



was neither clearly erroneous as to the relevant facts nor contrary to controlling law.

In brief summary, and as defendants essentially concede, Judge Gauvey correctly held that the attorney-client privilege may protect a communication from the attorney to the client but only insofar as that communication reveals confidential information obtained from the client. *United States v. (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984). The burden is on the defendants to identify the confidential client information contained in the memoranda, and the two affidavits of Deputy Commissioner Benjamin Brown fail to do so. Significantly, no affidavits were provided by any author or recipient of any of the memoranda other than Deputy Commissioner Brown, who is copied on the 2005 memorandum. Similarly, the burden is on the party seeking to establish the executive or deliberative process privilege to establish its applicability, *see Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 290 (4th Cir. 2004) (FOIA litigation), and the Brown affidavits are not sufficient to do so, nor is it self-evident from the contents of the memoranda that they are truly predecisional and part of the “give-and-take” process the privilege protects. *City of Va. Beach, Va. v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993).

The defendants in their objections also rely on the attorney work-product doctrine, which was not addressed by Judge Gauvey.<sup>1</sup> Once again, the Brown affidavits simply are not sufficient to establish, as Fourth Circuit law requires, that the documents were prepared “because of” anticipated litigation and in preparation for that litigation. *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *see also Hanson*, 372 F.3d at 292-93. While the documents refer to certain litigation, it is again not evident that they were drafted because of that

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<sup>1</sup> This omission is understandable given the defendants’ failure to argue the point other than by way of footnote in their reply memorandum. (*See Defs.’ Reply* at 4 n.2.)

litigation, as opposed to providing general legal advice, including non-confidential information about litigation. Accordingly, there is insufficient support in the record before Judge Gauvey or the objections before me to establish that the attorney work-product doctrine bars disclosure of these documents.

To be clear, this ruling is limited, as it must be, to the specific facts and documents before the court. It should not be taken to mean that the state defendants could not establish and rely on the deliberative process or attorney-client privilege, or benefit from work-product protection, as they conduct litigation in the future. The court recognizes the importance of those protections, when properly established, in the conduct of the state's business. For the reasons stated above, however, Judge Gauvey's thorough and carefully considered ruling in this case will be affirmed.

A separate Order follows.

February 23, 2009

Date

/s/

Catherine C. Blake

United States District Judge