asserts attorney-client privilege over eighteen.[FN7] EPA concedes that, with the exception of perhaps one document, its disclosures were inadvertent.[FN8] Moreover, EPA acknowledges that the inadvertent disclosures have regretfully caused some subject-matter waiver of the privilege, but resists GE's expansive interpretation of that concept. According to EPA, subject-matter waiver should extend only to the inadvertently-disclosed documents themselves, to copies of those documents, and to other documents that are virtually identical. GE, on the other hand, suggests that the scope of waiver here encompasses all documents of the same type as the inadvertently-disclosed materials, as well as those that relate to the broader content of the docu-

ments, defined generically by GE as UAOs and enforcement.

FN7. For example, Pl.'s Exhs. 7 and 40 do not involve attorney-client privilege assertions. *See* Defs.' Surreply at 9 ¶ 7, 22 ¶ 40. Similarly, EPA only claims work-product protection for Pl.'s Exhs. 20, 39, 84, and 89. *See id.* at 13 ¶ 20, 21 ¶ 39, 28 ¶ 84, 30-31 ¶ 89. It is unclear whether EPA makes any privilege assertions over Pl.'s Exh. 92, as it has failed to address this document in its supplemental memorandum.

The Court has not blindly deferred to EPA's assertion of the privilege, notwithstanding GE's decision not to argue directly against these privilege assertions for the limited purpose of subject-matter waiver analysis. It must be remembered that subject-matter waiver applies only to those documents for which EPA has *properly* asserted attorney-client privilege. Accordingly, Table T-2 includes the Court's findings with respect to whether the documents are actually protected by the attorney-client privilege.

FN8. EPA asserts attorney-client privilege over Pl.'s Exh. 33, but argues that its production of the document should not provide the basis for subject-matter waiver. Specifically, EPA submits that the document was produced in connection with the agency's response to a FOIA request that did not involve the personnel working on the discovery effort in this case. EPA admits, however, that it does not know whether the document was inadvertently produced in the FOIA response. The Court is required, under the law of this Circuit, to construe subject-matter waiver broadly. In light of EPA's inability to represent that the disclosure of this document-regardless of its context-did not result from carelessness that could jeopardize the sanctity of the attorney-client relationship, the Court finds that the subject-matter waiver rule must be applied as to the document.

***19** The question, then, is how broadly or narrowly to define the subject matter of the inadvertently-disclosed documents. Not surprisingly, the Court resolves this issue between the extremes advanced by the parties. The scope of subject-matter waiver is a matter that rests within the Court's discretion. *See M & T Mort. Corp.*, 235 F.R.D. 11, 2006 WL 845847, at *5 (citing *United Mine Workers*, 159 F.R.D. at 309); *see also In re Sealed Case*, 877 F.2d at 981. Ordinarily, a court's decision will be informed by the particular circumstances of the case and the conduct of the party seeking to avail itself of the privilege. *See In re Sealed Case*, 877 F.2d at 980-81; *Bowles*, 224 F.R.D. at 260. In light of these principles, the Court concludes that the scope of waiver urged by GE is unduly broad in the context of this case. GE's reliance upon the label assigned to the categories of documents and a broad description of the issues addressed therein, rather than the precise content of the documents, is misplaced. Hence, the accidental release of one workgroup document does not automatically remove the privilege for other workgroup documents *unless* those documents address the same subject matter and are not covered by other protections. Similarly, the inadvertent disclosure of Document A, which discusses Element 1 of UAO enforcement, does not waive the attorney-client privilege with respect to portions of Document B that focus on Element 2 of UAO enforcement, because Element 2 is not within the reasonably-defined subject matter of Document A. The broad approach advocated by GE is particularly unwarranted where, as here, there is no indication that EPA has acted in bad faith or has disregarded the sanctity of the attorney-client relationship. Indeed, it appears that the inadvertent disclosures were the inevitable result of EPA's attempt to respond conscientiously to GE's extremely broad document requests within a compressed time frame while operating within the confines of its limited resources.

This is not to say, however, that the Court adopts wholesale the waiver interpretation urged by EPA. Although the Court is confident that, despite the inaccuracies that have come to light, EPA has made reasonable efforts zealously to guard its attorney-client privilege, it must be remembered that the raison d'etre of the

subject-matter waiver doctrine is to deter careless treatment of documents that should have been more carefully guarded. Hence, the rule makes available to the adversary a broader universe of information than that which is yielded by the inadvertently disclosed documents themselves. In light of EPA's substantial efforts, there is arguably not much carelessness to deter. Nevertheless, mistakes were made, and the waiver rule's purpose is thus implicated. To accept EPA's very narrow interpretation would be to render that purpose a nullity.

Mindful of the parties' competing views, and having considered the specific circumstances of the case, the Court concludes that the subject matter of a specific disclosed document for waiver purposes consists of only the information that is contained within,[FN9] or has by its terms been brought within, the document's four corners. Hence, the inadvertent production by EPA of the eighteen privileged documents has caused a waiver of the attorney-client privilege with respect to: (1) the inadvertently-disclosed documents themselves, and other copies thereof; (2) all drafts and revisions of the inadvertently-disclosed documents, to the extent that they address the same subject matter; (3) comments on, and discussions of, the inadvertently-disclosed documents; (4) those portions of other allegedly-privileged materials that address the precise subject matter of the inadvertently-disclosed documents; and (5) those portions of other allegedly-privileged materials that are incorporated in, or cited for substantive support by, the inadvertently-disclosed documents. This waiver does *not*, of course, extend to those portions of documents that are subject to another claim of protection, such as the work-product doctrine or deliberative process privilege. Accordingly, EPA will be directed to review the documents identified on its privilege log and to disclose all portions of those documents that fit the Court's subject-matter waiver description, as explained here and applied in Table T-2, attached.

> FN9. For example, the inadvertently-disclosed document entitled "Memorandum: Guidance on Enforcement of CERCLA Section 106 Administrative Orders," EPA-5-ORC-003169, GE's Suppl. Exh. 3, discusses certain factors that EPA considers when it decides whether to pursue judicial enforcement of an order. As Table T-2 makes clear, this portion of the document is privileged; hence, the waiver rule is implicated. The "subject matter" of this document for purposes of the waiver rule includes the factors themselves, as well as any factors that are identified by reference to relevant portions of other documents. Accordingly, EPA may still claim attorney-client privilege to protect those portions of other documents that address *additional* factors that do not fit within this description. Similarly, the scope of waiver would not encompass a document that discusses a particular factor mentioned in the inadvertently-disclosed document, but in a different context. For example, there would be no waiver with respect to a document that evaluates such a factor in the context of a specific proceeding.

***20** In the end, very little subject-matter waiver has occurred. This is a direct result of the fact that most of the waiver documents are not, as the Court has concluded, covered by the attorney-client privilege in the first instance. Hence, the waiver rule does not apply to those documents. The Court recognizes that there is some latent tension in this result-although EPA has chosen to assert privilege over the documents, it is actually to EPA's benefit in this context that those documents are not, in the Court's view, actually privileged (because there then is no subject-matter waiver reaching beyond the disclosure of the documents themselves). Nevertheless, the application of the privilege principles developed by the D.C. Circuit to the unique context of this case, the peculiar nature of the UAO enforcement policy developed by EPA, and the specifics of each document mandate the conclusions reached in Table T-2. Of course, in the long run, a narrower scope to the attorney-client privilege than EPA has heretofore asserted will mean that more documents must be produced.

