UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO COMPEL GRANTED IN PART AND DENIED IN PART; APPELLANT'S MOTION FOR SANCTIONS DENIED; THIRD PARTY'S MOTION TO QUASH GRANTED IN PART AND DENIED IN PART: February 10, 2021

CBCA 6683, 6761, 6762, 6827, 6828, 6829, 6830, 6831, 6833, 6834, 6835, 6836, 6837, 6839, 6918, 6919, 6920, 6921, 6922

4K GLOBAL-ACC JOINT VENTURE, LLC,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Karl Dix, Jr., Lochlin B. Samples, and Jonathan R. Mayo of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

José Otero and Joshua L. Caplan, Office of the Solicitor, Department of Labor, Washington, DC; and Willow Eden Fort, Office of the Solicitor, Department of Labor, Nashville, TN, counsel for Respondent.

Olivia Fines of Parsons Federal Solutions, Centreville, VA, counsel for Parsons Corporation.

LESTER, Board Judge.

ORDER

Pending before the Board are two separate discovery motions, one of which asks the Board to compel discovery and impose sanctions against respondent, the Department of

Labor (DOL), and the second of which seeks to quash a subpoena served by appellant, 4K Global-ACC Joint Venture, LLC (4KG-ACC), on a third party, Parsons Corporation (Parsons).

In the first motion before us, 4KG-ACC seeks to compel DOL immediately to complete its production of electronically stored information (ESI) and other documents responsive to 4KG-ACC's document production requests. 4KG-ACC further requests that we strike DOL's privilege log and order DOL to produce all documents identified on that log, arguing that DOL has failed to establish that any documents identified are actually privileged. 4KG-ACC also requests that the Board sanction DOL for its failure to have complied with prior Board orders imposing deadlines for DOL's Phase 1 ESI production and for using a method of ESI searching that, according to 4KG-ACC, violates an ESI agreement that the parties previously executed.

In the second motion, Parsons asks us to quash a subpoena from 4KG-ACC that demands production of text messages between particular Parsons and DOL employees sent during performance of the contract underlying these appeals.

For the reasons set forth below, we grant 4KG-ACC's motion in part, deny it in part, and defer resolution of a portion of its privilege challenge pending an in camera review of documents over which DOL is asserting a deliberative process privilege claim. We grant Parsons' motion to quash only to the extent that we condition Parsons' obligation to produce text messages upon 4KG-ACC's advance agreement to reimburse Parsons' reasonable costs of production. We deny 4KG-ACC's request for sanctions against DOL.

Background

The nineteen consolidated appeals involved in this matter arise out of a contract for the construction of the Atlanta Job Corps Center (AJCC) and consist of 4KG-ACC's challenge to the DOL contracting officer's decision terminating that contract for default plus eighteen monetary claims. Not yet consolidated with those nineteen are two new related appeals that 4KG-ACC filed on January 8, 2021, which the Board docketed as CBCA 7025 and 7026. These new appeals added (1) a request for an additional $1.47 million in damages, beyond and in addition to the damages sought in the original nineteen appeals, that were allegedly incurred as a result of DOL-caused delays and DOL-ordered extra work; and (2) a challenge to the final evaluation of 4KG-ACC in the Contractor Performance Assessment Rating System (CPARS). Although 4KG-ACC has requested that CBCA 7025 and 7026 be consolidated with these nineteen appeals, the Board, by separate order, has deferred that

consolidation request until after the parties' submission of the complaint, answer, and appeal file in the two new appeals.

In response to prior discovery disputes between the parties in the nineteen consolidated appeals at issue here, the Board elected to adopt a phased approach to ESI discovery. In an order dated July 10, 2020, the Board defined "Phase 1" of ESI discovery as involving ESI from between August 1, 2018, and December 31, 2019 (with some exceptions within and outside of that period), and indicated that ESI "Phase 2" discovery, which would involve a narrowed set of production requests for materials outside of that time period, would occur after Phase 1 production was complete. Although DOL indicated that it would need until December 31, 2020, to produce all Phase 1 ESI documents, the Board indicated that, based upon the information that DOL had provided to the Board, the amount of time that DOL was seeking for production seemed unnecessarily long. In its order dated July 10, 2020, the Board directed DOL to produce all of Phase 1 ESI to 4KG-ACC no later than August 28, 2020, after which 4KG-ACC would propose a schedule for Phase 2 ESI discovery. Subsequently, by order dated August 17, 2020, the Board reiterated that the August 28, 2020, Phase 1 ESI deadline remained in effect, but allowed DOL until October 23, 2020, to complete production in response to five particular production requests, nos. 5, 24, 42, and 43. DOL did not file any subsequent motions to enlarge the Phase 1 ESI production deadlines.

In a motion to compel filed on September 29, 2020, 4KG-ACC complained that DOL had not met the Board-ordered deadline of August 28, 2020; that DOL had given itself a "new, self-extended production deadline" without seeking an enlargement from the Board and that DOE again did not meet that self-extended deadline; that DOL was improperly using Technology Assisted Review (TAR) tools to cull non-responsive documents from the documents that it was otherwise required to produce under (and in violation of) an ESI agreement that the parties had executed; that DOL was conducting a massive and overbroad privilege review, apparently through a manual review rather than through the use of an electronic privilege search review engine, that was causing significant delays in discovery; and that DOL had improperly withheld approximately 1250 documents under unsupported claims of deliberative process, attorney-client, and privacy privileges and attorney work product claims. 4KG-ACC has requested the following relief:

> (1) Order DOL immediately to produce all Phase 1 ESI material that 4KG-ACC has requested using 4KG-ACC's original Phase 1 search terms, without regard to any reduction or culling of documents from DOL's use of TAR;

(2) Preclude DOL from using TAR to eliminate allegedly non-responsive documents from DOL's production and/or order DOL to produce its procedures for TAR and for ESI gathering;
(3) Order DOL to make the custodians and original sources of discovery material available to 4KG-ACC for collection, capture, and sorting;
(4) Grant 4KG-ACC leave to take the deposition of a DOL document custodian regarding DOL's document gathering and production processes;
(5) Strike the entirety of DOL's privilege log as overbroad, inadequate, and not in compliance with established requirements;
(6) Order the production of all documents that DOL has withheld as privileged;
(7) Require that, in the future, DOL must respond to substantive discovery communications and submissions from 4KG-ACC within two business days of receipt; and
(8) Extend 4KG-ACC's deadline to submit Phase 2 ESI search terms until three weeks after DOL produces all Phase 1 documents and, further, expedite DOL's production of responsive Phase 2 ESI.

4KG-ACC also requests that the Board impose the following sanctions against DOL:

(1) Limit DOL's ability to rely on documents at any hearing in these appeals to those timely produced by August 28, 2020;
(2) Award 4KG-ACC its attorney fees for DOL's willful and intentional violations of the Board's orders; and
(3) Hold that any further violations by DOL related to discovery will result in the dismissal of DOL's pleadings in these consolidated appeals.

