

14-0370

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

HIGHLAND MINING COMPANY,

Plaintiff,

v.

Case No. 12-C-275
Chief Judge Phillip D. Gaujot

WEST VIRGINIA UNIVERSITY
SCHOOL OF MEDICINE,

Defendant.

ORDER

On the 6th day of November, 2013, this Court entered an Agreed Order Regarding Briefing on Outstanding Issues. Pursuant to that Order, the parties filed renewed Motions for Summary Judgment which primarily addressed the reliance of the West Virginia University School of Medicine (“WVU”) on certain West Virginia Freedom of Information Act (“FOIA”) exemptions, specifically those relating to “deliberative process/internal memoranda” and “academic freedom.”¹ WVU has also renewed its position that the FOIA requests of Highland Mining Company (“Highland”) are unduly burdensome. Highland does not believe either of the claimed exemptions to be applicable to the withheld documents, nor does it believe that its requests for production are unduly burdensome. Additionally, both parties’ pleadings have

¹ By its motion, Highland addressed WVU’s previously asserted “trade secret” exemption. However, by its Renewed Motion for Summary Judgment and Response to Highland’s Second Renewed Motion for Summary Judgment, WVU stated that “insofar as every document that implicates trade secrets is also exempt under the academic freedom privilege and deliberative process exemption, the Court need not even consider the applicability of the trade secret exemption.” WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 9, n.2. Highland opposed the applicability of the trade secret exemption by its Second Renewed Motion for Summary Judgment. *See* Pgs. 22-23.

directed the Court to review a selection of documents *in camera*, which WVU seeks to withhold on the basis of delineated FOIA exemptions.²

This Court has conscientiously considered the pleadings of both parties and reviewed the selected documents from the sample *Vaughn* index *in camera*. It has also engaged in a thorough review of the legal landscape as it relates to the claimed FOIA exemptions in this case. For the reasons to be discussed *infra*, this Court hereby DENIES Highland Mining Company's Second Renewed Motion for Summary Judgment and GRANTS WVU's Renewed Motion for Summary Judgment.

STANDARD OF REVIEW

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995) (quoting Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963) and Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)). When considering a motion for summary judgment, courts must “draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). “[S]ummary judgment should be denied if there is involved conflicting testimony or varying inferences which may reasonably be drawn from evidence which is uncontradicted; and that even in a case in which the trial judge is of the opinion that he should direct a verdict for one or the other of the parties on factual issues involved, he should, nevertheless, ordinarily hear evidence and upon a

² On May 30, 2013, the Court entered an Agreed Order, which directed WVU to produce a sample *Vaughn* index. Subsequently, on November 6, 2013, this Court's Agreed Order Regarding Briefing on Outstanding Issues referred the Court to a limited number of documents to review from that index, not to exceed ten (10) documents as selected by each party.

trial direct a verdict rather than to try the case in advance on a motion for summary judgment.” *State ex rel. Payne v. Mitchell*, 152 W. Va. 448, 454, 164 S.E.2d 201, 205 (1968) (quoting *Hatten, Adm’r, etc. v. Mason Realty Co.*, 148 W. Va. 380, 390, 135 S.E.2d 236, 243 (1964)).

With this in mind, it must be stated that “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” *Williams* at Syl. Pt. 2. “[T]he nonmoving party must . . . offer some ‘concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor’ or other ‘significant probative evidence tending to support the complaint.’” *Painter*, 192 W. Va. at 193, 451 S.E.2d at 759 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). “[S]elf-serving assertions without factual support in the record will not defeat a motion for summary judgment.” *Folio v. Harrison-Clarksburg Health Dept.*, 222 W. Va. 319, 324, 664 S.E.2d 541, 546 (2008) (*per curiam*) (quoting *Williams*, 194 W. Va. at 61 n.14, 459 S.E.2d at 338 n.14 (1995)).

FINDINGS OF FACT

1. On February 1, 2012, Highland submitted two (2) requests to WVU seeking disclosure of public records, pursuant to the West Virginia Freedom of Information Act (“FOIA”).
2. Those requests consisted of (1) information that was the subject of three subpoenas Highland previously served on WVU (“Subpoena-Based FOIA Request”); and (2) communications and peer review comments concerning five specific articles that then-WVU Professor Michael Hendryx had authored (“Communications FOIA Request”).³

³ Articles authored by Dr. Hendryx, formerly the Director of the West Virginia Rural Health Research Center, are of interest to Highland because they focused on linking coal mining to adverse health impacts. Articles authored by him were used to challenge Highland’s proposal to expand its Reylas Surface Mine in Logan County, West Virginia, in a civil action filed in the United States District Court for the Southern District of West Virginia (*Ohio Valley Environmental Coalition, Inc., et al. v. U.S. Army Corps. of Engineers*, Civil Action No. 3:11-cv-0149 (S.D. W. Va. 2011) (Supplemental Complaint for Declaratory and Injunctive Relief) (the “*Reylas 404 Permit Litigation*.”). Specifically, the Plaintiffs in that litigation sought to add a new claim to their Complaint based upon adverse health effects associated with the mining that Highland would be permitted to conduct. Highland thus served three (3) subpoenas on WVU seeking information regarding three (3) articles cited by the Reylas Plaintiffs. Though the

3. In the case at bar, WVU initially responded to the Subpoena-Based FOIA Request by seeking a prepayment of \$200.00 to cover the school's costs of analyzing potentially responsive documents.
4. Concerning the Communications FOIA Request, WVU had requested that Highland provide a time frame or other similar parameter, such as search terms, which Highland did.
5. By emails dated March 2, 2012, WVU declined to provide documents responsive to either request, asserting that they properly qualified for FOIA exemptions, specifically (1) information of a personal nature; (2) information specifically exempted from disclosure by statute; (3) internal memoranda; and (4) trade secrets.
6. On April 12, 2012, Highland filed a Verified Complaint for Declaratory and Injunctive Relief, pursuant to the FOIA, seeking disclosure of the requested FOIA documents.
7. Both parties have filed dispositive motions concerning the FOIA issues this case implicates. WVU filed a Motion to Dismiss on June 19, 2012. Highland filed a Motion for Summary Judgment on September 11, 2012, and renewed its motion on April 5, 2013. Highland filed a Second Renewed Motion for Summary Judgment on November 13, 2013, and WVU filed a Renewed Motion for Summary Judgment on December 13, 2013.⁴

CONCLUSIONS OF LAW

The West Virginia Freedom of Information Act ("FOIA")

1. "The disclosure provisions of this State's Freedom of Information Act, [W. VA. CODE] 29B-1-1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. [W. VA. CODE] 29B-1-1." Syl. Pt. 4, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).
2. "The party claiming exemption from the general disclosure requirement under West Virginia Code § 29B-1-4 has the burden of showing the express applicability of such exemption to the material requested." Syl. Pt. 7, *Queen v. West Virginia University Hospitals, Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

Plaintiffs' motion to add health-based claims to their Complaint was denied, these same articles, and others built upon them, have been cited in challenging other mining permits issued to coal companies operating in Appalachia.

⁴ Pursuant to ¶2 of this Court's November 6, 2013, Order, each party was deemed to have filed renewed Motions for Summary Judgment.