VII. *Appointment of a Special Master*

The appointment of a special master is, as EPA insists, an " 'extraordinary action." ' EPA Mem. Opp'n at 42

(quoting *Alexander v. FBI,* 186 F.R.D. 128, 133 (D.D.C.1998)). In its discretion, a court may decide to appoint a special master if it determines that such an action is warranted under the circumstances of the particular case. *See Meeropol v. Meese,* 790 F.2d 942, 961 (D.C.Cir.1986); *Alexander,* 186 F.R.D. at 133. Here, the Court concludes that there is no justification for the assertions of bad faith that implicitly underlie GE's request. *Cf. Cobell v. Norton,* 224 F.R.D. 1, 4 (D.D.C.2004) (referring to "abuses" on the part of the government agency-specifically, lying about its failure to clean up several rodent infestations, spoliation of evidence relevant to plaintiff's claim, and failure to produce documents that were responsive to plaintiff's discovery requests-as the driving force behind the court's decision to appoint a special master).

Although EPA's privilege assertions may on occasion have been erroneous or overly broad, they were made in good faith, pursuant to individual, document-specific review. In those instances where EPA realized that its previous assertions were misguided, it has reversed or amended its determinations and disclosed unprotected documents. The errors are, in the Court's view, simply the result of EPA's misinterpretation of how certain privileges and protections apply in the amorphous context of agency attorneys who act not only in a fashion similar to private attorneys, but also as regulators, adjudicators, or policymakers. There is no reason to predict that, having reviewed the proper scope of those privileges and protections as set forth in this Memorandum Opinion, EPA will refuse to reevaluate its withholdings consistent with the Court's decision. On the contrary, EPA's voluntary reassessments throughout the discovery process illustrate a willingness to act in accordance with the law. The Court, therefore, agrees with EPA that prior mistakes by a government agency during the disclosure process should not be used presumptively to justify subsequent distrust of that agency's determinations where, as here, the agency has taken steps to correct the earlier mistakes. *See Meeropol,* 790 F.2d at 952. Beyond the doubts as to the need for a special master, the Court is also not satisfied that appointing one would facilitate a more efficient discovery process. After all, "[i]f the master makes significant decisions without careful review by the trial judge, judicial authority is effectively delegated to [a non-Article III official]; if the trial judge carefully reviews each decision made by the master, it is doubtful that judicial time or resources will have been conserved to any significant degree." *Id.* at 961.

***21** It is clear, however, that the need for additional and adequate review of EPA's privilege assertions remains. In this regard, EPA will be required to update its current privilege log to remove (*i.e.*, produce) all documents that the Court has determined are not properly withheld, and to reflect only the grounds for withholding that the Court has upheld. EPA should review all of the documents on the updated privilege log in accordance with the proper basis for the withholdings, and then create a final privilege log that includes only those documents that, in light of the principles set forth above, EPA now maintains are properly withheld. From these documents, EPA will be required to generate a new sampling that consists of no more than 50 of the privilege log documents. The Court will then review this sampling and the corresponding entries on the new privilege log *in camera*.

*CONCLUSION*

For the foregoing reasons, the Court concludes that GE's motion will be granted in part and denied in part. EPA shall review its privilege log assertions for all documents in conformity with the principles and findings set forth in this Memorandum Opinion, and generate a fresh sampling for the Court to review *in camera.* A separate order has been posted on this date.

TABLE T-1:

SUMMARY OF WITHHOLDING DETERMINATIONS DOCUMENTS REVIEWED *IN CAMERA*

| *Log ID Number (per June 16, 2006 "Revised" Log)* | *EPA's Withholding Assertions* | *Findings of the Court* |
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| 5 | work-product | Properly withheld as work product because it |
| | doctrine ("wpd") | discusses specific legal concerns and strategies regarding particular ongoing cases, and the status of those cases. Even if created at least partly for administrative case management and review reasons, litigation was certainly a substantial factor in its creation. |
| 83 | attorney-client | These documents are different versions of the |
| 93 | privilege ("acp"); | guidance document submitted as Pl.'s Exh. 3 |
| | wpd | (discussed in Table T-2, below). Only the last pages of P.L. Nos. 83 and 93 are protected as work product because they address the parameters of a specific legal defense that may be raised by a PRP in particular litigation; although comprised of excerpts from a court decision, disclosure would reveal the mental impressions of the attorney by indicating that the attorney considered the decision important. The remainder of the documents, however, is not protected as work product because those portions are |

Not Reported in F.Supp.2d, 2006 WL 2616187 (D.D.C.), 63 ERC 1854
**(Cite as: 2006 WL 2616187 (D.D.C.))**

akin to the documents at issue in *Evans* and *Coastal States*-they are general guidance for agency employees regarding broad standards to be used when deciding whether to pursue enforcement. Such material lacks the requisite specificity to evidence that their creation was motivated by foreseeable and specific litigation. The judicial enforcement sections of these documents are, however, protected by the attorney-client privilege (as are the "general considerations" sections) because the decision whether to pursue judicial enforcement is a traditional legal assessment that includes the analysis of governing law. These portions of the documents advise the enforcement team as to the legal merits of defenses, litigation risks, and the legitimacy of certain arguments in the litigation context. For the reasons discussed below in Table T-2 regarding Pl.'s Exh. 4, however, there has been a waiver of the

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| | | attorney-client privilege regarding these items. No other portion of these documents is protected by the privilege because the handwritten notations are technical and editorial, rather than substantive and legal, and because the authors appear to be stating enforcement goals and regulatory policy rather than providing legal advice. |
| 160 | acp; wpd | Not work product because the document lacks sufficient specificity with respect to particular foreseeable litigation; simply sets forth general guidance regarding a broad class of cases, without providing any nexus to a specific PRP, investigation, violation, or site. The attorney-client privilege also does not apply because the document does not provide legal advice or address the parameters of the law; rather, it sets broad policy regarding the agency's regulatory goals. |
| 173 | acp; wpd | Properly withheld as work product. The document concerns an ongoing mediation and potential resolution with respect to a |

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| | | specific site and suspected violation. The document consists of attorney recommendations, analyses, and mental impressions regarding whether the proposed resolution is consistent with current and proposed guidance. The document therefore is also within the attorney-client privilege. |
| 226 | acp; wpd | Properly withheld as work product and under the attorney-client privilege. The author initiated the e-mail because a particular course of action is contemplated in a case, and sought legal consultation regarding whether the proposed action would be proper under the law. |
| 370 | acp; wpd | Properly withheld as work product. May not qualify under attorney-client privilege because EPA has failed to identify any recipients, and its format is not indicative of a communication. |
| 539 | deliberative process privilege (“dpp”) | Only the “Vision for the Cleanup Program” and “Common Themes” sections (pages 2873-76) appear to be deliberative and recommendatory in nature, and hence |

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| | | privileged. The remainder of the document does not appear to be deliberative based upon its format, tone, language, and content; rather, it appears to recite policies and to recount the events leading up to the establishment of those policies. In fact, the document purports to be an "accurate description of the current program," *see* EPA-4-ORC-A0002871 (footnote). |
| 546 | acp; wpd; dpp | Properly withheld as work product because it assesses the agency's settlement options with respect to a particular PRP, site and violation. It is not, however, protected in its entirety by the attorney client privilege, since some parts provide policy guidance rather than legal analysis. Only the legal analysis may be withheld under the attorney-client privilege. Finally, the document constitutes a straightforward application of the agency's existing interpretation of the law to a particular fact pattern, and hence it is not deliberative. It is not predecisional |