On November 5, 2020, after reviewing 4KG-ACC's motion to compel and the DOL privilege log that accompanied it, but before DOL had responded to the motion, the Board issued an order finding that, on its face, DOL's privilege log was deficient and directed DOL to revise that privilege log to add descriptive information about the bases of the privilege claim for each document in the log. DOL subsequently responded to 4KG-ACC's motion to compel and filed a revised privilege log with the Board.

On November 25, 2020, while its motion to compel was pending, 4KG-ACC served a subpoena on Parsons, seeking, no later than December 15, 2020, the production of text messages from the cellular telephones of eleven Parsons employees. Parsons was DOL's engineering support contractor (ESC) for the project at issue in these appeals, serving both as DOL's on-site construction representative and DOL's project manager. On December 9,

2020, Parsons filed a motion with the Board seeking to quash the subpoena. The Board issued an order suspending Parsons' obligation to comply with the subpoena pending the Board's resolution of Parsons' motion.

4KG-ACC filed its reply brief on the motion to compel on December 18, 2020, indicating that, as of that date, DOL had still not completed its Phase 1 ESI production, even though most of it was due by August 28, 2020. DOL had also missed the October 23, 2020, deadline for the production of the additional Phase 1 ESI materials responsive to request nos. 5, 24, 42, and 43, as required by the Board's August 17, 2020, order. 4KG-ACC argued that DOL had acted in bad faith and that, as a result, 4KG-ACC was entitled to the sanctions that it had requested.

At the parties' request, additional deadlines set in prior Board orders for Phase 2 discovery, identification of expert witnesses, and the disclosure of expert reports have been suspended pending the resolution of 4KG-ACC's motion to compel and Parsons' motion to quash.

Discussion

I. 4KG-ACC's Phase 1 Production Demand And Sanctions Request

4KC-ACC identifies two bases for its request for sanctions against DOL and for its motion to compel the immediate production of all Phase 1 ESI.

First, 4KG-ACC complains that, after applying the parties' agreed-upon search terms to locate ESI within its systems, DOL applied TAR tools in an effort further to reduce the ESI that had to be produced. 4KG-ACC claims that, under the parties' ESI agreement, DOL was required to produce all ESI documents responsive to the parties' agreed-upon ESI search terms and that, in any event, applying TAR after using search terms to locate ESI is unusual and unnecessary. It asks that we order DOL to produce any and all documents that were tagged by the parties' agreed-upon search terms, even if they are unrelated to the matters in litigation, and that we bar DOL from using TAR now and in the future to reduce the number of documents that DOL will produce. We deny 4KG-ACC's request.

Paragraph 4.13 of the parties' ESI agreement expressly permitted DOL to conduct additional responsiveness reviews outside the context of the use of the agreed-upon search terms:

> Right to Conduct Document Review. Nothing contained herein is intended to or shall serve to limit a Party's right to conduct a review of documents or ESI for relevance, responsiveness, and/or segregation of privileged and/or protected information before production.

4KG-ACC's argument that DOL breached the ESI agreement by not producing every document that responded to 4KG-ACC's requested search terms and by using TAR to cull non-responsive documents is unsupported by the parties' agreement. Further, even if the ESI agreement between the parties had barred the use of TAR tools, that agreement was not entered as an order of the Board, meaning that the Board has no basis for imposing the sanctions that 4KG-ACC requests. *Johnson Management Group, CFC, Inc.*, HUD BCA 97-C-109-C2, 00-2 BCA ¶ 31,116; *see* Board Rule 35(b) (48 CFR 6101.35(b) (2019)) (allowing the Board to impose sanctions if a party "fails to comply with any direction or order of the Board . . . or engages in misconduct affecting the Board, its process, or its proceedings").[1] In any event, DOL, in producing documents in response to written document production requests, need not produce documents unrelated to the subject of the litigation; the ESI search terms that 4KG-ACC provided may assist in guiding DOL to the responsive ESI that 4KG-ACC wants, but they cannot change or expand the scope of 4KG-ACC's written production requests. *See Phillips v. Boilermaker-Blacksmith National Pension Trust*, No. 19-2402, 2020 WL 5642341, at *3 (D. Kan. Sept. 22, 2020) (ESI search terms "cannot function as a stand-alone discovery procedure" untethered from written discovery requests pursuant to Rule 34 of the original Federal Rules of Civil Procedure (FRCP)); *Lewis v. Bay Industries, Inc.*, 51 F. Supp. 3d 846, 860 (E.D. Wis. 2014) ("[S]earch terms are to assist in locating discoverable documents or [ESI]; their presence does not by itself make a document relevant or discoverable."). 4KG-ACC has no discovery right to the production of irrelevant materials.

Second, 4KG-ACC complains that DOL has ignored the deadlines that the Board imposed for the production of Phase 1 ESI and that sanctions should be imposed for that failure. Clearly, DOL has not complied with the production deadline for Phase 1 ESI that the Board set in its discovery orders. Although DOL asserts that it produced some documents by the Phase 1 discovery deadline and was entitled later to "supplement" that production, the Board's orders set a hard deadline of August 28, 2020, for the production of *all* ESI responsive to 4KG-ACC's Phase 1 discovery requests, except for a limited subset that was due by October 23, 2020. As 4KG-ACC correctly notes, a supplemental production is

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[1] We note that the Board would not have entered an ESI order requiring DOL to produce a wide volume of documents unrelated to this litigation.

made when a "party learns that in some material respect the [previous] disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A), *quoted in* Appellant's Reply Brief at 8. Here, DOL did not "learn" after the Phase 1 ESI production deadline of August 28, 2020, that its Phase 1 ESI production was incomplete; it knew it on August 28. Accordingly, it cannot viably argue that it is now "supplementing" a prior production that it had previously, and mistakenly, thought was complete. To the extent that DOL argues that the August 28 deadline was somehow fluid, it misinterprets what the Board's orders said. DOL did not meet the Board-ordered deadlines, nor did it file a timely motion with the Board explaining the reasons that it could not meet the deadlines and asking for an extension of time. Pretending as though the deadline did not really exist and just letting it go by without seeking relief from the Board was an inappropriate approach to dealing with the Board's orders.

Despite this error on DOL's part, DOL has now provided extensive declarations that discuss the difficulties that DOL and its litigation support contractor have had in dealing with the volume of ESI that 4KG-ACC has demanded DOL produce. The Board has previously recognized the breadth of 4KG-ACC's requested discovery and indicated its concern that the discovery is not in keeping with the proportionality rules that now apply to proceedings before the Board. Since September 17, 2018, Board Rule 13(b) has provided that, "[u]nless otherwise ordered, the scope of discovery is the same as under Rule 26(b)(1) of the [FRCP]." As currently written, FRCP 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." No longer do we apply the broader "reasonably calculated to lead to the discovery of admissible evidence" standard, which amendments to the FRCP in 2015 purposely eliminated.