Deliberative Process Privilege

1. Exempt from disclosure under the West Virginia FOIA are “[i]nternal memoranda or letters received or prepared by any public body.” W. VA. CODE § 29B-1-4(a)(8) (2012).
2. “[W. VA. CODE] § 29B-1-4(8) [1977], which exempts from disclosure ‘internal memoranda or letters received or prepared by any public body’ specifically exempts from disclosure only those written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body’s deliberative, decision-making process.” Syl. Pt. 4, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996).
3. "In deciding whether a document should be protected by the [deliberative process] privilege we look to whether the document is '*predecisional*' whether it was generated before the adoption of an agency policy and whether the document is '*deliberative*' whether it reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added).
4. "To fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented judgment." *Ethyl Corp. v. United States Environmental Protection Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994) (citations omitted).
5. "Even purely factual matter may be exempt, however, if it is inextricable without compromise of the deliberative process." *Washington Research Project, Inc. v. Dep't of Health, Education and Welfare, et al.*, 504 F.2d 238, 249 (D.C. Cir. 1974) (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 91 (1973)). "[S]o too may be 'a summary of factual material (that) is part of the deliberative process,' even though the facts themselves are elsewhere on the public record." *Id.* (citing *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63 (D.C. Cir. 1974)). See also *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp. 770, 782 (D.D.C. 1990); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force, et al.*, 566 F.2d 242, 256 (D.C. Cir. 1977) (citations omitted).
6. The *Mead Data* Court cautioned that “[a]lthough Congress clearly intended to refer the courts to discovery principles for the resolution of exemption five disputes, [concerning 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,] the situations are *not* identical, and the Supreme Court has recognized that discovery rules should be applied to FOIA cases 'only by way of *rough analogies*.'" *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 571, n.15, 482 S.E.2d 180, 188, n.15 (1996) (citation omitted) (emphasis added).

7. "It has been widely recognized that the primary purpose of the deliberative process privilege is to encourage the free exchange of ideas and information within government agencies, particularly between subordinates and superiors, during the processes of deliberation and policy-making." *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996) (citations omitted).

Academic Freedom

1. Exempted from disclosure pursuant to the FOIA is "[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by *clear and convincing* evidence requires disclosure in the particular instance." W. VA. CODE § 29B-1-4(a)(2) (2012) (emphasis added).
2. "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. State of New Hampshire*, 354 U.S. 235, 250 (1957).
3. "[S]cholars too are information gatherers and disseminators . . . Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998).
4. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian et al. v. Bd. of Regents of the University of the State of New York et al.*, 385 U.S. 589, 603 (1967).
5. "It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment." *Urofsky v. Gilmore, et al.*, 216 F.3d 401, 406 (4th Cir. 2000) (citations omitted).
6. "Academic freedom . . . is necessary to enable the institutions [of higher education] to perform their societal obligation as established by the Legislature." W. VA. CODE R. § 128-36-21 (2007).
7. "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. Va. Const. art. XII, § 1.

8. “The mandatory requirements of ‘a thorough and efficient system of free schools’ found in Article XII, Section 1 of the West Virginia Constitution, make education a fundamental, constitutional right in this State.” *Pendleton Citizens for Comty. Schools v. Marockie*, 203 W. Va. 310, 507 S.E.2d 673 (1998) (citing Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)).

Undue Burden

1. The FOIA expresses a concern that “information requests not become mechanisms to paralyze other necessary government functions.” *Farley v. Worley*, 215 W. Va. 412, 422, n.14, 599 S.E.2d 835, 845, n.14 (2004).
2. The FOIA was not intended to “reduce government agencies to full-time investigators on behalf of requesters.” *Assassination Archives and Research Ctr., Inc. v. C.I.A.*, 720 F. Supp. 217, 219 (D.D.C. 1989).
3. Courts should remain mindful of the “limited resources public bodies have to not only respond to FOIA requests, but to provide other critical government services.” *Farley v. Worley*, 215 W. Va. 412, 424, 599 S.E.2d 835, 847 (2004).

DISCUSSION

I. WVU has properly withheld documents pursuant to the deliberative process privilege.

West Virginia Code § 29B-1-4(8), and the deliberative process exemption⁵ contained therein, properly apply to the documents WVU seeks to withhold. This exemption is satisfied because (A) policy-making is implicated in the case at bar; (B) the documents requested are both “pre-decisional” and “deliberative;” (C) factual information may be protected under this privilege; and (D) disclosure of the requested documents would defeat the primary purpose of this exemption.

Pursuant to W. VA. CODE § 29B-1-4(8) (2012), “[i]nternal memoranda or letters received or prepared by any public body” are exempt from disclosure under the FOIA. To properly qualify for this exemption, the documents in question must be both “pre-decisional” and

⁵ The Court will hereinafter interchangeably refer to this as the “deliberative process privilege” and as “Exemption 8.”

“deliberative.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). To be “pre-decisional,” the document must have been generated before the adoption of an agency policy. *Id.* To be “deliberative,” the document must reflect the give-and-take of the consultative process.” *Id.* This exemption protects “written internal government communications consisting of *advice, opinions and recommendations* which reflect a public body’s deliberative, decision-making process.” Syl. Pt. 4, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996) (emphasis added). This exemption also encompasses these same communications *from* one public body *to* another and those *to* a public body *from* outside consultants or experts obtained during the public body’s deliberative, decision-making process. *Id.*

A. Policy-making is implicated in the case at bar.

WVU is engaged in policy-making, rendering the deliberative process privilege applicable to the documents it seeks to withhold. The case law is very clear that to trigger proper application of Exemption 8, the public body must be engaged in some type of deliberative, decision-making process. Syl. Pt. 4, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996). Materials must implicate the formulation or exercise of agency policy-oriented judgment. *Ethyl Corp. v. United States Environmental Protection Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994) (citations omitted).⁶

In the case at bar, the decision-making process is implicated because Dr. Hendryx, and by extension, the West Virginia Rural Health Sciences Center (“the Center”) and WVU,⁷ was

⁶ Though this case implicates the federal FOIA, the *Daily Gazette* Court noted that there is a “close relationship” between it and our State’s FOIA, recognizing the value of federal precedents in construing our State’s parallel FOIA provisions.” 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996).

⁷ This Court has previously found, pursuant to its Order entered on October 3, 2012, that WVU and its School of Medicine are “public bodies” for the purposes of the FOIA. Order at 6, ¶3.

formulating a position on whether coal mining adversely affects the health of West Virginia citizens. Coal mining, in general, is a topic that consistently spurs heated debate in our State, and many West Virginians have a vested interest in issues relating to it, be they economic, social, or environmental. For this reason, the public has a profound concern with the past, present, and future of West Virginia coal mining, as it has defined the personal histories, livelihoods, social mobility, and physical safety of countless citizens of this State. Dr. Hendryx's work illuminated a coal mining issue of serious interest and its potential adverse health effects. The request to address this question did not have to be explicit; in other words, a concern to which a public body responds need not be *formally* posited, it need only exist. In the case at bar, understanding whether an activity that forms the life blood of our State's economy is potentially harming our citizens is an issue that undoubtedly permeates our social fabric. It is a question that many have asked, and continue to ask, and it is one to which Dr. Hendryx, and WVU, responded. Importantly, WVU did *not* disavow Dr. Hendryx's research, thus accepting it as legitimate thought and solidifying the attribution of the policy position his work illuminated to it.

Additionally, Dr. Hendryx's work in addressing this coal mining issue embodied the deliberative process itself. His research required him to exercise his judgment as a researcher and a scholar to develop an appropriate stance on the adverse health effects issue, if any. As he developed his research and findings, he received feedback and input from others, evidence of the "give and take" process involved in his work—and the deliberative process itself. As the former Director of the Center, Dr. Hendryx's research was clearly intended to advance the Center's mission, which is to "conduct and disseminate environmental health research that improves the health of rural populations and communities."⁸ This is arguably evidence of a second way in

⁸ *Service to the State, Center for Rural Health Research Center*, ROBERT C. BYRD HEALTH SCIENCES CENTER SCHOOL OF MEDICINE (Feb. 21, 2014), <http://www.hsc.wvu.edu/som/Service-to-the-State.aspx>.

which his work implicates policy on behalf of WVU, which in this example would be to improve rural health through research.

Several cases have been illustrative to this Court in determining the applicability of the deliberative process privilege to the case at bar. In *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, material held to be protectable pursuant to the deliberative process privilege involved scientific research, conducted by researchers for the CDC, FDA, NIH, and Mayo Clinic, after an adverse health link between a certain amino acid and a rare syndrome was identified. 844 F. Supp. 770, 774 (D.D.C. 1990). In *Krikorian v. Dep't of State*, the deliberative process privilege similarly applied because the information sought proposed recommendations for how the State Department might respond to inquiries on sensitive foreign policy issues. No. 88-3419, 1990 WL 236108, at *5 (D.D.C. Dec. 19, 1990).⁹ In both of these cases, a public body was developing responses to issues of public concern—those being the adverse health effects of an amino acid in *Cleary* and foreign policy-implicating questions in *Krikorian*—and the Courts found the deliberative process privilege to be properly applied. The case at bar similarly involves developing a response to a public inquiry, be it explicit or not, rendering application of the deliberative process privilege proper.