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| | | because it does not precede the development of the policy or agency legal interpretation that is being applied. Hence, this document is not protected by the deliberative process privilege. |
| 548 | acp; wpd | This item actually consists of two documents. The cover message forwards a memorandum from the Director of the Regional Support Division (who does not appear to have a legal title or to be functioning in a legal capacity). The memo simply reviews a court decision, stating the procedural and factual background and the court's rulings. It is not work product because it does not evidence an objectively reasonable belief of foreseeable and specific litigation. The document also does not contain legal advice or any information that is confidential to the agency, and does not qualify under attorney-client privilege. |
| 599 | acp | The document does not appear to involve legal advice or to communicate information |

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| | | that is confidential, and therefore is not<br>properly withheld under the attorney-client<br>privilege. |
| 625 | dpp | Paragraphs 1 and 2 represent personal views<br>of individual employees regarding the<br>development or revision of agency policy or<br>law. So long as they have not subsequently<br>been adopted or implemented (whether<br>formally or informally) by the agency, they<br>may be withheld under the deliberative<br>process privilege. The remainder of the<br>document, however, either does not include<br>substantive information regarding the<br>employees' personal views (in which case,<br>disclosure would not chill future<br>communications) or simply states<br>straightforward applications of pre-existing<br>policies and procedures to a specific fact<br>pattern. |
| 678 | acp; wpd | Improperly withheld as work product because<br>there is no nexus to specific, foreseeable<br>litigation-rather, the document discusses<br>how best to compel parties in general to sign |

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| | | onto consent decrees rather than UAOs. The document also is not properly withheld under attorney-client privilege because it contains no information that is confidential to the agency, does not appear to be legal advice concerning the parameters of the law (rather than regulatory strategy), and instead simply sets forth agency policy for implementing regulatory authority. |
| 767 | acp | Improperly withheld because it is not confidential information concerning the agency or legal advice. Rather, it presents the arguments of a PRP in ongoing litigation and seeks to ascertain how many regions have included a particular practice in their UAOs. Although perhaps work product, EPA has not claimed that protection. |
| 777 | acp; dpp | The attorney-client privilege does not apply because this document does not contain any information that is confidential to the agency or legal advice. The attorney is acting to help form agency policy, which is a func- |

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| | | tion that<br>private attorneys cannot perform. The<br>document may, however, be withheld<br>pursuant to the deliberative process privilege,<br>because it contains an employee's personal<br>assessments and recommendations for the<br>development or revision of agency policy (so<br>long as not subsequently adopted or<br>implemented). |
| 800 | dpp | The handwritten notes may be withheld as<br>deliberative and predecisional in nature<br>because they reflect the personal opinions of<br>agency staff (provided that they have not<br>subsequently been adopted, implemented, or<br>otherwise relied upon by the agency). The<br>typewritten portions (except for the very last<br>question and answer) appear to be statements<br>regarding the Region's current and prior<br>practice and resource constraints. This is<br>factual, not deliberative, material. |
| 839 | acp; wpd | Properly withheld as work product because it<br>contains an attorney's interpretation of a<br>recent court decision and how it could be |

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| | | used to defend EPA policy from attack in future litigation, as well as its pertinence to another, specific type of claim. Because it involves such legal analysis and interpretations, it is also properly withheld under the attorney-client privilege. |
| 899 | acp | Properly withheld under the attorney-client privilege because it assesses whether a particular settlement strategy is legally permissible-analogous to a memorandum prepared by corporate counsel regarding whether a particular strategy would violate the law. |
| 1002 | acp; wpd | Properly withheld as work product because the document is a discussion regarding preparation for a court hearing in ongoing litigation, consisting of both facts and attorney mental impressions. Also properly withheld under the attorney-client privilege, because it concerns the development of legal advice among the agency's attorneys regarding the legality of a particular UAO provision in connection with ongoing |

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| | | litigation. |
| 1013 | acp; wpd | Properly withheld as work product because it is an outline of the attorney's mental impressions regarding the practical impact of a Supreme Court case and legal issues to be addressed in specific litigation. It may not properly be withheld under the attorney-client privilege, however, because the EPA has not advised to whom, if anyone, the document was transmitted. |
| 1042 | acp; wpd | Protected work product because it appears to address issues that have arisen in the course of an investigation or enforcement proceeding regarding a specific site, PRP, or violation. It is also attorney-client privileged because the author was seeking legal advice regarding ”what the courts have ruled on in the past.” |
| 1094 | acp; wpd; dpp | The document is a contact sheet to facilitate administrative ease. It is not protected work product because it lacks sufficient specificity to establish that it was prepared in anticipation of litigation. It appears to be |

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| | | simply a case management or internal oversight tool. It is also not protected by the attorney-client privilege because EPA has failed to identify any recipients, it does not appear to contain confidential information regarding the agency, and it does not appear to concern legal advice, services or strategy. Nothing about the document appears to be deliberative or predecisional in nature-the portions that have any relevance to agency policy at all seem to simply state the preexisting agency policy or protocol-and hence, the deliberative process privilege does not apply. |
| 1204<br>1210 | wpd | Properly withheld as work product because it is a draft letter to a specific PRP requesting certain action regarding a specific, previously-issued UAO. |
| 1214 | wpd | Properly withheld as work product because it was created in connection with a specific site, UAO, and PRP. |
| 1222 | wpd | Properly withheld as work product because it evaluates and discusses a particular option for |

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| | | modifying a specific, preexisting UAO. |
| 1230 | wpd | Protected work product because it is a draft UAO for a specific site/ PRP/violation. |
| 1290 | acp; wpd; dpp | The work product assessment for the typewritten draft of the memorandum is the same as that for P.L. Nos. 83 and 93, above, except that the "Validity of Sufficient Cause" defense section and footnote 6 may also be withheld as protected work product. The handwritten notes may be withheld as protected work product, as they discuss options with respect to specific types of claims and noncompliance, and appear to contemplate a specific UAO. The material is not protected by the attorney-client privilege because EPA has failed to identify any intended or actual recipients, thereby preventing the Court from assessing whether the documents are actual communications that have been treated as confidential. Regarding the deliberative process privilege, the handwritten notes appear to be interpretations |

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| | | of already existing policies and law as applied to the facts of the case involving the UAO. Hence, they are not predecisional or deliberative-they merely assist with ongoing litigation. The typewritten memorandum does not appear, based on its language, tone, or format, to be deliberative or predecisional and EPA has not established that the views in the document have not been relied upon, implemented, or otherwise subsequently adopted. |
| 1326 | wpd | Protected work product because it discusses strategies, anticipated steps/difficulties, and possible defenses regarding a specific site. |
| 1425 | acp; wpd | Protected work product because it was prepared in connection with a specific ongoing proceeding against a particular PRP, and it recommends a procedure for resolution. This document is also protected by the attorney-client privilege because it involves government lawyers functioning in much the same way that private attorneys do in assessing the use of alternative dispute |

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| | | resolution and the likelihood of prevailing through it under the circumstances. |
| 1482 | acp; wpd | Protected work product because the handwritten notations concern a specific UAO in connection with a specific site. EPA has not, however, established that the document is protected under the attorney-client privilege because it has failed to provide the Court with a list of intended or actual recipients. |
| 1724 | acp; wpd | Protected work product because it involves a specific site, PRP and violation. It is mostly fact work product, but there are some mental impressions and legal arguments/positions. The document essentially reads as though it provides excerpts for inclusion in a legal brief. However, EPA has failed to identify any intended or actual recipients, and the Court thus cannot assess whether the document is an actual communication (from its format and content it does not appear to be) or whether it has been treated confidentially-EPA therefore has not carried its burden of convincing the Court that |