Had 4KG-ACC taken a more narrowed and targeted approach to document production in these appeals, we might provide less leniency to DOL in its efforts to respond. 4KG-ACC made a choice, however, in taking an aggressive and expansive view of discovery. Through its broad and somewhat oppressive approach to document production demands, 4KG-ACC has placed an inordinate burden on DOL and cannot reasonably argue that production should have been highly expedited, at great expense to DOL. "It cannot seriously be disputed that compliance with the 'spirit and purposes' of [the] discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot 'behave responsively' during discovery unless they do both, which requires

cooperation rather than contrariety, communication rather than confrontation." *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 360 n.3 (D. Md. 2008). DOL has, in its response to 4KG-ACC's motion to compel, provided detailed declarations explaining the problems that 4KG-ACC's broad ESI search terms have created and discussing the large amount of material completely unrelated to the contract at issue that searches using those terms have generated. In light of those explanations, we will not second-guess DOL's efforts to apply TAR tools to its collections or step into its efforts to reduce non-responsive materials from its productions.

Had DOL previously provided the type of detailed explanations that it has now produced in its response to 4KG-ACC's motion to compel, the Board would have modified the production deadlines to make them more reasonable and attainable. Although we cannot condone DOL's failure to have provided the Board with that opportunity through motions for enlargement of the August 28 and October 23, 2020, deadlines and, instead, simply to miss them, it would be "inappropriate for this Board to sanction [a party] for its legitimate inability to comply with this Board's Order." *Afro-Lecon, Inc. v. General Services Administration*, GSBCA 11109(7508-REM)-REIN, 1993 WL 485821 (Nov. 10, 1993). We decline in the circumstances here to sanction DOL in the manner that 4KG-ACC has requested for missing the August 28 and October 23, 2020, Phase 1 ESI deadlines.

4KG-ACC argues that, in considering sanctions, we should take into consideration the great prejudice that it has suffered because of DOL's delays in production. *See Brasfield & Gorrie, LLC v. Department of Veterans Affairs*, CBCA 3300, 14-1 BCA ¶ 35,806 (one purpose of sanctions is to prevent prejudice to the non-offending party). It filed its original discovery requests more than one year ago, almost immediately after it filed its first appeal (CBCA 6683) challenging DOL's default termination decision and argues that it has been unable, because of DOL's dilatory conduct, to complete the development of what is now nineteen appeals that it has incrementally filed over the course of a little more than a year. Yet, 4KG-ACC *continues* to file—most recently on January 8, 2021—appeals arising out of the contract at issue that contain allegations that directly overlap with, but expand upon, allegations in the existing appeals. The two most recent appeals (CBCA 7025 and 7026), filed only one month ago, add another $1.47 million to 4KG-ACC's claimed damages under the contract at issue, as well as a CPARS evaluation challenge. These new appeals will require their own discovery and will require DOL again to revisit searches of document collections that it had already conducted and completed. The Board has no intention of conducting a hearing on 4KG-ACC's interrelated claims on a piecemeal basis, but will hear *all* of them in a single consolidated hearing when all are ready. By continually filing additional appeals arising out of this contract over the course of the last twelve months, each of which requires discovery, 4KG-ACC continually adds to the time that will be necessary

to prepare the consolidated cases for hearing and renders its claims of prejudice arising from past DOL production delays unfounded.

That being said, the parties must devise a plan for completing both Phase 1 and Phase 2 ESI discovery in these appeals. Obviously, DOL is going to have to complete its Phase 1 ESI production and engage in a Phase 2 production effort. The Board directs the parties to confer about a new, and realistic, schedule for completing discovery in these appeals, including a deadline by which DOL will compete its Phase 1 ESI production; new deadlines for 4KG-ACC to submit Phase 2 ESI search terms for DOL's approval, if it has not yet done so, and for DOL to conduct and complete its Phase 2 ESI production; and deadlines for other activities necessary for developing these appeals for a hearing. Although CBCA 7025 and 7026 are not yet consolidated with these appeals, any proposed schedule should include the necessary development of those two appeals.

4KG-ACC has requested that the Board grant it leave to depose a DOL document custodian about DOL's document gathering and production processes. In its order of July 10, 2020, the Board authorized the parties to begin fact witness depositions on November 16, 2020, but deferred expert witness depositions until a later date. The order did not specifically address depositions of document custodians. To the extent that the Board's existing orders do not contemplate such depositions, the Board now authorizes them.

II. 4KG-ACC's Challenges To DOL's Privilege Claims

A. 4KG-ACC's Deliberative Process Privilege Challenge

1. The Parameters of the Deliberative Process Privilege

DOL has submitted a privilege log in which it claims privilege over approximately 1250 documents. 4KG-ACC challenges the entirety of DOL's privilege claims and demands that DOL be ordered to produce all documents identified on DOL's log. By order dated November 5, 2020, the Board required DOL to revise and reissue its privilege log to address its descriptions supporting each of its privilege claims because the Board had found the original log to be facially deficient. DOL submitted that revised log on December 11, 2020. In a reply brief that 4KG-ACC filed after having received the revised log, 4KG-ACC continued to challenge all of DOL's privilege claims, including approximately 820 claims of deliberative process privilege.

"The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark [they make] is a potential item

of discovery and front page news, and its object is to enhance 'the quality of agency decisions' by protecting open and frank discussion among those who make them within the Government." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (quoting *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)); *see Wolfe v. Department of Health & Human Services*, 839 F.2d 758, 773 (D.C. Cir. 1988) (en banc) ("[The quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl."). It is an executive privilege that protects from public disclosure "intra-government documents reflecting advisory opinions, recommendations, and deliberations that comprise a part of the process by which governmental decisions and policy are formulated." *Federal Data Corp.*, DOT CAB 2389, 91-3 BCA ¶ 24,063.