B. The withheld documents are “deliberative” and “pre-decisional.”

The documents WVU seeks to withhold are integral to the consultative process, and for this reason, non-disclosure pursuant to Exemption 8 is proper. W. VA. CODE § 29B-4-1(a)(8) (2012) shields from disclosure “[i]nternal memoranda or letters received or prepared by any public body.” They may consist of “advice, opinions and recommendations which reflect a

⁹ In this case, a FOIA request was made for records relating to a State Department article and accompanying note. No. 88-3419, 1990 WL 236108, at *1 (D.D.C. Dec. 19, 1990). The article provided a historical review of the Armenian and Turkish conflict, the emergence of Armenian terrorist organizations, and chronicled these groups' activities throughout the 1970's.

public body's deliberative, decision-making process,” and they “must bear on the formulation or exercise of agency policy-oriented judgment.” Syl. Pt. 4, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996); *Ethyl Corp. v. United States Environmental Protection Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994) (citations omitted). The materials must be “pre-decisional,” generated before the adoption of an agency policy, and “deliberative,” reflecting the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added).

In the case at bar, the documents WVU seeks to withhold from disclosure are “proposed edits, peer review comments” and documents “relat[ing] to the planning, preparation, and editing necessary to produce a final published article.” WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 4. Highland believes that these documents should *not* be protected by the deliberative process privilege because WVU, and its School of Medicine, are not vested with decision-making authority concerning public policy. Highland’s Second Renewed Mot. for Summ. J. at 13-15. To the contrary, WVU believes that public scholars *do* engage in decision-making, that being the process involved in the final publication of their research efforts.¹⁰ WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 2-5. As this Court has previously discussed, it believes that WVU *is* engaged in decision-making, though for a slightly more nuanced reason.¹¹

Contrary to Highland’s position, this Court believes the withheld documents to be both pre-decisional and deliberative. Proposed edits, peer review comments, and documents

¹⁰ WVU explains that for public scholars, “the public function they are hired to perform is the research and publication of such scholarly articles, and the ‘decision’ they make or the ‘action’ they perform as State employees includes the final publication of their research efforts.” WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 4.

¹¹ See this Court’s previous discussion, *supra*, as this “decision-making” involves WVU’s stance on the adverse health effects of coal mining in West Virginia.

concerning the planning and preparation of a final published article all consist of the very advice, opinions, and recommendations that the deliberative process privilege seeks to protect. These materials, particularly the peer review commentaries, are the very essence of the “give-and-take” of the consultative process. They are pre-decisional because they were created prior to the completion of the article, and the conclusions drawn regarding the adverse health effects of coal mining. The materials are deliberative, as both suggestions and recommendations are being offered in the formulation, and especially editing, of the article and development of its final conclusions.¹²

The case of *Cleary, Gottlieb, Steen & Hamilton v. Dep’t of Health and Human Services, et al.* is highly instructive concerning whether or not research materials, involving peer review commentaries and related documents, are properly exempt from disclosure pursuant to the deliberative process privilege. *Cleary* involved a massive product liability action related to the manufacture of the amino acid L-tryptophan. After the FDA, CDC, and other health authorities reported a possible link between its ingestion and a rare medical syndrome, researchers from the CDC, FDA, NIH, the Mayo Clinic, and the drug’s manufacturer subsequently began an intensive analysis of products containing it. 844 F. Supp. 770, 774 (D.D.C. 1990). After the commencement of the product liability actions, the Plaintiff made numerous FOIA requests to both the FDA and the CDC, and among them were requests relating to a study conducted and reported by Dr. Rossanne Philen (“Philen Study”).¹³ Pursuant to the deliberative process privilege, the CDC withheld databases and special database files created for the study, their indices, printouts of statistical results, handwritten notes, an analysis of one database, and an

¹² See documents 01-0014, 01-0033, 01-0109, 01-0113, 01-0072, 01-0120, 04-0443, 04-0561, and 05-0837, as provided to this Court for its review.

¹³ Only the FOIA requests germane to the case at bar have been included, for the sake of brevity and clarity.

initial draft of the manuscript. *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp. 770, 781 (D.D.C. 1990).

In determining that the exemption was properly applied by the government, the Court explained that the draft of the manuscript, prepared by Dr. Philen for review by her collaborators, was “pre-decisional *inherently*, and deliberative because it was created for *candid review and discussion* among Dr. Philen and her research colleagues.” *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp. 770, 782 (D.D.C. 1990) (emphasis added).¹⁴

The facts of this case parallel those in *Cleary* as research calculations, draft materials, notes, etc. are being sought. As in *Cleary*, these materials are pre-decisional inherently, as they were created prior to the formulation of Dr. Hendryx's final research product—and the conclusions he drew therefrom, which would be reflective of his, and by extension, the public Center's, position on his coal mining research thesis. In order to arrive at such a conclusion, and as is customary in the research field, the materials were created for “candid review and discussion” among Dr. Hendryx and his colleagues, as in *Cleary*. They contain the “candid comments” of Dr. Hendryx's peer reviewers, as identified in *Krikorian*. 1990 WL 236108, at *5 (D.D.C. Dec. 19, 1990). They include “*subjective, personal thoughts*” concerning Dr. Hendryx's work and were certainly taken into careful consideration while Dr. Hendryx conducted his research and completed his article. See *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868-69 (D.C. Cir. 1980); *Krikorian v. Dep't of State*, 1990 WL 236108, at *5 (D.D.C. Dec.

¹⁴ The Court also noted, which is of interest to the Court in this case, that the final manuscript was published, so releasing the draft manuscript would not disclose any *new data*. *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp. 770, 782 (D.D.C. 1990). The Court also sided with policy, explaining that disclosure of such draft documents would undercut the openness of decision-making embodied in Exemption 5. *Id.* See also *Keeper of the Mountains Found. v. U.S. Dep't of Justice*, 514 F. Supp. 2d 837, 854 (S.D. W. Va. 2007) (“Draft documents, by their very nature, are typically predecisional and deliberative.”) (citations omitted).

19, 1990).¹⁵ The deliberative process privilege properly protects the documents being sought because they are both pre-decisional and deliberative.¹⁶

C. Raw data, compilations, and documents obtained by others are protected by the deliberative process privilege.

The Court finds that these materials are protected because they are inextricably linked to the deliberative process itself, and they would not *necessarily* be disclosed during civil discovery. The Court in *Daily Gazette* explained that the deliberative process privilege does not extend to factual materials, even if used in deliberations. 198 W. Va. 563, 573, 482 S.E.2d 180, 190 (1996). However, the *Washington Research Project Inc.* Court stated that "[e]ven purely factual matter *may* be exempt, however, if it is *inextricable without compromise* of the deliberative process." 504 F.2d 238, 249 (D.C. Cir. 1974) (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 91 (1973)) (emphasis added). "[The] distinction between fact and opinion may not be conclusive, as 'the disclosure of even purely factual material may so expose the deliberative process within an agency' to warrant the application of the privilege to that material." *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp. 770, 782 (D.D.C. 1990) (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force, et al.*, 566 F.2d 242, 256 (D.C. Cir. 1977)). 5 U.S.C. § 552(b)(5) (2000) exempts materials that "would not be available by law to a party other than an agency in litigation with the agency."

¹⁵ As the Court in *Daily Gazette Co., Inc. v. West Virginia Development Office* noted: "[C]ourts have interpreted the deliberative process privilege to include opinions and recommendations to a governmental agency by outside consultants and experts so long as such opinions or recommendations are obtained during the government agency's deliberative, predecisional process." 198 W. Va. 563, 572, 482 S.E.2d 180, 189 (1996) (citations omitted).