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| | | the attorney-client privilege applies. |
| 1730 | acp; wpd | Protected work product because it is a draft<br>UAO for a specific PRP, site, and violation.<br>It is not, however, covered by the attorney-client<br>privilege because it does not appear to<br>be a communication to the client or to other<br>attorneys regarding legal advice or strategy;<br>rather, it is a communication to the PRP, and<br>it serves to regulate the conduct of the PRP<br>and to assign liability, not to provide legal<br>advice. |
| 1781 | acp; wpd | Protected work product because it is a legal<br>product concerning a specific site, PRP, and<br>violation. The document is not covered by<br>the attorney-client privilege, however,<br>because it recommends regulatory<br>enforcement action (rather than addressing<br>the parameters of the law) and does not<br>communicate legal advice or information that<br>is confidential to the agency. |
| 1823 | acp; wpd | Protected work product because it was drafted<br>with respect to a specific settlement, PRP,<br>site, and violation. It sets a schedule and |

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| | | discusses issues to be addressed during mediation. It does not, however, fall under the attorney-client privilege because EPA has not identified any recipients and it does not appear to have been a communication of confidential legal advice between attorneys or between an attorney and a client. |
| 1842 | acp; dpp | This document is not protected by the attorney-client privilege because it does not involve legal advice or analysis-it simply argues for the adoption or revision of agency policy based on the drafter's views regarding its effectiveness. The attorney is acting as a decisionmaker or regulator, and concerns addressed are sensibility, prudence, and cost-effectiveness. The document does, however, appear to recommend new or revised policy (not to set that policy). If the document has not subsequently been relied upon, adopted, or implemented by the agency, then it may be withheld under the deliberative process privilege. |

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| 1939 | acp; wpd; dpp | Protected work product because it concerns a settlement proposal for a specific site, PRP and violation. It is also protected by the attorney-client privilege because it concerns the provision of legal advice and contains information that is confidential to the agency; it seeks pre-approval of settlement terms, mentions colorable claims, and analyzes litigation risk. It is not, however, deliberative or predecisional, because it does not precede the establishment of the policies and principles being applied to arrive at the conclusion indicated. |
| 2233 | acp; wpd | Protected work product because it contains recommendations regarding a specific UAO draft in connection with an ongoing investigation. It is also protected by the attorney-client privilege because it contains legal advice (discussing whether the agency can legally order certain action by the PRP). |
| 2304 | acp; wpd; dpp | Protected work product because it discusses specific settlement options regarding |

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| | | a specific violation and PRP. For the same reasons, the memorandum involves an attorney functioning as a private attorney would; confidentiality may therefore be inferred, and the document is protected by the attorney-client privilege. Only paragraph 2 in the "Note" section, however, appears to meet the predecisional and deliberative tests for application of the deliberative process privilege. |
| 2358 | acp; wpd | Protected work product because the document is an analysis of a proposed consent decree for settlement with respect to a specific violation, PRP, and site. Parts of the document are also protected by the attorney-client privilege. At first blush, the document appears to be in the nature of other documents determined not to be protected (which forwarded drafts of and requested signatures for UAOs). But there is a fundamental difference between the consent decree process and the UAO process, and that difference justifies the protection of P.L. No. 2358 even |

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| | | though other documents are not protected. This document reflects a full legal analysis of proposed action in an adversarial setting. When drafting consent decrees and forwarding them (with an analysis) for review, the government attorney is acting no differently than is the private attorney for the PRP-both attorneys are negotiating, reviewing, and recommending the acceptance or rejection of the consent decree. In the UAO context, however, there is no private analog because the PRP is not given a choice; the UAO is the agency's non-negotiable, unilateral assignment of legal repercussions against a PRP. In this way, the EPA attorney's involvement in the consent-decree process is legal, but his involvement in the PRP process is more regulatory. |
| 2408 | acp | This document is not protected by the attorney-client privilege because it does not seek or provide legal advice or services. Rather, it seeks a consensus regarding whether the workgroup should disband, or |

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| | | alternatively whether it should continue to help draft new policy or consider legal issues in the future. That is internal agency organization, not legal analysis. It also contains no confidential information concerning the agency. The agency may, however, redact as protected the portions of this document that appear under the headings ”(Old) Draft (title unknown)” and ”Institutional Controls” because they set forth legal issues that the attorneys are concerned about. |
| 2694 | acp | Nothing about this document concerns the confidentiality of the attorney-client relationship. It also does not appear to concern legal advice, services or issues because it is focused on the logistics of how to fund cleanups at mine sites using trusts, and thus conserving agency resources. This is more regulatory than legal in nature. |
| 2814 | acp; wpd | Not protected work product because it lacks requisite specificity. There is nothing in EPA's description of the document or the document itself to convince the Court |

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| | | that it addresses a UAO in an ongoing investigation (rather than a model UAO to be used more broadly). It also does not reflect any information that is confidential to the agency or contain legal advice, which makes the attorney-client privilege unavailable. The attorneys are acting in a regulatory and editorial capacity, not providing legal advice, with the exception of paragraph 79 regarding the sufficient cause defense. Since that paragraph discusses a legal issue, it may be withheld. |
| 2831 | acp; wpd; dpp | No portion of this document is protected work product because the document cannot reasonably be said to have been prepared in anticipation of litigation. The document simply contains the minutes of a meeting which appears to have been held more for internal oversight and management purposes than in preparation for any specific litigation. For the most part, the attorney-client |

privilege
is also unavailable because the document
contains no information that is confidential to
the agency, and does not concern legal advice
or strategy-it only concerns regulatory
guidance. The one exception is the seventh
paragraph from the top on the first page
(discussing anticipated judicial enforcement).
The document largely appears to address
actions that have already been taken, policies
that have already been set, or whether future
actions should be taken in light of existing
policies, and hence is not predecisional or
deliberative. Certain portions of the
document discuss recommendations for
amendments to certain policies (for example,
the sixth paragraph from the top on the first
page and the third paragraph from the top on
the third page), or the development of new
policies. These portions may be withheld
pursuant to the deliberative process privilege
so long as they have not actually been

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| | | adopted by the agency. |
| 2923 | acp | This is attorney-client privileged material because it considers legal issues and methods of pursuing PRPs. It does not set policy; it evaluates legal options and provides legal advice. |
| 3211 | acp; wpd | Protected work product because it concerns a specific site and violation, and lists suspected PRPs. The focus is how to narrow or rank the universe of PRPs for the site and violation. It is not, however, attorney-client privilege material because it does not provide legal advice or contain confidential information concerning the agency. |
| 3413 | acp; wpd; dpp | Protected work product because the document discusses a settlement for a specific site and PRP in an ongoing judicial action, and assesses litigation risks, adequacy of the government's case, and possible defenses. Moreover, it is protected by the attorney-client privilege because it is characteristic of the type of work that a private attor- |

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| | | ney would perform-a classic legal memorandum regarding the disposition of filed litigation. The deliberative process privilege, however, does not apply, because the document is more in the nature of a straightforward application of already-established policies and principles to a particular set of facts. |
| 3431 | wpd | Protected work product because the document appears to be handwritten attorney notes regarding developments in a particular case. |
| 3668 | acp; wpd; dpp | Not protected work product because it is from the client, and hence not attorney work-product. It is protected by the attorney-client privilege because it is a communication from a client (EPA) to its lawyer (DOJ) asking for legal representation and the onset of litigation. The deliberative process privilege does not apply because although the recommendations may technically precede the actual decision to pursue litigation, they do not precede the development of the broader relevant agency policy being applied. |
| 3683 | wpd | Not protected work product because it |