The Government must follow certain procedures to invoke the privilege, including the submission of a declaration from the head of the agency (or the individual to whom the head has delegated authority) affirmatively invoking the privilege after a personal review. *Marriott International Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006); *Wilson v. General Services Administration*, GSBCA 13152, 96-2 BCA ¶ 28,615. DOL has satisfied the procedural requirements through the declaration of John P. Pallasach, the Assistant Secretary for Employment and Training within DOL, to whom the Secretary of Labor, through Secretary's Order 16-2006, 71 Fed. Reg. 67,024 (Nov. 17, 2006), has delegated authority to invoke the deliberative process privilege. The Assistant Secretary represents that he reviewed a representative sampling, culled by counsel for DOL, of the documents being claimed as privileged and attests that, based upon his review, he believes that the privilege is validly invoked. In light of the volume of documents over which the deliberative process privilege is being asserted, we find the sampling method that the Assistant Secretary utilized sufficient to comply with the procedural requirements for invoking the deliberative process privilege. *See Scalia v. International Longshore & Warehouse Union*, 336 F.R.D. 603, 610-11 & n.4 (2020) (holding that, "even though [the high-level official affiant] did not personally review every withheld document," the affidavit invoking deliberative process privilege over organized files was sufficient to establish that the privilege had not been "indiscriminately invoked"). Nevertheless, the official's declaration, while legally necessary to invoke the privilege, "is not dispositive," as "[i]t is not the administrative agency asserting the privilege, but the tribunal before which the issue arises, that must make the final determination" regarding the validity of the privilege. *Federal Data Corp.*

To qualify for the privilege, a document must be both "(1) 'predecisional,' i.e., prepared in order to assist an agency decisionmaker in arriving at [a] decision, and (2) 'deliberative,' i.e., actually . . . related to the process by which the policies [or decisions]

are formulated." *In re United States*, 678 F. App'x 981, 988 (Fed. Cir. 2017) (quoting *National Council of La Raza v. Department of Justice*, 411 F.3d 350, 356 (2d Cir. 2005)); *see Mountain Valley Lumber, Inc.*, AGBCA 2003-171-1, 2006 WL 903652 (Mar. 24, 2006); *Xerox Corp. v. Government Printing Office*, GSBCA 12322-P, 93-3 BCA ¶ 25,936. Such predecisional deliberative documents may include "draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Federal Data Corp.* (quoting *Coastal States Gas Corp. v. United States Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

The applicability of the privilege is far from unlimited, however. Our "adversary system of establishing truth by litigation . . . requires development of all relevant facts to produce real justice through due process." *Cetron Electronic Corp. v. United States*, 207 Ct. Cl. 985, 989 (1975). Accordingly, the privilege is "construed narrowly in order to permit parties seeking discovery to obtain sufficient information" to support their positions in litigation. *First Heights Bank FSB v. United States*, 46 Fed. Cl. 827, 829-30 (2000). In general, it does not encompass factual information, factual conclusions, factual speculation, interpretation of facts, or investigative material, *Unisys Corp. v. Department of Commerce*, GSBCA 12823-COM, 95-2 BCA ¶ 27,903, except to the extent that non-privileged factual information "can[not] be separated from expressions of opinion or recommendations without compromising that privileged material in those documents." *Federal Data Corp.* Nevertheless, "[t]he distinction between whether the nature of the material is factual or opinion is . . . not dispositive of whether the material is deliberative." *In re United States*, 321 F. App'x at 959; *see National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he scope of the deliberative process privilege should not turn on whether we label the contents of a document 'factual' as opposed to 'deliberative.'"). The fact-versus-opinion distinction has been refined in recent years "to look [more broadly] at the deliberative process as a whole: courts look at what function the documents play in the decision-making process, and whether their disclosure would threaten the deliberative process." *California Native Plant Society v. United States Environmental Protection Agency*, 251 F.R.D. 408, 413 (N.D. Cal. 2008). Thus, "whenever the unveiling of factual materials would be tantamount to the 'publication of the evaluation and analysis of the multitudinous facts' conducted by the agency, the deliberative process privilege applies." *In re United States*, 321 F. App'x at 960 (quoting *National Wildlife*, 861 F.2d at 1119). Ultimately, the agency bears the burden of establishing that documents are covered by the privilege. *Charlesgate Construction Co.*, LBCA 96-BCA-2, et al., 1997 WL 159854 (Mar. 7, 1997).

Even where the deliberative process privilege attaches, it is not absolute. *Marriott International*, 437 F.3d at 1307. Once the existence of the privilege is established, the

tribunal must balance the public interest in nondisclosure against the requesting party's need for the information to assist in prosecuting its claims, *Federal Data Corp.*, and it is the responsibility of the party seeking production to convince the tribunal that its significant, if not compelling, need outweighs the privilege. *Marriott International*, 437 F.3d at 1307; *Federal Data Corp*. "Some of the factors to be applied in reaching this determination are: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violate." *Federal Data Corp.*

Importantly for purposes of the privilege claims here, the role of the Government in the events at issue "may affect the degree of necessity for production." *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA 17717, 73-2 BCA ¶ 10,205. "Where the Government is a party litigant and application of executive privilege may result in an unfair litigating advantage, the courts may be more inclined to find that the privilege must give way to the need." *Id.*; *see Dairyland Power Cooperative v. United States*, 77 Fed. Cl. 330, 342 (2007) (if the Government is a party to and has a stake in the action, its privilege invocation "must be carefully scrutinized"); *Pacific Gas & Electric Co. v. United States*, 71 Fed. Cl. 205, 214 (2006) (the balance is more likely to weigh in favor of a plaintiff's need for protected documents if the Government takes a "litigation position" that implicates the documents). Further, the privilege will not protect deliberative documents where the deliberative process itself is the subject of or has been placed in issue by the litigation. *Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995); *Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986). In such instances, "direct evidence of the deliberative process [may be] irreplaceable" as a necessary part of the discoverable information in the litigation. *Department of Economic Development v. Arthur Andersen & Co. (U.S.A.)*, 139 F.R.D. 594, 596 (S.D.N.Y. 1991).

These later considerations are directly relevant when the Government seeks to withhold documents relating to deliberations regarding the administration of the very contract at issue in the litigation. Many years ago, the Armed Services Board of Contract Appeals (ASBCA) in *Ingalls Shipbuilding* analyzed the distinction between internal agency deliberations about policy and legal matters, on the one hand, and internal deliberations about contract administration matters, on the other. The ASBCA recognized that concern about full and frank exchanges of information "comes into play" where "commentary or policy analysis is . . . involved" on matters of agency policy, "as e.g. in suggestions for modification of [safety] standards." *Id.* (quoting *Ditlow v. Volpe*, 362 F. Supp. 1321, 1327 (D.D.C. 1973)). The same concern, the ASBCA recognized, is not typically in play where individuals

are providing opinions to a contracting officer about matters of contract administration on a particular government contract.

> It may well be in a particular case, especially in connection with contract disputes, that technical experts are providing to a decision-maker (such as a contracting officer) factual input of various kinds—e.g., engineering, audit, quality assurance. Such factual information could be characterized as opinion, in the sense that any statement of fact is actually the opinion of the person making the statement, and other persons may well hold a contrary opinion. Likewise, such factual information could be characterized as advisory, in the sense that it is provided to assist the decision-maker. The "advisory opinions" that executive privilege is designed to protect, however, contain ideas and points of view on legal and policy matters, as distinguished from factual matters.