¹⁶ Additionally, the Court in *Coastal States* noted that the identity of the parties is an important consideration in deciding the applicability of the privilege. 617 F.2d 854, 867-68 (D.C. Cir. 1980). This Court finds further support for its position that particularly the peer review comments are exempted from disclosure because they were being transmitted to the Center's *Director* at the time in question, and this position would have certainly been authoritative within the WVU system. More specifically, this position would engender a greater degree of decision-making authority and proper application of the privilege.

The test under this exemption is whether the documents would be “routinely” or “normally” disclosed in civil discovery, upon a relevancy showing. *FTC v. Grolier*, 462 U.S. 19, 26 (1983) (citation omitted).

1. These materials are inextricably linked to the deliberative process itself.

This Court finds that if Highland seeks materials involving Dr. Hendryx’s research calculations, related numerical formulations, or other raw data, they are not subject to disclosure in this case. As the courts have made clear, factual materials that implicate the deliberative process itself, or threaten to expose it, may be protected from disclosure. Gathering data, analyzing it, deciding what numerical formulations to apply to it, etc. are all processes involving the exercise of judgment and decision-making. As the Court in *Washington Research Project Inc.* explained, separating the pertinent from the impertinent is a “judgmental process, sometimes of the highest order,” so even citing evidence *verbatim*, when evaluating the relative significance of the facts recited in the record, may implicate the deliberative process privilege. 504 F.2d 238, 249-50 (D.C. Cir. 1974) (citing *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974)).¹⁷

In discussing the distinction between the factual and the deliberative, the Court in *Montrose Chemical* had to determine whether the summaries prepared by EPA attorneys of an extensive public hearing concerning DDT, for use by the EPA Administrator, were subject to FOIA disclosure. 491 F.2d 63 (D.C. Cir. 1974). The Court found that they were not because they

¹⁷ See also *Cleary, Gottlieb, Steen & Hamilton v. Dep’t of Health and Human Services, et al.*, 844 F. Supp. 770, 783 (D.D.C. 1990) (Concerning the software programs which the Court also found were protected by Exemption 5, it explained that since the programs were designed to manipulate data in a certain way, “scientific deliberations and opinions [were] ‘inextricably intertwined’ with the underlying facts.” Specifically, the exemption encompassed the “decision-making process behind the culling and selection of relevant facts.”); *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (“[F]actual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action.”).

involved the deliberative process of the attorneys, and disclosure would uncover what information they had “cited, discarded, compared, evaluated, and analyzed.” 491 F.2d 63, 71, 68 (D.C. Cir. 1974). The Court noted that the Administrator was not using the summaries to obtain *new facts not* in the record, explaining that the litigants and the public already had full access to the record on which the decision was made. 491 F.2d 63, 70 (D.C. Cir. 1974).

In the case at bar, it is not clear that the raw data, compilations, and similar materials have not already been published in the articles themselves. Highland has not asserted that it is seeking new data, an issue addressed in *Montrose Chemical*. Perhaps more importantly, this Court does not believe that it can *conclusively* separate fact from opinion, concerning Dr. Hendryx’s research. This Court cannot definitively say that calculations, formulations, and notes that Highland may be seeking do *not* involve some type of judgmental process on behalf of Dr. Hendryx, or his colleagues, that factored into his final research product. Importantly, this Court cannot say with certainty that the consultative process would *not* be compromised should Dr. Hendryx be required to disclose the data he gathered, and *evaluated*, while developing a stance on the potential adverse health effects of coal mining in West Virginia. As in *Montrose Chemical*, disclosure of the data and facts would uncover what he “cited, discarded, compared, evaluated, and analyzed.” The Court eloquently explained:

The work of the assistants in separating the wheat from the chaff is surely just as much part of the deliberative process as is the later milling by running the grist through the mind of the administrator. And that some wheat is thrown away and some chaff included with the grain does not alter the nature of the process, even though it reflects error on the part of the assistants.

491 F.2d 63, 71 (D.C. Cir. 1974).

2. These materials are not necessarily discoverable in the civil context.

Highland has argued that WVU may not rely on the exemption contained in our State's federal counterpart, which protects materials that "would not be available by law to a party other than an agency in litigation with the agency." Highland's Second Renewed Motion for Summ. J. at 20 (citing 5 U.S.C. § 552(b)(5) (2000)). Citing *FTC v. Grolier*, Highland argues that documents "routinely" or "normally" disclosed in civil discovery, upon a relevancy showing, must be disclosed under the FOIA. 462 U.S. 19, 26 (1983). Highland thus contends that since no harm can be shown for disclosing raw data, data compilations, or other information obtained from third parties in this case, the material would be subject to civil discovery—and by extension, disclosure pursuant to the FOIA.

This Court, in the company of the *Dow Chemical Co.* Court, disagrees with Highland's position that no harm can be shown upon disclosure of raw data, compilations, and documents obtained by others. This information is the product of extensive research and time-intensive analysis which the authors would have a vested interest in protecting. In *Dow Chemical Co. v. Allen*, the Plaintiff sought, through administrative subpoenas, the disclosure of the notes, reports, working papers, and raw data concerning an on-going, and incomplete, animal toxicity study. 672 F.2d 1262, 1265-66 (7th Cir. 1982).¹⁸ In evaluating the burden of compliance with the subpoenas, the Court astutely noted:

[E]nforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to imagine that that realization might well be both unnerving and discouraging. Indeed, it is probably fair to say that the character and extent of intervention would be such that,

¹⁸ The study had been conducted at the University of Wisconsin, and the administrative law judge had issued the subpoenas, but the district court refused to enforce them. *Dow Chemical v. Allen*, 672 F.2d 1262, 1265-66 (7th Cir. 1982).

regardless of its purpose, it would “inevitably tend() to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor”. . . If a private corporation can subpoena the entire work product of months of study, what is to say further down the line the company will not seek other subpoenas to determine how the research is coming along? To these factors must be added the knowledge of the researchers that even inadvertent disclosure of the subpoenaed data could jeopardize both the studies and their careers.

672 F.2d 1262, 1276 (7th Cir. 1982) (internal citation omitted)

The *Dow Chemical* Court took these observations into consideration when determining that enforcement of the subpoenas would be unreasonable. 672 F.2d 1262, 1276-77 (7th Cir. 1982). This Court finds that parallel reasoning applies to this case, in that the information Highland requests is not necessarily disclosable in the civil context. The interests of the researchers, so carefully explained in *Dow Chemical*, are the same as the interests of Dr. Hendryx and his colleagues and should be factored into an analysis of whether the information sought would be disclosed in the civil context. Though the research in *Dow Chemical* was ongoing, the distinction is of little consequence because this Court is concerned not only with the effect of its ruling in the case at bar, but with the *precedent* it would set in subjecting entire research studies to disclosure, in the manner condemned by the *Dow Chemical* Court.

Additionally, the Court in *FTC v. Grolier* was careful to temper its reasoning concerning “normal” or “routine” discoverability. In that case, the documents being sought were argued to be work-product materials. Specifically at issue before the United States Supreme Court was the extent to which Exemption 5, addressing inter/intra-agency memoranda, applied when the litigation for which the requested documents had terminated. *FTC v. Grolier*, 462 U.S. 19, 20 (1983). The Supreme Court noted that the exemption was intended to encompass the attorney work-product rule, and the disclosure test was whether the documents would be “routinely” or “normally” discovered upon a relevancy showing. *Id.* at 26. However, of note here is that the

Supreme Court dispensed with the Respondent's argument that requested documents must be disclosed because the *same* documents were ordered disclosed during discovery in previous litigation. *Id.* at 27-28. In the Supreme Court's own words:

It does not follow, however, from an ordered disclosure based on a showing of need that such documents are routinely available to litigants. The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis.