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| | | does not seem to have been created with an eye toward litigation, even though its subject is litigation. Rather, the document is a response to a congressman's inquiry (which was never sent). This document has no relationship to the agency's investigation of this site; it simply answers the questions of a third-party. |
| 3687 | wpd | Protected work product because it is a draft UAO for a specific site, PRP and violation. |
| 3791 | wpd | Protected work product because it is an agenda for a meeting with a PRP regarding a specific UAO, violation, and site, and it contains a chart analyzing noncompliance, as well as a log of the steps taken in the case. |
| 3793 | wpd | Protected work product because it consists of handwritten attorney notes chronicling activities and actions in a particular case. |
| 3849 | acp; wpd | Protected work product because it was prepared by an attorney to assist in UAO proceedings regarding a specific site, |

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| | | PRP and violation. It is not, however, attorney-client privilege material because it does not provide legal advice or contain information that is confidential to the agency. |
| 3875 | wpd | Protected work product because it was prepared to assess a specific PRP's request to extend the deadline for actions required at a specific site. |
| 3924 | acp; wpd; dpp | Protected work product because the document describes interactions and negotiations with a specific PRP regarding a specific site or violation. Also protected by the attorney-client privilege because it contains legal analysis and assessment of options. The document does not qualify under the deliberative process privilege because it only precedes the decision in the particular case; there is no indication that it precedes development of the policy or regulatory decision that established the principles to be applied in the case. |
| 4043 | acp; wpd | Protected work product because it concerns a specific PRP, site, and violation, and assesses |

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| | | whether to require a certain action. It is also protected under the attorney-client privilege because it seeks legal advice regarding whether "requiring" the action has certain implications, whether it is covered under the current order, and whether the order needs to be amended. |
| 4246 | wpd | Protected work product because it addresses concerns of the agency regarding a specific PRP, site, and UAO. |
| 4261 | acp; wpd | Protected work product because it concerns an investigation regarding a specific site and UAO. Also protected under the attorney-client privilege because it contains legal assessment of PRP's actions. |
| 4271 | acp; wpd | The draft letter to the PRP regarding a specific violation and site is protected work product, as is the attorney transmittal discussing, revising, and forwarding the letter. The draft letter is not, however, protected by the attorney-client privilege because it does not contain legal advice or analysis, or any information confidential to the agency. The |

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| | | e-mails are protected under the privilege because they provide legal advice and interpretations. |
| 4410 | acp; dpp | This email discusses policy; it does not appear to address legal advice, services or strategy. Accordingly, the attorney-client privilege is unavailable. Its language, tone, and format do suggest that the views expressed in the email are those of the drafter alone, and that a final decision on the subject is under contemplation. If these views were not subsequently adopted as the agency position, then the document may be withheld under the deliberative process privilege. |
| 4413 | acp; dpp | This e-mail does not concern the provision of legal advice; it concerns the development of policy advice. Accordingly, the attorney-client privilege is unavailable. It does appear to be predecisional and deliberative material, however, as it discusses competing policy positions on which the agency appears not yet to have developed a final decision. If |

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| | | the views expressed were not subsequently adopted as the agency position, then the e-mail may be withheld under the deliberative process privilege. |
| 4652 | acp; dpp | This document is covered by the attorney-client privilege because it reflects legal advice, recommendations, and strategy communicated on a number of subjects. Regarding the deliberative process privilege, most of this document describes actions and decisions that have already occurred, or does not contain any substantive information that would fall within the privilege's ambit. The document does not contain the type of recommendations regarding a particular agency decision under consideration that would be within the privilege. |
| 4735 | acp | Only the third and fourth paragraphs involve a discussion of legal strategy and are privileged. The remainder of the communication was not made to provide legal advice; it was only made to provide information in response to a congressman's |

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| | | inquiry. The final response to Congress, of course, is not privileged. |
| 4762 | acp; wpd | Not protected work product because it was not prepared in anticipation of litigation-the document appears to have been generated for purposes of an administrative survey or case management review of orders issued by different regions. As the document states, its purpose is to "attempt to inventory" these items. The document also does not provide legal advice or involve confidential information regarding the agency. Instead, it surveys and summarizes actions already taken regarding participate and cooperate orders. Hence, it is not protected by the attorney-client privilege. |
| 4771 | acp; wpd | Protected work product because it will assist in civil judicial proceedings for § 106 claims. The document was prepared in anticipation of litigation generally, but there is a sufficiently specific nexus to actual anticipated litigation. In short, the document is akin to those |

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| | | at issue in *Delaney* and *Schiller.* The document is protected under the attorney-client privilege because it provides legal advice and attorney recommendations regarding legal proceedings. |
| 4794 | acp; dpp | The document is not covered by the attorney-client privilege because it is of a regulatory, law enforcement, or adjudicatory nature as opposed to legal advice or strategy. EPA has also failed to identify any intended or actual recipients. The deliberative process privilege also does not apply. There is no indication that the document predates the agency's establishment of its policy and procedures regarding UAOs, or that the document has not been relied upon by agency employees or used as a template in the creation of UAOs. The document appears to be more authoritative and guidance-oriented than recommendatory or suggestive. Although the document does include personal comments by the drafter explaining the structure, |

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| | | revisions, and inclusion/exclusion of certain items, EPA's declarations do not establish that the viewpoints expressed have not subsequently become the viewpoints of the agency. |
| 4811 | acp; wpd | Protected work product because it assesses arguments included in a legal brief for an ongoing judicial civil proceeding. It is also protected under the attorney-client privilege because the attorneys are consulting one another regarding legal arguments to be included in court memoranda. |
| 4898 | acp; wpd | Protected work product because it is a document prepared by a party in anticipation of specific litigation, for transmission to the Solicitor General. It is also the type of communication that private parties engage in with their attorneys, and it addresses the recipient's legal representation of agency interests in the course of litigation, and hence it is also protected under the attorney-client privilege. |
| 4901 | acp; dpp | The attorney-client privilege does not cover |

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| | | this document because the document does not provide legal advice. It is a policy-oriented document, and therefore the attorneys are not performing the same type of functions as private attorneys would. With respect to the deliberative process privilege, that privilege only covers those portions of this draft document that do not describe actions already taken or projects already established/developed. It may be used to withhold information describing prospective priorities, actions, schedules, projects, recommendations, or goals, but only to the extent that they have not subsequently been adopted. |
| 4956 | acp; wpd; dpp | The document is protected work product, as it was created in anticipation of (or during) litigation. It appears to be an overview or summary for the purpose of bringing someone up to speed on his cases, but does reflect the attorney's work on ongoing litigation matters. Accordingly, it may be withheld as |

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| | | protected work product. Paragraphs 1 and 3 are also protected by the attorney client privilege because they concern legal advice, although the remainder of the document does not. Regarding the deliberative process privilege, most of this document is not predecisional with respect to the temporal development of the policy or agency position that dictates ultimate case-specific determinations, and some portions of the document contain no substantive material. Accordingly, the deliberative process privilege does not apply. |
| 5003 | acp; dpp | The attorney-client privilege does not apply to this document because it concerns enforcement of the law-how to compel compliance. Moreover, EPA has failed to identify any actual or intended recipients. Regarding the deliberative process privilege, the portions of the document that simply report actions that have been taken, policies that have been implemented, or data |