Id. "Factual investigations, such as evaluations of contract claims, that are needed in the ordinary course of Government business, will not foreseeably dry up because of the possibility of future disclosure. If anything, the knowledge of possible future disclosure would simply bring to bear a greater incentive for the investigators to be fully accurate, which we view as a salutary effect to be sought after, not avoided." *Id.* Accordingly, the ASBCA held that the deliberative process privilege was not applicable to the types of "opinion" about factual matters that were presented to the contracting officer. *See also Carl W. Olson & Sons Co.*, IBCA 930-9-71, 74-1 BCA ¶ 10,564 (citing *Ingalls Shipbuilding* with approval); *Robert E. McKee General Contractor, Inc.*, GSBCA 3697, 1973 WL 1973 (Oct. 16, 1973) (same).

2. The Validity of DOL's Deliberative Process Privilege Claims

Looking at DOL's deliberative process privilege claims, it is often difficult to discern from the descriptions on DOL's privilege log the extent to which the deliberations at issue are directly tied to general agency policy decisions or to the contracting officer's decision to terminate 4KG-ACC's contract or his decisions on other contract administration matters. DOL's privilege log entries describe "deliberative, pre-decisional communication[s] regarding" such matters as "termination" of the contract at issue, "termination of Mississippi Job Corps Center," "DOL's [AJCC] options," "DOL's [AJCC] post-termination options," "inter-agency agreement with [the United States Army Corps of Engineers (USACE)]," and "[Memorandum of Understanding (MOU)] and associated Pay Applications," without any further elaboration. Rarely do the entries tell the Board (as they must) what "decision" was at issue for which the opinions were being offered or whether the document at issue pre- or

post-dates that decision. *See Unisys Corp.* ("To qualify for protection, an evaluation must directly recommend courses or prescribe options for a *specific* agency decision or policy change." (emphasis added)); *California Native Plant Society*, 251 F.R.D. at 413 (In its log, "[t]he agency should point to the decision or policy for which the agency prepared the document," and "[c]onclusory statements that a document is deliberative do not suffice.").

Nevertheless, in its response to 4KG-ACC's motion to compel, DOL has acknowledged that many of its deliberative process privilege claims relate "to documents evidencing inter and intra agency communications regarding whether or not to terminate the contract with 4KG ACC." DOL Response Brief at 13-14. Even though 4KG-ACC is the appellant here, a default termination is a government claim that the Government must justify. *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612 (2016). To the extent that DOL is attempting broadly to shield all agency deliberations about the contracting officer's ultimate decision to terminate 4KG-ACC's contract, as well as decisions to withhold payments to 4KG-ACC and to transfer contract functions from 4KG-ACC to the USACE, it is highly unlikely that any such claim could withstand 4KG-ACC's privilege challenge. *See Ingalls Shipbuilding*; *see also Federal Deposit Insurance Corp. v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998) ("[W]hen the Government seeks affirmative relief, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over." (quoting *Equal Employment Opportunity Commission v. Citizens Bank & Trust Co.*, 117 F.R.D. 366, 366 (D. Md. 1987))). 4KG-ACC alleges in its complaint that DOL's payment withholdings were the result of a DOL employee's retaliation against 4KG-ACC for complaining about that employee's prior improper conduct and that the ultimate default termination decision was pretextual, the decision having been made earlier to transfer work to the USACE. Those appear to be what at least some of the documents in dispute may address. If that is the case, we could not uphold DOL's privilege claim, as DOL cannot hide the basis of its contract administration actions, including a default termination, under the guise of the deliberative process privilege, even if, as DOL indicates in its briefing, it utilized a procurement review board to evaluate the appropriateness of default termination and make recommendations about it to the contracting officer. *See Superior Timber Co.*, IBCA 3459, 97-2 BCA ¶ 29,112 ("[A] plaintiff may not hide behind the shield of a privilege and withhold testimony that may materially aid the defense while invoking the aid of the court in prosecuting a claim." (quoting *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1579 (Fed. Cir. 1985))).

4KG-ACC insists that, because DOL's log descriptions are deficient in justifying the deliberative process privilege, DOL's privilege claims automatically fail and 4KG-ACC is entitled to the documents. The Board is not ready to require production of documents that may, in fact, be privileged simply because of possible procedural defects in the privilege

assertion. We lack complete confidence that we have correctly interpreted the content of each of the documents in play, given that the current privilege log leaves some ambiguity in its descriptions and in identifying the specific "decision" to which each of the deliberative documents relates, and DOL has indicated that at least some privileged documents are separate and distinct from the default termination decision. Although the Board is highly skeptical about the viability of at least some of DOL's deliberative process assertions, we believe that a better course of action is to require DOL to submit the documents over which it claims deliberative process privilege to the Board for in camera review. As the Supreme Court has recognized, "in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 406 (1976). As suggested by Rule 9(d)(2) of the Board's rules, the Board has the authority, sua sponte, to order in camera review of documents over which a claim of privilege has been challenged, *System Management American Corp.*, GSBCA 9773-P, 89-3 BCA ¶ 21,945, particularly where "there has been at least some showing, however preliminary and indeterminative, that these communications may not," or may, "be protected by the [claimed] privilege." *Renner v. Chase Manhattan Bank*, No. 98-CIV-926, 2001 WL 1819215, at *4 (S.D.N.Y. July 13, 2001); *see, e.g.*, *Marriott International*, 437 F.3d at 1307; *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 217 (2010); *Pacific Gas & Electric Co. v. United States*, 71 Fed. Cl. 205, 206-07 (2006); *Greenpeace v. National Marine Fisheries Service*, 198 F.R.D. 540, 542 (W.D. Wash. 2000). The Board exercises that authority here and, below, will set a schedule for the in camera submission of documents covered by DOL's deliberative process privilege claims.

Nevertheless, the Board strongly suggests that, before submitting those documents for in camera review, DOL reevaluate and eliminate from its privilege claims those that are tied only to "decisions" associated with the administration of the contract at issue in these appeals, as the Board is highly unlikely to uphold any such privilege claims, particularly as they relate to DOL's default termination claim. Further, along with its in camera submission, DOL shall update its privilege log to identify, for each document over which a claim of deliberative process privilege is asserted, (1) the specific policy or decision that was at issue and being debated when the document was created, and (2) the date upon which that policy or decision was ultimately made.

B. 4KG-ACC's Attorney-Client Privilege and Work Product Challenges

In its privilege log, DOL claims that approximately 725 documents are protected by the attorney-client privilege and/or the work product doctrine. 4KG-ACC challenged the entirety of those privilege claims in its motion to compel, asserting that DOL's descriptions were insufficient to justify any claims of privilege. Nevertheless, in the reply brief that

4KG-ACC filed after DOL revised its privilege log on December 11, 2020, and provided more detailed descriptions of the bases of its privilege claims, 4KG-ACC did not mention, but did not expressly withdraw, its blanket challenge to all of those privilege claims.