Id. at 28

Pursuant to the Supreme Court's reasoning, disclosure in one context, that of civil litigation, does not necessarily imply disclosure in another, that of the FOIA. Buttressing this rationale is our own State Supreme Court's observation in *Daily Gazette*: "Although Congress clearly intended to refer the courts to discovery principles for the resolution of exemption five disputes, the situations are *not* identical, and the Supreme Court has recognized that discovery rules should be applied to FOIA cases 'only by way of *rough analogies*.'" 198 W. Va. 563, 571, n.15, 482 S.E.2d 180, 188, n.15 (1996) (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force, et al.*, 566 F.2d 242, 252 (D.C. Cir. 1977) (citation omitted))) (emphasis added). This Court believes that it is thus not wholly bound to discovery principles, but is left with more flexibility in terms of their application, as instructed by the *Daily Gazette* Court.¹⁹

D. Requiring disclosure would defeat the primary purpose of the deliberative process privilege.

Disclosing the materials claimed to be exempt pursuant to the deliberative process privilege, including raw data, compilations, and documents obtained by others, would run afoul of the privilege's intended purposes. This exemption furthers the following three policy bases:

¹⁹ The Supreme Court in *FTC v. Grolier* explained that it would not be difficult to "imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the *normally* privileged." 462 U.S. 19, 28 (1983). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, n.16 (1975).

(1) promoting broad consideration of alternatives and improving the quality of decisions; (2) preventing premature disclosure of ongoing discussions that might confuse the public; and (3) protecting the integrity of the decision-making process, by ensuring that officials are judged on what they decide, not what they consider. *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp. 770, 782 (D.D.C. 1990) (citing *Jordan v. Department of Justice*, 591 F.2d 753, 772-23 (D.C. Cir. 1978) (*overruled on other grounds*)). The deliberative process exemption is meant to: (1) assure that agency subordinates will feel free to provide the agency decision-maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; (2) protect against premature disclosure of proposed policies prior to final formulation or adoption; and (3) prevent the confusion and misleading of the public by disseminating documents that suggest reasons and rationales for a course of action that did not ultimately dictate the reason for that course of action. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

In the case at bar, many of the documents Highland seeks include peer review commentaries and article drafts, and disclosing materials such as these runs afoul of the protection that is granted to the decision-making process's integrity. Suggestions and comments made to Dr. Hendryx that he chose to either incorporate into his final product, or perhaps more importantly, discard, will subject him to judgment on what he *considered* as opposed to *decided*. *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al.*, 844 F. Supp.

770, 782 (D.C. Cir. 1990) (citing *Jordan v. Department of Justice*, 591 F.2d 753, 772-23 (D.C. Cir. 1978) (*overruled on other grounds*)). As the *Coastal States* Court explained, the “deliberative process” privilege is meant to assure that agency subordinates will feel free to provide the agency decision-maker with their “uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” 617 F.2d 854, 866 (D.C. Cir. 1980). This Court is concerned that subjecting peer review comments and drafts to disclosure will stifle the candid commentary, and in the case of article drafts, free-thinking, required in the deliberative process. As WVU astutely points out, “[t]o subject a reviewer[’s] comments, even while keeping the identity of the person hidden, to public scrutiny will certainly have a chilling effect on a reviewer’s willingness to challenge traditional ideas and propose unconventional concepts.” WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 7.

As the *Coastal States* Court explained, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” 617 F.2d 854, 866 (D.C. Cir. 1980) (citing *United States v. Nixon*, 418 U.S. 683, 705 (1974)). This Court is also concerned that it is not only the peer reviewers, but the article authors themselves who may temper their approaches to research questions and problem-solving and be more hesitant to think outside the box, fearing public reception of the extreme or unconventional. In fact, it is exactly this type of hesitancy that stifles innovation, making the threat to the integrity of the decision-making process a reality.

II. The concept of “academic freedom” renders Highland’s requests “unreasonable invasions of privacy,” pursuant to FOIA Exemption 2.²⁰

This Court believes that FOIA Exemption 2 is properly applied because the concept of “academic freedom,” in addition to other concerns, makes disclosure an unreasonable invasion of privacy.²¹ Throughout this case, Highland has hotly contested WVU’s position of non-disclosure grounded in the concept of “academic freedom.” The issue is complex because the majority of “academic freedom” jurisprudence exists within the context of the First Amendment, as opposed to that of the FOIA. Even in the First Amendment realm, in the words of the *Dow Chemical* Court, the jurisprudence concerning academic freedom of a university to be free of governmental interference is decidedly “sparse.” 672 F.2d 1262, 1275 (7th Cir. 1982). Additionally, there is no on-point case law, with facts parallel to the case at bar, that speaks to the concept of “academic freedom” in the manner in which it is being asserted here. However, this Court believes that the “academic freedom” principles embodied in our First Amendment jurisprudence are applicable, and thus transferrable, to that of the FOIA, especially because the right to education in our State is *fundamental*.²²

Exempted from disclosure pursuant to the FOIA is “[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by *clear and convincing*

²⁰ In the alternative, this Court finds that the “deliberative process privilege” also shields the documents from disclosure.

²¹ WVU has claimed disclosure exemption pursuant to an “academic freedom” privilege in numerous instances. Though this Court believes the privilege to exist, in the alternative, it will ground its reasoning as to why withholding is proper in FOIA Exemption 2. Its reasoning in this regard incorporates the concept of “academic freedom,” as opposed to relying on it as a distinct privilege.

²² In discussing “academic freedom” as applied to scientific research, the *Dow Chemical* Court stated that it thought it was clear that “whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom.” 672 F.2d 1262, 1275 (7th Cir. 1982) (citation omitted).

evidence requires disclosure in the particular instance.” W. VA. CODE § 29B-1-4(a)(2) (2012) (emphasis added). “The essentiality of freedom in the community of American universities is almost self-evident.” *Sweezy v. State of New Hampshire*, 354 U.S. 235, 250 (1957). “[S]cholars too are information gatherers and disseminators . . . Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.” *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998). “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian et al. v. Bd. of Regents of the University of the State of New York, et al.*, 385 U.S. 589, 603 (1967).

WVU asserts that email communications between the authors in this case regarding the articles, drafts of the articles, peer review comments, and similar documents are exempted under the “academic freedom” privilege. It appears that WVU initially grounded this privilege in FOIA Exemption 2, which protects materials of a personal nature, such as that kept in a personal, medical or similar file, whose disclosure would be an unreasonable invasion of privacy. W. VA. CODE § 29B-1-4(a)(2) (2012); Compl. Exs. H, K. Highland states that this exemption has never been recognized in West Virginia, nor its federal counterpart, as providing a basis for withholding documents pursuant to an “academic freedom” privilege.²³ Highland’s Second Renewed Mot. for Summ. J. at 16. Though Highland is correct in this regard, this Court believes that an absence of on-point authority does not necessarily imply that WVU’s contention runs afoul of FOIA jurisprudence. In fact, this Court believes that the concept of “academic freedom”

²³ Highland also asserts that no case has recognized an “academic freedom,” or similar privilege, as falling within the deliberative process exemption. Highland’s Second Renewed Mot. for Summ. J. at 16, n.15.

is one of the reasons *why* disclosure of the requested materials would be an unreasonable invasion privacy, making application of Exemption 2 proper.

A. The information Highland requests is of a “personal nature.”

Exemption 2 is wholly applicable to email communications between the authors regarding the articles, article drafts, peer review comments, and other similar documents because these communications contain “[i]nformation of a personal nature.” W. VA. CODE § 29B-1-4(a)(2) (2012). The peer review materials and communications between the authors are personal because they embody subjective, candid commentary. They reflect the individualized critiques, and personal opinions, of the reviewers and authors that they likely would not care to have disseminated with individuals other than those to whom the communications were directed. The draft articles, notes, etc. are similarly “personal” in nature because they are reflective of Dr. Hendryx’s thought process and conceptualization of his final work product. Like his peer reviewers, Dr. Hendryx would almost certainly *not* wish to have his personal thoughts concerning his research, and article drafts, disclosed prior to the completion of the editing process, if *ever*.