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| | | that does not reveal the views of agency employees are not protected. The portions of the document that relay the interpretations or conclusions of the drafter or other agency employees drawn from the data and survey responses, the editorial comments inserted for the reviewers, and the "Findings" and "Recommendations" sections are all protected-these portions employ suggestive rather than directive terms and are indicative of the type of ongoing policy review in which agencies must be expected to engage. The deliberative process privilege does not apply, however, if the opinions reflected here have been implemented or adopted by the agency. |
| 5009 | acp | Most of the document does not constitute legal analysis or advice, but rather an overview of participate and cooperate UAOs that have been issued each fiscal year from 1981-2000. Because EPA has failed to identify any actual or intended recipi- |

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| | | ents, the Court is unable to conclude that the document has been treated confidentially or that it actually constitutes a communication of legal advice. Accordingly, the attorney-client privilege would not apply. Some parts of the document, however, contain the attorney's legal assessment regarding whether certain UAOs constitute participate and cooperate orders. Those parts of the document are covered by the attorney-client privilege. |
| 5101 | acp; dpp | The document is not covered by the attorney-client privilege because EPA has failed to identify any recipients or to establish that the document communicates legal advice or other confidential information. Moreover, the document does not use language or tone that is suggestive rather than authoritative, and to the extent that the document simply summarizes a decision that has already taken place (the Supreme Court's *Aviall* holding) and the facts that underlie it, the ma- |

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| | | terial is neither predecisional nor deliberative. |
| 5135 | acp; dpp | The attorney-client privilege does not apply because the document relates to the setting and description of the enforcement-first policy (rather than legal advice, services, or strategy). Because the communication concerns recommendations and revisions of an agency policy document, it may be protected by the deliberative process privilege if the recommendations have not subsequently been adopted by the agency. |
| 5147 | acp; dpp | This document may not be withheld under the attorney-client privilege. The material is general guidance for employees regarding policy implementation, and does not concern the parameters of the law, legal advice, or legal strategy and services. The document does not appear deliberative or predecisional in nature because it seems to simply restate ”longstanding policy” relating to the enforcement first strategy and its underlying goals. The document states that its purpose is |

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| | | to focus attention on the policy, and hence it does not relate to the adoption or amendment of policy, but rather seeks to help employees implement a pre-existing policy. Finally, its language is not recommendatory, but rather is characteristic of a statement or reiteration of policy. |
| 5239 | acp; dpp | The document is not covered by the attorney-client privilege because EPA has failed to identify the author or recipients; the Court cannot even determine whether the document was treated as confidential or was drafted by an individual to whom the attorney-client privilege would apply. Moreover, the document concerns encouraging PRPs to acquiesce in a particular enforcement method, which is a regulatory issue. The deliberative process privilege would appear to apply, since the document is a draft policy memorandum that is "recommend[atory]" in nature, is undergoing the process of active editing and revision, and is marked as a "draft" |

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| | | that is ”deliberative,” so long as the views expressed were not adopted by the agency in full. |
| 5292 | acp; wpd | Protected work product because it concerns a specific issue regarding a particular PRP, site, and violation. It is not, however, protected by the attorney-client privilege because the document is not a communication to the client or between attorneys involving legal advice and confidential information for the purpose of effective legal representation. |
| 5413 | acp; wpd | Protected work product because the document concerns issuance of a draft UAO regarding a specific site and PRP. It is not, however, protected by the attorney-client privilege because it recommends regulatory action rather than providing legal advice. |
| 5432 | wpd | Protected work product because it assesses compliance of a specific PRP regarding a specific UAO, site, and violation. |
| 5453 | acp; wpd | Protected by work product and the attorney-client privilege because specific litigation is |

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| | | clearly anticipated and document contains recommendation on legal issue regarding that litigation. |
| 5466 | acp; wpd | Protected work product because it requests approval for a removal action regarding a specific site and violation, as well as identified PRPs. It is not, however, protected by the attorney-client privilege because it recommends regulatory and enforcement action rather than providing legal advice. |
| 5616 | acp; wpd; dpp | Protected work product because the document discusses next steps in particular UAO proceedings with respect to specific sites. Because EPA has not identified any intended or actual recipients, however, the Court cannot determine whether the document has been treated as confidential and is, in fact, a communication within the attorney-client privilege. The document is not protected by the deliberative process privilege because, although it may precede specific decisions |

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| | | with respect to the investigations at issue, it does not precede the establishment of the policy or principles that are used to reach those case-specific determinations. |
| 5638 | wpd; dpp | Not protected work product because it does not appear to have been created in anticipation of specific litigation. The document is an outline-in the nature of a checklist-for a general guidance or training document. There is no specific PRP, claim, site, violation or analysis of a specific legal defense or strategy. Rather, the document has been created for the administrative and regulatory purpose of helping employees to monitor compliance. To the extent that the document is a draft, it may be protected by the deliberative process privilege in a limited regard-only those items included on the outline (but not in the final policy document) and not subsequently adopted by the agency may be redacted. |
| 5667 | acp; dpp | This document is not covered by the attorney-client |

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| | | privilege because it is a recap of existing agency policy regarding the issuance of UAOs to federal agencies, and does not involve legal advice, services, or strategy. Although most of the document does not appear to be deliberative because it simply describes pre-existing policy and actions, the last two paragraphs of the document do appear to be deliberative. They may be withheld only if not subsequently adopted or relied upon as policy or an agency position. |
| 5759 | acp; wpd | Protected work product because prepared by attorney in connection with an ongoing investigation or administrative proceeding regarding specific PRPs, sites, violations, and UAOs. Pages 48161-69 are not protected by the attorney-client privilege because they do not constitute a communication between attorney and client, but rather between adversaries, and disclosure of this material would not have any impact on the sanctity of |

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| | | confidential attorney-client communications. Moreover, page 48159 is not a document prepared for legal advice or services, but rather to monitor compliance with agency policy regarding UAO reform, and pages 48154, 48155, and 48158-69 do not contain any information that is confidential to the agency. |
| 5995 | acp; dpp | EPA may not claim the attorney-client privilege because the document does not reflect any information that is confidential concerning the agency, and does not appear from its content or format to be communicative or treated as confidential (because EPA has not identified any actual or intended recipients). The document does appear to be deliberative, based upon its tone, language, and manner-it suggests options for making the UAO Reform program more efficient-but it may be withheld under the deliberative process privilege only if the |

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| | | agency has not adopted the views expressed. |
| 6035 | acp; wpd | Protected work product because it involves a specific site and UAO and an analysis of the surrounding circumstances. EPA has failed to identify any recipients, however, and the Court cannot, based on the nature and format of the document alone, assess whether the document is a communication that was treated confidentially, and hence is within the attorney-client privilege. |
| 6116 | wpd | Protected work product even though it appears to have been created partly for the purpose of administrative oversight, because the anticipation of specific litigation appears to have played a substantial role in its creation. |
| 6207 | wpd; dpp | The Court is unable to conclude that the entire document is protected work product because the description provided by EPA in its privilege log, and the material on page 53548 and the top of 53549, suggest that the document is focused on unspecified, generic, |

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| | | and unknown future litigation. Only page 53549 (from the “Introduction” section down) has the requisite specificity to be considered ”prepared in anticipation of specific litigation.” Otherwise, there is no particular PRP, violation, or site identified, and neither the privilege log description nor the document itself provide enough information to enable the Court to conclude that the entire document is work product. The document also does not appear to be deliberative or predecisional in nature, but rather simply to summarize what the Region is already doing. |
| 6272 | acp; wpd; dpp | Protected work product because it concerns a specific UAO and specific PRPs. The entire document is not covered by the attorney-client privilege, however, because it is regulatory and enforcement-focused; it does not concern the provision of legal advice or services. Those portions that engage in legal analysis regarding the assessment of the evidentiary strength of a case against |

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| | | a particular PRP, however, may be withheld under the attorney-client privilege (for example, the last paragraph of section A1 on page 54608). The deliberative process privilege does not apply because the document appears only to precede the agency's final decision in a particular case; it does not appear to precede the development of the policies and interpretations that are being applied. |
| 6278 | acp; wpd | Protected work product because the document concerns specific litigation. It is not, however, protected under the attorney-client privilege because it recommends regulatory action and the enforcement of the law. |
| 6282 | acp; wpp | Protected work product because the document contains comments and strategies regarding a UAO issued in connection with a specific site. It is not, however, attorney-client material because it involves enforcement and regulatory duties. |
| 6326 | acp; wpd | Protected work product because it concerns the UAO issued in connection with a specific |

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| | | site, violation and PRP. It is not attorney-client material, however, because much like P.L. No. 6282, it concerns UAO reform policy and amounts to regulatory and enforcement (rather than legal) activity. |
| 6356 | acp; wpd; dpp | Protected work product because it addresses settlement negotiation options with respect to a particular site, PRP or violation. It does not qualify for the attorney-client privilege, however, because the Court cannot ascertain that it is an attorney-client communication that has been treated confidentially, since EPA has failed to identify any recipients. Nor is the deliberative process privilege available, as the document does not appear to precede the establishment of agency policy or protocol, but rather only to precede the agency's final decision in a particular case. |
| 6409 | acp; dpp | This document is not protected by the attorney-client privilege because it concerns regulatory discretion regarding funding, not legal advice or strategy. The document is |

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| | | concerned with allocation of agency resources, not the parameters of the law. It does not qualify for the deliberative process privilege because, although it discusses possible actions in particular cases, there is no indication that it precedes the development of agency policy regarding the use and availability of enforcement-fairness moneys. It appears to be applying already-existing policy to particular facts for Region 9 cases. |
| 6533 | acp; wpd; dpp | Protected work product because it involves particular actions and circumstances regarding a specific investigation, site, PRP, and potential UAO. Only the last two sentences interpret law or provide legal advice. The rest of the document discusses the requirements of the "SPIM manual" (which is more agency protocol and policy than it is law) and appears focused on how best to pursue an enforcement action. Accordingly, the attorney-client privilege only applies to the last two sentences. There is no indication that this document is pre- |

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| | | decisional. Although it precedes the decision regarding whether to issue a UAO in a particular case, it does not appear to precede the agency's decision with respect to its practice of issuing UAOs in this fashion. The document is a straightforward explanation of agency law or policy in light of a particular factual context, and it is not deliberative. |
| 6535 | acp; wpd | Protected work product because it was prepared in connection with a specific enforcement proceeding or investigation regarding a particular site, PRP or violation. It is not protected by the attorney-client privilege, however, because EPA has failed to identify any recipients, its format and content do not suggest that it constitutes a communication, and it appears to be more in the nature of a regulatory (rather than legal) assessment. |
| 6703 | acp; dpp | Because EPA has failed to identify any actual or intended recipients, and the content and format of the document do not appear |

to be
communicative or to support an inference of
confidentiality, the attorney-client privilege
may not be available. The document seems
policy-driven rather than focused on the
provision of legal advice or strategy.

With respect to the deliberative process
privilege, nothing about this document-even
viewed in light of the declarations submitted
by EPA-establishes that it is predecisional.
Although the declarations conclusorily state
that the document is not binding or
precedential, and that the agency is free to
reject its content at any time, EPA has failed
to establish that it has not been treated as
policy (*i.e.*, that it has not actually been relied
upon or adopted as the agency's position).
With the exception of the bracketed comment
and the sentence that follows it in the second
full paragraph of the “Section 106(a) UAOs
for RD/RA” section, the document's tone,
language, and manner do not appear

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| | to be deliberative. Rather, the document appears to state agency policy and protocol, and to provide guidance on how employees will act in accordance with the policy and protocol, rather than to recommend revisions to or amendments of the policy and protocol. |

TABLE T-2:

SUMMARY OF ATTORNEY-CLIENT PRIVILEGE AND SUBJECT-MATTER WAIVER DETERMINATIONS FOR DOCUMENTS INADVERTENTLY PRODUCED BY EPA

| *GE Exhibit Number and EPA Stamp Number* | *Findings of the Court* |
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| EPA-5-ORC-003412, Pl.'s Exh. 1<br><br>Memorandum from Barry Breen re: "Negotiation and Enforcement Strategies to Achieve Timely RD/RA Settlements and Timely Superfund Cleanups." | This document is not privileged, because it does not involve the seeking or provision of legal advice, but rather concerns setting regulatory and enforcement policy. The document's purpose is to guide employees generally in how to encourage PRPs to acquiesce in a certain approach. EPA has failed to identify any specific addressees, and hence, the Court is unable to assess whether the document has been circulated to non-essential persons. There is no subject-matter waiver resulting from inadvertent disclosure. |
| EPA-5-ORC-003169, Pl.'s Exh. 3 (Memorandum from Barry Breen re: "Guidance on Enforcement of CERCLA Section 106 Administrative Orders."); | These documents are different versions of the same general guidance within EPA on enforcement of § 106 orders. For the most part, then, they set regulatory and enforcement policy rather than provide legal advice, and are therefore not privileged. |

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| EPA-1-ORC-A0003277, Pl.'s Exh. 4 (Memorandum from Barry Breen, with handwritten comments and sketches, re: "Guidance on Enforcement of CERCLA Section 106 Administrative Orders.") | Indeed, the sections providing background information, enforcement goals, and a list of general factors to choose between trust fund response actions and compelled injunctive performance certainly do not constitute legal advice or services of a type typically provided by a private attorney. However, the section assessing factors used to consider judicial enforcement is within the attorney-client privilege, as it is a traditional legal assessment, including analysis of governing law, that advises the enforcement team with respect to the legal merits of defenses, litigation risks, and the legitimacy of certain arguments in the litigation context. The privilege has been waived, therefore, as to the specific subject-matter of the section entitled "Factors to be Used in Considering Judicial Enforcement." |
| EPA-5-ORC-003366, Pl.'s Exh. 6<br><br>Document from EPA Office of Site Remediation entitled "Supplement to Guidance on Petitions for Reimbursement under CERCLA § 106(b)(2)." | The document is not privileged and the waiver rule does not apply. The document provides guidance on how agency employees should carry out agency policy. As such, it is setting regulatory and enforcement guidance rather than providing legal advice. EPA has failed to identify any intended or actual recipients, and hence the Court cannot ascertain whether this document was treated as confidential. |
| EPA-1-ORC-A0001054, Pl.'s Exh. 10<br><br>Memorandum from Jerry Clifford re: "Documentation of Reason(s) for Not Issuing CERCLA § 106 UAOs to All Identified PRPs." | This document sets internal policies and procedures regarding issuance of UAOs, and does not involve the provision of legal advice. The privilege and its waiver rule do not apply. |
| EPA-6-REC-004410, Pl.'s Exh. 23 | The document is simply a meeting agenda |