The revised log provides descriptions of the basis of DOL's privilege claims, such as "attorney-client communication providing legal advice regarding MOU and associated Pay Applications," and identifies each communication's date, author, and recipient(s) (including at least one attorney), and subject line entry. 4KG-ACC has not identified which of the revised descriptions, if any, are insufficient to support the privilege claim. Of the attorney-client privilege and work product entries that the Board reviewed, the descriptions, while somewhat slimmer than might be desired, appeared on their face minimally sufficient to justify the privilege claim. Given that blanket challenges to all privilege claims in a privilege log, like 4KG-ACC's challenge here, are disfavored, *see Donald v. Arrowood Indemnity Co.*, No. 2:10cv227, 2011 WL 2174015, at *3 (S.D. Miss. May 31, 2011), the Board declines to undertake the type of fulsome review of each and every attorney-client privilege and work product description in DOL's privilege log that 4KG-ACC has itself declined to undertake. 4KG-ACC's challenge is denied, without prejudice to 4KG-ACC's ability, after consulting in good faith with DOL, to challenge specific attorney-client privilege and work product claims in the future on a document-by-document basis.

C. 4KG-ACC's Challenge to DOL's Privacy Act Privilege Claims

In its privilege log, DOL has withheld numerous documents as privileged because they contain "personally identifiable information" or "information protected under the Privacy Act." *See, e.g.*, Document Nos. DOL_036775-83, DOL_037089-98, DOL 039021-37, DOL_043671-75, DOL_081280-87, DOL_083828-30. There is no such evidentiary privilege for Privacy Act information. *Kepa Services, Inc. v. Department of Veterans Affairs*, CBCA 2727, et al., 15-1 BCA ¶ 35,889. To the extent that relevant documents contain Privacy Act information, they may be produced under the protective order that the Board previously issued in these appeals, but they are not privileged. *See id.*

The fact that Privacy Act information is not privileged does not mean that it does not warrant heightened consideration in evaluating whether it needs to be produced. *See In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1216 (D.C. Cir. 2004) ("[The fact that a document [is] subject to the [Privacy] Act [is] not 'irrelevant to the manner in which discovery should proceed.'" (quoting *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987))). Many of the entries on DOL's privilege log indicate that at least some of the protected information relates to an "[e]mployee performance management plan." To the extent that such documents involve employee performance ratings, evaluations, or

assessments, it would be difficult to see why such information would be sufficiently relevant to a contract dispute to warrant disclosure. *Kepa Services*; *Essex Electro Engineers, Inc.*, DOT CAB 1025, 79-2 BCA ¶ 14,158. Although DOL cannot properly claim privilege over Privacy Act information, it may apply a heightened relevance standard to such information for discovery purposes.

III. 4KG-ACC's Third-Party Subpoena Seeking Text Messages

A. Third-Party Challenges to the Subpoena

A third party, Parsons, has filed a motion to quash a subpoena that 4KG-ACC served on November 25, 2020. The subpoena seeks "all text messages in the possession of" eleven specifically identified Parsons employees that are responsive to two sets of document production requests that 4KG-ACC previously served on DOL, which contain a total of 117 separate document requests. Apparently, while working on this project, several of the named individuals used Parsons-issued cellphones, at least one used a combination of a Parsons-issued phone and a personal cellphone, and at least one used only a personal cellphone to communicate about the project. Reviewing the breadth of 4KG-ACC's requests, it appears that 4KG-ACC is seeking the production of all text messages on those phones relating to the project at issue in these appeals or relating to individuals who worked on the project. Although the subpoena itself does not appear to identify any kind of date range for text messages that Parsons must produce, Parsons indicates in its motion that 4KG-ACC has agreed to some kind of date range limitation, although we are not aware from the briefing what the date range is.

Parsons complains that 4KG-ACC's subpoena is overly broad and unduly burdensome because it seeks all text messages in individuals' accounts within a particular date range, without any other parameters. Parsons argues that, because Parsons' employees work on more than one project at a time (and presumably use text messaging during those other projects), the date range limitation that 4KG-ACC provided would require Parsons to produce text messages wholly unrelated to the project at issue here, many of which might be confidential to the owners of the other projects. Parsons requested that 4KG-ACC provide search terms that Parsons could use to locate relevant text messages, but, according to Parsons, 4KG-ACC declined to do so, concerned that it would miss relevant texts that did not include the search words. For its part, 4KG-ACC indicates that it offered to limit its request to texts between eight Parsons custodians and a list of limited DOL employees.

As an initial matter, we recognize that there is nothing about the nature of text messages that excludes them from the regular discovery rules. "Text messages are

discoverable if they are relevant, not privileged, and in the [party's] custody, possession, or control." *RightCHOICE Managed Care, Inc. v. Hospital Partners, Inc.*, No. 4:18-CV-06037, 2019 WL 3291570, at *2 (W.D. Mo. July 22, 2019); *see Paisley Park Enterprises v. Boxill*, 330 F.R.D. 226, 234 (D. Minn. 2019) ("It is well established that text messages 'fit comfortably within the scope of materials that a party may request under Rule 34 [of the FRCP].'" (quoting *Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (E.D. Mich. 2008))). "A company controls the text messages of its employees on work phones" and can be compelled to produce them in appropriate circumstances. *Lalumiere v. Willow Springs Care, Inc.*, No. 1:16-CV-3133, 2017 WL 6943148, at *2 (E.D. Wash. Sept. 18, 2017).[2]

In seeking to quash 4KG-ACC's subpoena, Parsons asks us to consider its non-party status and apply a heightened standard in comparing its burden of production to the purported relevance, or lack thereof, of the text messages that 4KG-ACC seeks. Although Parsons correctly notes that "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs," Parsons Reply at 2-3 (quoting *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998)), the problem that we have here is that Parsons has not identified what that burden will be. We know nothing about the volume of text messages at issue, the manner in which the texts are stored, or the cost and time of retrieval and production. It is up to the party objecting to discovery requests seeking the production of text messages to show a "disproportionate burden from the . . . collection and production." *Thomas v. City of New York*, 336 F.R.D. 1, 5 (E.D.N.Y. 2020). Pure speculation, without any specifics, does not meet that burden.

In this case, 4KG-ACC has informed us that it is limiting its requests to texts between eight Parsons employees and a limited number of DOL employees. Parsons has not explained how it would be difficult and overly burdensome to pull text message chains

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[2] DOL has informed us that some of Parsons' employees used personal, rather than Parsons-provided, cellphones to communicate on the job. Typically, a company "does not possess or control the text messages from the personal phones of its employees and may not be compelled to disclose text messages from employees' personal phones." *Lalumiere*, 2017 WL 6943148, at *2. Nevertheless, there is some authority indicating that it would not be reasonable for a company "to assume data on [its employees'] personal cell phones would not be subject to discovery when the record clearly shows that they used their phones for work purposes." *Paisley Park*, 330 F.R.D. at 235. 4KG-ACC has not indicated that it is seeking to require Parsons to produce text messages from employees' personal cellphones. Accordingly, we need not address whether Parsons has any obligation to assist in an effort to recover text messages from personal cellphones.

between those individuals and to review them for relevance. Without such information, the Board cannot conduct *any* comparison of burden and relevance. To the extent that Parsons believes it is unfair to pull it into this litigation at all, Parsons is not the type of disinterested third party that has no connection to the events leading to the litigation. Parsons was a central figure in overseeing and assessing 4KG-ACC's work on this project, and DOL has even argued here that Parsons was DOL's "functional equivalent" on the job. In such circumstances, we see no reason to apply a heightened relevance standard here, and, in fact, cannot in light of the absence of information about burden.