B. Disclosing the information requested would be an unreasonable invasion of privacy.

It would be unreasonable to disclose the information pertaining to the peer review comments, in addition to the article drafts, because of the privacy expectations of their authors. In the case of the peer review materials, the reviewers undoubtedly believed, absent contrary indication, that their commentary would remain between themselves and the email recipient, as opposed to being disclosed to the general public. As WVU astutely explained, “[t]o subject a reviewer[’s] comments, even while keeping the identity of the person hidden, to public scrutiny will certainly have a chilling effect on a reviewer’s willingness to challenge traditional ideas and

propose unconventional concepts.” WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 7.²⁴ Dr. Hendryx similarly had no reason to expect that each step of his research process could be turned over to the public, before completion and absent his consent. Dr. Hendryx, quite reasonably, would anticipate public criticism of his completed work product itself, as opposed to the thought process, and trials and errors, that led to its completion. In fact, it seems wholly *unreasonable* to subject all of a researcher’s work, from inception to completion, to public disclosure, which is essentially what Highland is asking. A researcher should *not* have to wholly forfeit the right to determine what part of her/his work, the unique product of one’s hands and mind, is made public.

Beyond these clear observations regarding privacy expectations, this Court believes that the concept of “academic freedom” serves as additional justification as to why the invasion of privacy implicated in this case is unreasonable, pursuant to W. VA. CODE § 29B-1-4(a)(2) (2012). It is bedrock principle that our law resolutely safeguards speech because it is meant to be fostered, as opposed to chilled, encouraged as opposed to stifled. A profound significance attaches to a scholar’s ability to both teach, and research, freely, as the ability to question, doubt, and challenge the world around us is innovation’s catalyst. As the Court in *Sweezy v. New Hampshire* so eloquently explained:

²⁴ Highland contends that there is no reason to expect that the identities of the actual reviewers would be disclosed to Highland when the materials were turned over. It also indicated its willingness to redact materials to address legitimate privacy concerns. Highland’s Second Renewed Mot. for Summ. J. at 19; *Id.* at 19, n.16. For the reasons to be discussed *infra*, this Court will explain why this course of action does not address the heart of the issue.

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. 235, 250 (1957).

If the forum of ideas is to live and breathe as it should, conversation, debate, and creativity should exist freely and openly. An environment such as this is threatened when the ebb and flow of the intellectual process is constricted, which is why our law so fervently protects free speech. As the Court in *Keyishian et al. v. Bd. of Regents of the University of the State of New York et al.* explained, “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” 385 U.S. 589, 603 (1967). “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.” *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1274 (7th Cir. 1982) (citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978)). This Court believes that not only is academic freedom transcendental, but so too are the First Amendment principles which lie at its heart, making them applicable not only to constitutional law, but to FOIA jurisprudence as well.

For this reason, the Court believes it is proper to allow the concept of “academic freedom” to be taken into consideration when determining whether or not the invasion of privacy implicated in this case, pursuant to FOIA Exemption 2, is unreasonable. The *Dow Chemical* Court’s evaluation of the burden of compliance with administrative subpoenas is instructive in this regard. In that case, the Court dedicated an entire portion of its opinion to the concept of

“academic freedom” and made several observations germane to this case. It noted that by their terms, the subpoenas would require the researchers to turn over “virtually every scrap of paper and every mechanical or electronic recording made during the extended period that those studies have been in progress at the university,” in addition to having to continually update the Plaintiff with “additional useful data.” 672 F.2d 1262, 1276 (7th Cir. 1982). The *Dow Chemical* Court found that these requirements posed substantial intrusion into the enterprise of the university, and one of the reasons concerned the chilling of research efforts. As this Court previously noted, such intervention would inevitably check the “ardor and fearlessness of scholars,” since they would know that the “fruits of their labors” could be continually “appropriated” and “scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs.” *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982); *Sweezy v. New Hampshire*, 354 U.S. 235, 262 (1972). This Court believes, as did the *Dow Chemical* Court, that such a realization might well be both “unnerving” and “discouraging,” the latter of which is particularly dangerous to intellectual discourse. 672 F.2d 1262, 1276 (7th Cir. 1982).

This Court also wishes to address Highland’s contention that there is no “academic freedom” exemption from disclosure under the FOIA. As previously stated, Highland is correct in that, to this Court’s knowledge, no case with facts parallel to this one has applied the concept as a privilege to prevent FOIA disclosure. However, what this Court has done is to use the concept in its consideration of the reasonableness of the invasion of privacy it believes to be occurring in this case. Though the Court in *Urofsky et al. v. James S. Gilmore, III, et al.*²⁵ explained that the United States Supreme Court had never set aside a state regulation on the grounds that it violated a First Amendment right to “academic freedom,” this case is distinguishable because the constitutionality of a state regulation is not being challenged here. In

²⁵ 216 F.3d 401, 410-15 (4th Cir. 2000).

the case at bar, the situation is closer to that of *Dow Chemical*, in which a court is examining the reasonableness of a particular request, using “academic freedom” as a factor in its calculus. In *Dow Chemical*, the “reasonableness” concerned the burden of administrative subpoenas, and in the case at bar, the “reasonableness” concerns the invasion of privacy brought about by a FOIA request.

C. There is no “clear and convincing” evidence that the public interest requires disclosure.

Pursuant to FOIA Exemption 2, even if the disclosure is unreasonable, as this Court believes it to be, it could *still* be warranted if there was clear and convincing evidence that the public interest required it. W. VA. CODE § 29B-1-4(a)(2) (2012). This Court staunchly believes that it does *not*. Having previously explained its concerns that disclosure would have a chilling effect on candid peer review and the proposal of new ideas, this Court is also concerned that this case would set dangerous precedent. As Gavison explained:

[P]rivacy . . . contributes to learning . . . by insulating the individual against ridicule and censure at early stages of groping and experimentation. No one likes to fail, and learning requires trial and error . . . In the absence of privacy we would dare less, because all our early failures would be on record. We would only do what we thought we could do well. Public failures make us unlikely to try again.

Dow Chemical Co. v. Allen, 672 F.2d 1262, 1276 n.24 (7th Cir. 1982) (citing Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 448 (1980)).

Subjecting the entire work product, and research process, of Dr. Hendryx and his colleagues to disclosure would yield such consequences. This Court believes that Gavison’s prophetic stance is an accurate one; scholastic “ardor” and “fearlessness” pale in a prematurely illuminated public spotlight.

Additionally, subjecting a public university professor’s draft articles, peer review commentary, etc. to FOIA disclosure would send the message that upon accepting employment

with a public university, a professor consequently forfeits certain rights to her/his research work, namely the ability to determine what is to be made public, and when. Our own Legislature has stated that “[a]cademic freedom . . . is necessary to enable the institutions [of higher education] to perform their societal obligation.” W. VA. CODE R. § 128-36-2.1 (2007). In fact, after discussing the exercise of academic freedom, the Legislature has *specifically* explained that “[a]ll faculty members shall be entitled to *full freedom* in research and in the *publication* of the results of such research.”²⁶ W. VA. CODE R. § 128-36-2.2 (2007). This Court is deeply concerned with the ability of public university professors to adequately, and indeed passionately, perform this obligation when faced with the reality that virtually all of their work could be subject to complete disclosure, outside of their control. As the *Urofsky* Court explained, “[i]t is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment,” yet this seems to be the inescapable reality of Highland’s request. *Urofsky, et al. v. Gilmore, et al.*, 216 F.3d 401, 406 (4th Cir. 2000) (citations omitted).

Perhaps even more troubling to this Court is the fact that it is reasonable to be concerned that a public institution may not be able to attract the best and the brightest academicians because they may balk at the notion that *all* of their work could be subject to disclosure. As Kenneth Weber explained:

²⁶ This is “subject to the adequate performance of their other academic duties, which may include designated instruction, research, extension service, and other professional duties.” W. VA. CODE R. § 128-36-2.2 (2007).

Academic scientists have already forgone competitive salaries and waived any proprietary rights to their work in favor of the state schools. To permit indiscriminate public access to their [research]²⁷ would be to further discourage the most talented individuals from accepting positions at our state schools.