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| | listing subjects with no legal advice included. The handwritten annotations do not appear to contain legal advice on specific topics or to reflect information that is confidential to the agency. Moreover, EPA has failed to identify any recipients-intended or actual-of those handwritten notations. The notations do not themselves reflect that a protected communication occurred, and they do not take a form that suggests that they are communicative. The privilege and its waiver rule do not apply. |
| Memorandum (with handwritten comments and illustrations) from Baerbel Schiller re: "Agenda for September 13, 1993, UAO for RD/RA Workgroup Conference Call." | |
| EPA-OSRE-A0016794, Pl.'s Exh. 28<br><br>Minutes from Compliance Team Meeting of 12/10/1996 | Although some sections of this document, *e.g.*, Section II.D, may concern subjects that might be within the attorney-client privilege, the information in this brief set of meeting minutes is neither legal advice nor (based on the document) a communication of substantive confidential legal information between attorney and client. Hence, neither the privilege nor the waiver rule applies. |
| FOIACC-001300, Pl.'s Exh. 33<br><br>Memorandum from Cate Gillen Tierney re: "CERCLA § 106 Meeting with ORE." | This document reflects legal advice provided at a meeting that is focused on a specific issue and set of matters potentially subject to § 106 orders. It concerns the type of function that a private attorney would ordinarily perform. Hence, confidentiality can be inferred, and the privilege applies. The production of this document therefore waives the privilege with respect to the subject-matter of the document, which is "the use of CERCLA § 106 to address imminent and substantial endangerments that may not fall within 'traditional' CERCLA fact patterns." It does not matter whether, as EPA states, the document was produced in connection with a FOIA request rather than in the context of |

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| | these discovery efforts; EPA admits that it cannot represent that the document was purposefully produced. Hence, the Court is not convinced that the disclosure was not the result of carelessness. |
| EPA-8-GEN-00182, Pl.'s Exh. 36(e-mail communication from Michael Northridge to James Doyle summarizing issues for discussion at 12/18/2000 UAO Workgroup Conference Call);<br><br>EPA-8-GEN-000090, Pl.'s Exh. 37(e-mail communication from Joni Teter to Suzanne Bohan containing an Agenda for the 12/18/2000 UAO Workgroup Conference Call, dated 12/11/2000) | These documents reflect no information that is confidential concerning the agency. Instead, they are simply broad descriptions of general subjects for a routine conference call. Although some sections may concern subjects that could possibly be within the attorney-client privilege, no substantive legal advice is contained in the documents. The attorney-client privilege therefore does not apply here. The waiver rule is thus inapplicable as well. |
| EPA-8-REC-003585, Pl.'s Exh. 52<br><br>Two pages of a Memorandum to Max H. Dodson from Paul J. Rogers, Andrew J. Lensink, Holly Fliniau, and Carol Russell, dated 04/20/2998, re: “Unilateral Administrative Order French Gulch/Wellington-Oro Site.” | At issue in this submission are only two pages of a longer document. These pages are only factual materials, not advice or recommendations. Moreover, this document may be regulatory or adjudicatory in nature. The Court can ascertain nothing that reflects information that is confidential concerning the agency, or that is legal advice, in this two-page document. Accordingly, it does not come within the attorney-client privilege, and the waiver rule does not apply. |
| EPA-OSRE-A0054846, Pl.'s Exh. 53<br><br>Memorandum from Walter E. Mugdan to Jeanne M. Fox re: “Request for Signature on Unilateral Administrative Order for Removal Action at the Tri-Cities Barrel Co., Inc. Superfund Site, Port Crane, Broome County, New York.” | Although from regional counsel to regional administrator (and thus agency decision-makers), this document is a routine step in regulatory enforcement, and does not include a legal assessment or legal advice. It is simply forwarding a UAO for approval and signature, without any analysis of the law or provision of legal advice, and hence is more properly characterized as regulatory |

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| | enforcement activity than as legal evaluation. The privilege does not apply and, therefore, neither does the waiver rule. |
| EPA-OSRE-A0047733, Pl.'s Exh. 54<br><br>Memorandum from John Lyons to Elizabeth Adams re: "Issuance of CERCLA 106 Unilateral Administrative Order to Montrose Chemical Corporation for Initial Remedial Groundwater Design Activities at the Montrose Chemical and Del Amo Superfund Sites. Request for Concurrence in Decision to Issue UAO only to Montrose Chemical Corporation." | See the explanation for Pl.'s Exh. 53 above. However, the first paragraph on page 2 of the document is an explanation of the law as applied in a specific context, and hence is the type of legal evaluation and advice properly protected by the attorney-client privilege. Waiver applies as to the subject-matter of "issuance of this UAO to only certain PRPs." |
| EPA-OSRE-A0048483, Pl.'s Exh. 55<br><br>Typewritten document re: "Excerpt from Memorandum to Regional Administrator Explaining Basis for Exclusion of Certain PRPs from Liberty Site UAO." | See the explanation for Pl.'s Exh. 54 above. There is waiver as to the same subject-matter of "issuance of this UAO to only certain PRPs." |
| FOIACC-009004, Pl.'s Exh. 81<br><br>Handwritten notes from Alan Watts to Debbie Negel, dated 8/27/1997, re: changes to be made to a draft UAO. | Although the handwritten notes are "recommendatory" with respect to certain changes to the draft UAO, they do not constitute legal advice or evaluation except for the bracketed language at conclusion of item 2, which is within the attorney-client privilege and hence also causes waiver for that narrow subject-matter. |
| EPA-2-ORC-012312, Pl.'s Exh. 82<br><br>Administrative Order with handwritten notations from Region Two re: CERCLA § 106 proceeding "In the Matter of the Esso Standard Oil S.A., Ltd., Texaco Caribbean, | The draft UAO is more in the nature of regulatory enforcement activity than provision of legal advice or evaluation. Handwritten annotations are minimal and do not constitute legal advice, evaluation, or strategy. Neither attorney-client privilege nor waiver applies. |

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| Inc., L'Henri, Inc., d/b/a O'Henry Cleaners; TuTu Wells Site, Anna's Retreat, St. Thomas, U.S.V.I." | |
| FOIACC-008994, Pl.'s Exh. 83<br><br>Administrative Order with handwritten notations from Region Five re: CERCLA 106 proceeding "In the Matter of Sun Machine Parts Site, Chicago, IL." | See the explanation for Pl.'s Exh. 82 above. The UAO appears to be final (note case number stamp). Annotations are questions and some answers, but do not appear to be legal advice or assessment. |
| EPA-7-ORC-000352, Pl.'s Exh. 92<br><br>Memorandum from Baerbel Schiller re: "Agenda for June 6, 1003, UAO for RD/RA Workgroup Conference Call," and Memorandum from Bruce M. Diamond re: "Determination of Imminent and Substantial Endangerment for Removal Actions." | EPA did not address this document in its explanatory submission. Assuming that EPA would assert the attorney-client privilege, however, the Court finds that such an assertion would be misplaced. The conference call agenda is not privileged, as it contains no legal advice or analysis. The memorandum from Mr. Diamond is not privileged either. It is from the Directors of two EPA offices, not from attorneys acting as legal advisors, and contains regulatory guidance, not legal advice or analysis. The third document is simply a blank form that includes no substantive information of any kind, much less legal advice or analysis. |

D.D.C.,2006.
General Elec. Co. v. Johnson
Not Reported in F.Supp.2d, 2006 WL 2616187 (D.D.C.), 63 ERC 1854

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