Parsons has raised other objections to the subpoena, which we address below:

First, Parsons' complaint that 4KG-ACC's production requests are overly broad because they seek all text messages from certain individuals is unfounded. Certainly, a request for *all* text messages from or to particular individuals, limited only by a date range, can be overly broad in scope, depending upon the issues in dispute. *See Greenfield v. Newman University, Inc.*, No. 2:18-CV-02655, 2020 WL 6559424, at *9 (D. Kan. Nov. 9, 2020) ("Asking Plaintiff to produce all text messages that relate to this lawsuit expands the request beyond information that could lead to the discovery of relevant information."). Nevertheless, 4KG-ACC's production requests are not as broad as Parsons portrays them. 4KG-ACC does not seek text messages relating to projects other than the one at issue in these appeals, making Parsons' concern about having to produce messages of its employees relating to *other* projects unfounded. To the extent that there are specific requests within the 117 at issue that cause particular concerns, Parsons may raise those specific complaints in a subsequent motion.

Second, Parsons' suggestion that 4KG-ACC should have to provide it search terms for use in locating responsive text messages is not workable. Other tribunals that have ordered the production of text messages have not required the requesting party to supply particular search terms for texts but instead have imposed more categorical limitations: (1) that the texts are in the company's possession, custody, or control; (2) that the texts were sent between the user of the phone and a particular relevant witness; (3) that the texts were sent from or received on the company-supplied phone; and (4) that they were sent or received during the relevant time period. *See, e.g.*, *Modern Remodeling, Inc. v. Tripod Holdings, Inc.*, No. CCB-19-1397, 2020 WL 1984338, at *1 (D. Md. Jan. 31, 2020); *Alejandro v. ST Micro Electronics, Inc.*, No. 15-CV-01385, 2016 WL 2939939, at *2 (N.D. Cal. Mar. 28, 2016). *But see Benefield v. MStreet Entertainment, LLC*, No. 3:13-CV-1000, 2016 WL 374568, at *7 (M.D. Tenn. Feb. 1, 2016) (parties can agree to use search terms to limit production of text messages). Those limitations appear consistent with the manner in which 4KG-ACC has agreed to limit its subpoena requests here. Further, 4KG-ACC is entitled to production of

"text messages . . . in a manner that provides a 'complete record' as opposed to 'scattershot texts,'" *Laub v. Horbaczewski*, 331 F.R.D. 516, 527 (C.D. Cal. 2019) (quoting *Paisley Park*, 330 F.R.D. at 236), making production only of those specific texts that respond to a word search not particularly feasible.

Third, to the extent that Parsons is concerned, as it asserts, that production may include "information commercially sensitive to Parsons and its clients," Parsons Reply at 3, Parsons may produce those messages pursuant to the protective order that the Board previously issued in these appeals.

Fourth, Parsons asserts that, under FRCP 45(d)(1), parties issuing a subpoena must "take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena" and that, pursuant to FRCP 45(d)(2)(B)(ii), the Board must "protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Here, we protect Parsons by ordering 4KG-ACC to cover the reasonable costs of Parsons' text message production, including (1) costs of employees' time in searching for and downloading texts and reviewing them for relevance and privilege and (2) costs, if any, of Parsons' e-discovery vendor. *See In re American Nurses Ass'n*, 643 F. App'x 310, 315 (4th Cir. 2016); *United States v. CBS, Inc.*, 103 F.R.D. 365, 369 (C.D. Cal. 1984). 4KG-ACC has already agreed in the subpoena to "advance the reasonable costs of producing the subpoenaed text messages as agreed with Parsons ahead of time." Although, many years ago, one of our predecessor boards held that "a non-party can be required to bear some or all of its expenses [in responding to a subpoena] where the equities of a particular case demand it" and applied a seven-part test adopted from the federal courts to evaluate potential cost shifting, *see Heritage Reporting Co. v. General Services Administration*, GSBCA 10396, 94-2 BCA ¶ 26,686, amendments to FRCP 45 have eliminated that seven-part test in favor of considering only one factor: whether compliance will require "significant expense" by the responding non-party. "[I]f an objection is made and the [tribunal] orders the non-party to comply, the [tribunal] *must* protect a non-party from significant expenses resulting from compliance." *In re Modern Plastics Corp.*, 890 F.3d 244, 252 (6th Cir. 2018) (emphasis added); *see Rhea v. Apache Corp.*, No. 19-7000, et al., 2020 WL 6226288, at *3 (10th Cir. Oct. 23, 2020); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001). Accordingly, the Board conditions Parsons' obligation to comply with 4KG-ACC's subpoena upon 4KG-ACC's pre-agreement with Parsons regarding costs.

B. DOL's "Functional Equivalent" Privilege Argument

DOL has requested that, before Parsons produces any text messages in response to 4KG-ACC's subpoena, DOL be allowed to review those text messages for privilege. It

asserts that the employees of Parsons, which served as the project manager on this job, should be viewed as the "functional equivalent" of DOL employees, such that, pursuant to an exception to the third-party disclosure privilege waiver first identified in *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), some communications between Parsons and DOL could be viewed as privileged. Although the Board could not find any decisions in which the Court of Appeals for the Federal Circuit has considered the viability of the "functional equivalent" theory, the Federal Circuit has previously considered with approval the related "common interest" exception to the third-party disclosure privilege rule, *In re Regents of University of California*, 101 F.3d 1386, 1389-90 (Fed. Cir. 1996), making it seem likely that it would agree with the majority of courts that have recognized the "functional equivalent" doctrine. We see no reason not to recognize that seemingly well-settled doctrine here. *See LFH, LLC v. General Services Administration*, CBCA 395, et al., 08-2 BCA ¶ 33,915 (recognizing and considering the related "common interest" doctrine).