Kenneth A. Weber, *State Public Records Acts: the Need to Exempt Scientific Research Belonging to State Universities From Indiscriminate Public Disclosure*, 10 J.C. & U.L., 129, 144 (1984).

The individuals who bear the greatest cost of this reality are perhaps not the scientists or academicians themselves, but *students*. If we are unable to attract the best and the brightest academicians at our State's schools, it logically follows that our students will be deprived of the opportunity to be instructed by the *best* and the *brightest*. Education is a *fundamental*, constitutional right in our State, and academic freedom is *necessary* to enable our institutions to perform their societal obligation, as established by our Legislature. *Pendleton Citizens for Comty. Schools v. Marockie*, 203 W. Va. 310, 507 S.E.2d 673 (1998) (citing Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979); W. VA. CODE R. § 128-36-21 (2007)). It is the transformative passion of our most talented educators and researchers that inspires our youth and electrifies innovation; we must not lose it.²⁸

²⁷ The original quotation uses the word "notebooks." As Weber explains, it is the scientific community's accepted practice to permanently record all of one's work, including preliminary and unsuccessful experiments, into one's notebook. It is from the notebook that the scientist gleans the most "accurate and reproducible data" for publication. Of note is the fact that perhaps 95% of the data remains in the notebook because it is "unworthy of publication in scientific journals." Kenneth A. Weber, *State Public Records Acts: the Need to Exempt Scientific Research Belonging to State Universities From Indiscriminate Public Disclosure*, 10 J.C. & U.L., 129, 134 (1984) (citation omitted).

²⁸ Frank Murray makes a very poignant observation regarding the sociological value of researchers in this country, which this Court also finds to be deeply significant:

Truth and fact in modern society must be buttressed so as not to be overwhelmed by a whirlwind of propaganda. Ironically, the free marketplace of ideas must be shielded from the modern free market, as the free flow of information is of little use if such information is distorted by special interests. This is not merely a state concern, but a duty of the state because the existence of publically identifiable truth is a precondition for democracy. A privilege therefore must be granted to those professions who serve as a locus and greenhouse for fact-finding, untarnished by corrupted facts paid for by free enterprise. The best institutional candidate for this role is academia's scholarly researcher, who toils not for profit, but for humanity. Any democratic

Taking all of these consequences of disclosure into consideration, this Court does not find, by “clear and convincing” evidence, that the public interest requires it. In fact, this Court believes that the public’s interest staunchly *opposes* it.²⁹

III. Highland’s requests for production are unduly burdensome.

This Court finds that Highland’s production requests are unduly burdensome. The FOIA expresses a concern that “information requests not become mechanisms to paralyze other necessary government functions.” *Farley v. Worley*, 215 W. Va. 412, 422, n.14, 599 S.E.2d 835, 845, n.14 (2004). The FOIA was not intended to “reduce government agencies to full-time investigators on behalf of requesters.” *Assassination Archives & Research Ctr., Inc. v. C.I.A.*, 720 F. Supp. 217, 219 (D.D.C. 1989). Courts should remain mindful of the “limited resources public bodies have to not only respond to FOIA requests, but to provide other critical government services.” *Farley v. Worley*, 215 W. Va. 412, 424, 599 S.E.2d 835, 847 (2004).

In the case at bar, upon close analysis of the Subpoena-Based FOIA Request and Communication Request, it is clear that Highland is essentially asking WVU for *everything*.³⁰ WVU asserts that it has identified over 240,000 documents responsive to Highland’s requests. WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 10. Concerning Drs. Hendryx and Zullig, WVU states that it has identified, and reviewed, over 43,000 potentially responsive documents. *Id.* WVU further asserts that it has

constitutional order that seeks to preserve its function must assure the survival of this last bastille of truth.

Frank Murray, *Boston College’s Defense of the Belfast Project: A Renewed Call for a Researcher’s Privilege to Protect Academia*, 39 J.C. & U.L. 659, 707-08 (2013).

²⁹ In the alternative, this Court finds that the deliberative process privilege would protect the materials from disclosure, for all of the reasons contained within its discussion of said privilege, *supra*.

³⁰ Compl. Exs. A, B.

produced 2,364 documents, totaling 11,090 pages, and has redacted 119 of the documents produced and withheld 772 documents. *Id.*³¹ Highland contends that of the 2,364 documents WVU produced, 20% of them were U.S. Department of Energy “Annual Coal Reports” or “Coal Industry Annuals,” so they should not have been required to be “reviewed and analyzed in their entirety” and examined for exemption; Highland states that they were clearly public records. Highland’s Reply in Supp. of Second Renewed Mot. for Summ. J. at 7. Highland also asserts that another 6% of the documents produced consisted of multiple copies of “the same published articles that *Highland* submitted to WVU as part of its FOIA Request.” *Id.* at 8. Additionally, Highland takes issue with some of the totals that WVU has provided concerning the documents identified as responsive and those reviewed and analyzed.³²

These figures do not persuade this Court that Highland’s requests are reasonable. Even after subtracting the percentage of documents that Highland has identified as clearly being public records or multiple copies, assuming it is *appropriate* to do so, WVU has *still* produced 1,749 documents. WVU maintains that it has identified over 200,000 documents responsive to Highland’s requests, reviewed 43,000 that were potentially responsive with respect to Drs. Hendryx and Zullig, and retained a document management company to manually review each and every document, expending \$23,000, in fees to do so. WVU’s Renewed Mot. for Summ. J. and Response to Highland’s Second Renewed Mot. for Summ. J. at 12. These staggering figures speak for themselves in terms of the capacious scope of Highland’s request and its associated

³¹ Highland contends that WVU has produced 2,245, documents, not 2,364, “omitting double counting of duplicates.” Highland’s Reply in Supp. of Second Renewed Mot. for Summ. J. at 8, n.5.

³² Highland states that there is no support in the record for “the total number of documents that have been identified as responsive; the number that [has] been identified as involving Professors Hendryx and Zullig; and the number of documents that have been ‘reviewed and analyzed.’” Highland’s Reply in Supp. of Second Renewed Mot. for Summ. J. at 7. Highland does state that it received a memorandum suggesting that 200,000, documents were identified in connection with a search for files maintained by WVU staff other than Professors Hendryx and Zullig in the form of a proposal from the document management company retained by WVU.

burden. In fact, the definition of “document” pursuant to the Subpoena for responsive documents pertaining to Ahern, Zullig, and Hendryx’s articles underscores just how extensive Highland’s request is:

[A]ny written or graphic matter of any kind whatsoever, however produced or reproduced, any electronically or magnetically recorded matter of any kind or character, and any other matter constituting the recording of data or information upon any tangible thing by any means, including but not limited to, the original and any non-identical copy of any of the following (regardless of however or by whomever prepared, reproduced, maintained, or stored): books, records, reports, articles, abstracts, posters, studies, memoranda, notes, letters, correspondence, e-mail, instant messages, chats, chat postings, bulletin boards, electronic bulletin boards, posters, blogs, websites, voicemail, SMS messaging, instant messaging, studies, trials, clinical data, reports, analysis, evaluations, assessments, speeches, telegrams, diaries, calendar entries, journal, logs, schedules, maps, graphs, charts, contracts, releases, appraisals, valuations, estimates, opinions, studies, analyses, summaries, magazines, booklets, pamphlets, circulars, brochures, bulletins, instructions, minutes, photographs, purchase orders, bills, checks, drafts, certificates, tabulations, questionnaires, films, or tapes, surveys, messages, correspondence, letters, records (of meetings, conferences and telephone or other conversations or communications), tables, drawings, sketches, tax reports, working papers, financial statements, computer data (including information or programs stored in a computer or storage media, whether or not ever printed out or displayed) as well as any other tangible thing on which information is recorded in any writing, sound, electronic or magnetic impulse, or in any other manner, and including preliminary versions, drafts, revisions or amendments to or of any of the foregoing and any supporting, underlying or preparatory materials.

Compl. Ex. A to Subpoena Duces Tecum at 5.

This Court believes that at this point, WVU has demonstrated that the FOIA requests are unduly burdensome. Though initially denying WVU’s Motion to Dismiss, and the “undue burden” argument contained therein, WVU has now shown, with specificity, the true extent of Highland’s requests. The figures representing the total numbers of potentially responsive documents, those reviewed, and the fees incurred are only those *to date*. This Court is deeply concerned about the continued time and expense that would be required to complete the process, which has identified over 200,000, potentially responsive documents.

The law is clear that FOIA requests should not “reduce government agencies to full-time investigators on behalf of requesters,” nor should they paralyze other government functions. *Assassination Archives & Research Ctr., Inc. v. C.I.A.*, 720 F. Supp. 217, 219 (D.D.C. 1989); *Farley v. Worley*, 215 W. Va. 412, 422, n.14, 599 S.E.2d 835, 845, n.14 (2004). Government agencies are certainly organizations of *limited* resources, and they must be able to use those resources to perform their other essential functions, outside of responding to FOIA requests. *Farley v. Worley*, 215 W. Va. 412, 424, 599 S.E.2d 835, 847 (2004). This Court believes that WVU has shown the gravity of the FOIA burden imposed upon it, both in terms of labor and cost expended, and that it is coming dangerously close to the scenarios as anticipated by the *Farley* and *Assassination Archives* Courts—specifically WVU becoming a full-time FOIA investigator. In fact, a review of other West Virginia FOIA cases starkly underscores just how burdensome Highland’s request is. At issue in *Associated Press v. Canterbury*³³ were thirteen (13) email communications, forty three (43) in *PG Publishing Co., d/b/a the Pittsburgh Post-Gazette v. West Virginia University*,³⁴ and one hundred and fifty-five (155) were withheld in *Daily Gazette Co., Inc. v. West Virginia Development Office*. 198 W. Va. 563, 567, 482 S.E.2d 180, 183 (1996). These cases evidence the stark disparity of production burden between them and the case at bar.

CONCLUSION

Applying the appropriate standard of review, this Court finds that the statutory exemptions implicated in this case properly shield the delineated documents from disclosure. This Court believes that there is no genuine issue of fact to be tried, nor is inquiry concerning the

³³ 224 W. Va. 708, 688 S.E.2d 317 (2009).

³⁴ Civil Action No. 08-C-276 (Monongalia County, W. Va.) (Shea R. Browning Aff. at 2, Aug. 12, 2008).

facts desirable to clarify the law, pursuant to *Williams v. Precision Coil, Inc.*, rendering summary judgment appropriate.

The deliberative process privilege is properly invoked in the case at bar because first, Dr. Hendryx, and by logical extension WVU, was responding to the question of whether coal mining adversely affects the health of West Virginians. The request for an answer to this question, and an agency position on the issue, need not be explicitly posited to the WVU School of Medicine, it need only exist. Second, the peer review materials and article drafts were both “pre-decisional” and “deliberate” because they occurred prior to the publication of the article in final form and reflected the “give and take” process between Dr. Hendryx and his peers concerning the quality and direction of his work. The documents contained the very type of candid, subjective commentary, particularly to an individual of enhanced authority within the agency, which renders them exempt pursuant to the deliberative process privilege. Dr. Hendryx’s work evidences the deliberative process itself because it required him to exercise his judgment as a scholar and researcher to address the coal mining question. Also, Dr. Hendryx’s work would advance the West Virginia Rural Health Research Center’s mission, and policy, which is to improve rural health through research, further evidence of the deliberative process invoked in Exemption 8. Furthermore, WVU did not disavow Dr. Hendryx’s work, thereby solidifying the attribution of the policy position his work illuminated to WVU.

Raw data, compilations, and documents obtained by others are protected by the deliberative process privilege because they are inextricably linked to the deliberative process itself. This Court cannot definitively find that it would not jeopardize the deliberative process by requiring disclosure of even raw data, because this material *still* requires the exercise of judgment as implicated in the deliberative process. Additionally, this material is not necessarily

discoverable in the civil context because it would be highly unreasonable to subject a researcher's *entire* work product to disclosure, which is essentially what Highland is asking this Court to do. Application of Exemption 8 is proper in this case because to do otherwise would run afoul of its policy, namely the safeguarding of the deliberative process's integrity and ensuring that candid communication, and problem solving, occurs during the process.

This Court believes that Exemption 2 properly protects the documents WVU seeks to withhold from disclosure, concerning "academic freedom." The information sought is of a "personal nature" because it contains the candid, subjective, and personal opinions of the peer reviewers, in addition to Dr. Hendryx's personal notes and deliberations. The invasion of privacy implicated in this case is unreasonable, both for the peer reviewers and Dr. Hendryx. The former reasonably believed that their candid comments would remain between authors, and the latter believed that every aspect of his research would *not* be made public, absent his control. It is here that the concept of "academic freedom" contributes to the unreasonableness of the privacy invasion, as free thought and candid review should not be stifled for fear of both premature disclosure, and complete disclosure altogether. Scholars and academicians should not forfeit their inherent right to "academic freedom," and the ability to freely and candidly research, because they work for a public university. Our State's ability to attract the best and the brightest educators of our youth should *not* be compromised because those educators fear working for a public institution where their entire work product is subject to full disclosure, absent their control. Students in this State have a *fundamental* right to an education, and they should have the opportunity to be educated by the best and the brightest our State has to offer. This Court does not find the public interest in disclosure to be "clear" and "convincing."

And finally, Highland's requests are unduly burdensome. The scope of the requested material itself threatens to turn WVU into a full time FOIA investigator for Highland, and others similarly situated, as contemplated in *Assassination Archives & Research Ctr., Inc. v. C.I.A.* The extent of WVU's efforts to date, as evidenced in the sheer volume of materials it has reviewed and would be required to continue to review, is stark evidence of how unreasonable the burden cast upon it is.

WVU has met its burden of showing that the claimed FOIA exemptions properly apply to the documents it seeks to withhold in this case. As the Court in *Queen v. West Virginia University Hospitals, Inc.* instructed, the party claiming exemption carries the burden of demonstrating that applicability of the exemption to the requested materials. Syl. Pt. 7, 179 W. Va. 95, 365 S.E.2d 375 (1987).

Even liberally construing the FOIA's disclosure provisions, as it must, this Court remains firm in its conviction that the exemptions have been properly applied. Syl. Pt. 4, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

For the foregoing reasons, the Court **ADJUDGES** and **ORDERS** as follows:

1. Highland Mining Company's Second Renewed Motion for Summary Judgment is **DENIED**.
2. WVU's Renewed Motion for Summary Judgment is **GRANTED**.
3. The Circuit Clerk shall strike this matter from the docket.
4. The Circuit Clerk shall provide copies of this order to counsel of record.

ENTER:

March 19, 2014

PHILLIP D. GAUFOT, CHIEF JUDGE

ENTERED

March 19, 2014

DOCKET LINE #: 61

JEAN FRIEND, CIRCUIT CLERK

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit and Family Courts of Monongalia County, State aforesaid do hereby certify that the attached ORDER is a true copy of the original Order made and entered by said Court.

Jean Friend
Circuit Clerk

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. _____

(Circuit Court Civil Action No. 12-C-275)

HIGHLAND MINING COMPANY,

Plaintiff Below/Petitioner,

v.

WEST VIRGINIA UNIVERSITY
SCHOOL OF MEDICINE,

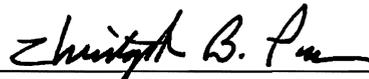
Defendant Below/Respondent.

CERTIFICATE OF SERVICE

I, Christopher B. Power, counsel for Petitioner Highland Mining Company, do hereby certify that a copy of the foregoing Notice of Appeal, including attachments, was served upon the persons listed below this 16th day of April, 2014, via U.S. Mail, postage prepaid and addressed as follows:

Carte P. Goodwin, Esq.
Benjamin B. Ware, Esq.
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301-1678
Counsel for Respondent

Jean Friend, Clerk
Monongalia County Circuit Court
Monongalia County Courthouse
243 High Street, Room 110
Morgantown, WV 26505



Christopher B. Power (W.Va. Bar No. 4286)