Although disclosure of documents to third parties generally waives evidentiary privileges, "there is an exception for independent contractors and other third parties who are functional equivalents of employees." *Memry Corp. v. Kentucky Oil Technology, N.V.*, No. C04-03843, 2007 WL 39373, at *2 (N.D. Cal. Jan. 4, 2007); *see Export-Import Bank of the United States v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) ("[C]ommunications between a company's lawyers and its independent contractor merit protection if, by virtue of assuming the functions and duties of [a] full-time employee, the contractor is a *de facto* employee of the company."). Under one formulation of the test for a "functional equivalent" as it applies to the attorney-client privilege, a communication shared between an agency and its independent contractor "is privileged if (1) the independent contractor had a significant relationship not only with the government entity, but also to the transaction which is the subject of the government entity's need for legal services; (2) the communication was made for the purpose of seeking or providing legal advice; (3) the subject matter of the communication was within the scope of the duties provided to the entity by the contractor; and (4) the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents." *Grand Canyon Skywalk Development LLC v. Cieslak*, No. 2:15-CV-01189, 2015 WL 4773585, at *11 (D. Nev. Aug. 13, 2015). Similarly, with regard to the deliberative process privilege, "[w]hen an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, [it is] entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of" the agency's deliberative process. *Center for Public Integrity v. United States Department of Energy*, 393 F. Supp. 3d 86, 92 (D.D.C. 2019) (quoting *National Institute of Military Justice v. United States Department of Defense*, 512 F.3d 677, 680 (D.C. Cir. 2008)); *see In re Apco Liquidating Trust*, 420 B.R. 648, 650 (M.D. La. 2009) ("The [deliberative process] privilege also applies to communications of

non-government contractors or consultants directly involved with the internal agency decision-making process."). Ultimately, "application of the privilege to communications with an independent contractor is determined on a case-by-case basis." *A.H. ex rel. Hadjih v. Evenflo Co.*, No. 10-CV-02435, 2012 WL 1957302, at *3 (D. Colo. May 31, 2012).

DOL has established that the "functional equivalent" doctrine can apply to its dealings with Parsons' employees. The contracting office overseeing this contract, with a staff of five people, is responsible for the physical condition of 123 active Job Corps centers and the construction of new Job Corps centers. Because of the small size of its staff, it relies on its ESC, with a staff of seventy-two, to provide daily on-site project monitoring and management on construction projects; structural, electrical, and mechanical engineering expertise and oversight for those projects; non-conformance reporting; construction activity record-keeping; on-site inspections; and regular communications about projects with the DOL contracting office. Essentially, Parsons, as the ESC, served as the DOL contracting office's eyes and ears on the construction project at issue here. Since Parsons provided the type of technical and management oversight that a contracting officer's technical representative or project manager would typically provide, it is clear that Parsons served a role that fits within the "functional equivalent" doctrine.[3]

That does not mean, though, that every communication between DOL and Parsons' employees is automatically privileged. The "functional equivalent" doctrine is an exception to the third-party disclosure privilege waiver rule, not a privilege in and of itself. *Bieter Co.*, 16 F.3d at 937-38. It only expands the universe of individuals who DOL can involve in privileged discussions and communications. From DOL's description of Parsons' work, it appears that most of Parsons' efforts were driven by monitoring the factual circumstances on the ground during contract performance. That type of factual observation would not generally be privileged. To the extent that DOL wants to claim privilege over any

[3] To the extent that 4KG-ACC believes that, if Parsons is DOL's "functional equivalent," it should not have to have served a subpoena on Parsons, but that DOL should have been required to produce Parsons' documents itself, the "functional equivalent" doctrine does not necessarily make Parsons DOL's "agent" for purposes of DOL's ability to control Parsons or of Parsons' ability to control DOL. *See ExxonMobil Corp. v. Department of Commerce*, 828 F. Supp. 2d 97, 105-07 (D.D.C. 2011) (evaluating when agency has control of documents). The relationship between Parsons and DOL is governed by the terms of their bilateral contract, and Parsons remains an independent entity from DOL for purposes of document production. A subpoena to Parsons was necessary to secure Parsons' obligation to produce documents in its possession.

communications between it and Parsons' employees, it will have to identify and justify specific privileges that attach to specific communications.

DOL asks us to allow it to review for privilege any text messages that Parsons believes it should produce. That is a matter between Parsons and DOL, governed by the contract between them. To the extent that DOL and Parsons agree, DOL may review for privilege documents that Parsons intends to produce in response to 4KG-ACC's subpoena if Parsons is willing to allow it to do so. Nevertheless, to the extent that DOL engages in such a review, we will not require 4KG-ACC to be financially responsible for any costs of that privilege review. Further, the Board will not allow DOL significantly to delay Parsons' production through a privilege review, meaning that any such DOL review will have to be expeditious. To the extent that the text messages relate to communications between Parsons' employees and DOL contracting office staff about contract administration issues and Parsons' recommendations about how to move forward on the contract at issue, the Board will view any assertion of deliberative-process privilege in such circumstances with great skepticism.

Decision

For the foregoing reasons, 4KG-ACC's request that DOL be required immediately to produce all Phase 1 ESI responsive to 4KG-ACC's search terms and be barred from using TAR tools is **DENIED**. On or before **February 24, 2021**, the parties shall file a joint proposed schedule of further proceedings, inclusive of proposed deadlines for the completion of Phase 1 and Phase 2 ESI production and additional discovery activities.

4KG-ACC's request that the Board order DOL to respond to substantive discovery communications and submissions from 4KG-ACC within two business days of receipt is **DENIED**.

4KG-ACC's request for sanctions against DOL is **DENIED**.

4KG-ACC's request that the Board grant it leave to depose a DOL document custodian regarding DOL's document gathering and production processes is **GRANTED**.

Resolution of 4KG-ACC's deliberative process privilege challenges is **DEFERRED**. On or before **February 24, 2021**, DOL shall submit the documents that it claims are protected by the deliberative process privilege to the Office of the Clerk of the Board on a thumb drive or other electronic storage device, identifying the submission as being for in camera review pursuant to the terms of this order and not for filing in these appeals. At the

same time that it makes that in camera submission, DOL shall file with the Clerk and provide to 4KG-ACC a revised copy of the deliberative process privilege entries in its privilege log that, for each document for which the deliberative process privilege is claimed, identifies the specific policy or decision that was at issue and being deliberated when that document was generated and the ultimate date upon which the policy or decision was made.

4KG-ACC's blanket attorney-client privilege and work product challenge is **DENIED**, without prejudice to 4KG-ACC's right, after negotiating with DOL in good faith, to assert specific privilege challenges on a document-by-document basis.

4KG-ACC's Privacy Act privilege challenge is **GRANTED**, although DOL need not produce documents that, although listed on its log, are not relevant to the issues in these appeals.

Parsons' motion to quash is **GRANTED IN PART**. Parsons' obligation to produce text messages in response to 4KG-ACC's subpoena is subject to 4KG-ACC's agreement to reimburse all reasonable costs that Parsons incurs in producing them, and Parsons may produce documents containing information that is commercially sensitive to Parsons or its clients (not including DOL) under the protective order previously issued in these appeals.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge