UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL, Plaintiff	)	
v.	)	**Civil Action No. 11- 1971 (JEB)**
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants	)	

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Defendants, United States Department of Homeland Security (DHS) and the United States Citizenship and Immigration Services (USCIS), by and through undersigned counsel, respectfully file this reply memorandum in response to Plaintiff's Opposition to Defendants' Motion to Dismiss and for Summary Judgment (Pltf's Opp.). Plaintiff's claims for declaratory and injunctive relief with respect to the documents released to Plaintiff as well as Plaintiff's claims based upon a violation of the Administrative Procedure Act (APA) should be dismissed for lack of subject matter jurisdiction.[1] Defendants should be granted summary judgment on Plaintiff's remaining claims because Defendants properly submitted declarations and a Vaughn Index, conducted an adequate search, and complied with the Freedom of Information Act's segregability requirements. In addition, Defendants properly applied FOIA Exemptions 5 and 6 to the withheld information.

I. ARGUMENT

A. AIC's Claim for Injunctive and Declaratory Relief Should Be Dismissed with Respect to the Documents Released to Plaintiff.

Plaintiff seeks injunctive and declaratory relief for USCIS's failure to provide its FOIA

[1] Plaintiff has "agree[d] to withdraw its APA claim." Pltf's Opp. at 2 n.1.

response within the FOIA statutory timeframe. Complaint ¶¶21 27. However, on February 6, 2012, USCIS provided AIC with a comprehensive FOIA response and released certain documents in full. As this Court has stated, "[o]nce the records are produced[,] the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made." Saldana v. BOP, 715 F.Supp. 24, 26 27 (D.D.C. 2010). Therefore, as Defendants stated in their motion, Plaintiff's claims for injunctive and declaratory relief with respect to the documents released in full are moot because Defendant complied with Plaintiff's FOIA request. Defs' Mtn at 13. Indeed, Plaintiff appears to have conceded this argument. Specifically, Plaintiff stated that "[w]hile claims for injunctive relief with respect to documents released in full may be moot, … AIC's claims regarding documents withheld in full or in part … are not moot." Pltf's Opp. at 29. Hence, Plaintiff's claim for injunctive and declaratory relief with respect to the documents released in full should be dismissed. See Fed. R. Civ. P. 12(b)(1).

B. Defendant Conducted an Adequate Search.

The FOIA requires an agency to undertake a search that is "reasonably calculated to uncover all relevant documents." Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Such searches are "adequate" as a matter of law. Valencia Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999); see also Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not rendered inadequate merely because it failed to "uncover every document extant." SafeCard Servs., Inc. v. SEC, 926 F.2d at 1201. The established reasonableness standard by which FOIA searches are judged "does not require absolute

exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Dep't of State, 779 F.2d 1378, 1384 85 (8th Cir. 1986). Thus, "the issue in a FOIA case is not whether the agencies' searches uncovered responsive documents, but rather whether the searches were reasonable." Moore v. Aspin, 916 F. Supp. 32, 35 (D.D.C. 1996); see also Meeropol v. Meese, 790 F.2d 942, 952 53 (D.C. Cir. 1986). Once the agency demonstrates the adequacy of its search, the FOIA requestor must show "that the agency's search was not made in good faith." Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993). Unsupported assertions of bad faith are insufficient to raise a material question of fact with respect to the adequacy of an agency's search for purposes of summary judgment. See Oglesby, 920 F.2d at 67 & n.13.

The Declaration of Jill Eggleston, Assistant Center Director, Freedom of Information and Privacy Act Unit, National Records Center (NRC), USCIS, demonstrated that USCIS's search method was reasonably calculated to uncover all records in its possession responsive to AIC's FOIA request. Defendants' Motion to Dismiss and for Summary Judgment (Defs' Mtn), Ex. A, Eggleston Dec.; Ex. 1, Second Declaration of Jill Eggleston (Second Eggleston Dec.) USCIS's Significant Interest Group (SIG) determined that the search for responsive records should encompass a wide variety of USCIS components because no single USCIS file was available that contained records responsive to the AIC FOIA request. Defs' Mtn, Ex. A, Eggleston Dec. at ¶11. The SIG staff sent search requests ("staffing requests") via email to all USCIS agency components it deemed to have responsive records. The staffing request detailed the scope of the FOIA request and attached the actual FOIA for each component's use. Id. at ¶13. Each USCIS component tasked was directed to forward any responsive documents to the NRC for processing pursuant to the FOIA. Each component also was directed to identify any other USCIS

components that might possess records responsive to the request so that these components could be similarly tasked. Id. Accordingly, USCIS SIG staff sent staffing requests to multiple USCIS program offices.

The SIG team determined that the USCIS's Service Center Operations (SCOPS); Office of Policy and Strategy (OP&S); Field Operations Directorate (FOD); Refugee, Asylum, International Operations (RAIO); and the Office of Chief Counsel (OCC) were reasonably likely to have responsive records. This determination was made because SCOPS is responsible for the direct oversight and support of USCIS service centers located within the United States that adjudicate, manage and deliver immigration decisions and benefits. OP&S was tasked because its mission includes: (a) recommending and developing national immigration policy; (b) developing and coordinating immigration regulation initiatives; (c) performing research, evaluation and analysis on immigration services issues; (d) developing and coordinating strategic plans; and (e) serving as liaison with DHS and sister agencies on immigration policy issues. FOD was tasked because it manages the day-to-day operations of the various USCIS field offices and oversees the adjudication of all applications and petitions for immigration benefits requiring face to face interviews, timely action on related ancillary applications and other assigned product lines, provision of direct customer service, immigration information, ensuring the integrity of the immigration system and assistance to applicants, petitioners and beneficiaries. RAIO was tasked because it is responsible for overseeing, planning, and implementing policies and activities related to asylum and refugee issues as well as immigration services overseas. RAIO's offices are involved in extending citizenship and immigration benefits to eligible individuals, exercising vigilance in matters involving fraud detection and national security, sustaining effective

intergovernmental liaisons, and advancing USCIS strategic priorities in the international arena. Finally, OCC was tasked to locate responsive records because it is the legal arm of the USCIS and, among other things, renders legal advice and opinions on a myriad of immigration, administrative and legislative matters. OCC helps develop legal policies, guidance and training for USCIS.

Plaintiff contends that the Eggleston Declaration is legally sufficient because "it fails to explain why other offices ... would not have responsive records." Pltf's Opp. at 7. However, an agency is not required to establish why each of its various components would not have responsive records. Rather, this Circuit has clearly established that the fundamental question is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Steinberg v. DOJ, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. DOJ, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Moreover, the agency "is under no obligation to search every system of records which might conceivably hold responsive records." See Oglesby, 920 F.2d at 68. Here, the searches conducted by the identified components were reasonable. In fact, in order to determine what components were likely to have responsive records, Defendant's FOIA staff "consult[ed] a variety of sources containing organizational and operational information about the agency and its various components ...." Defs' Mtn, Ex. A, Eggleston Dec at 4, n.2. This enabled the FOIA staff to identify all agency offices and functions affected by the particular FOIA request. Id. During this process, "the focus of a given FOIA request is compared to the various USCIS components' assigned areas of responsibilities" to identify whether there are "matching, comparable and/or compatible subject matters." Id. The FOIA request is then sent to any USCIS component charged

with responsibilities encompassing the FOIA requester's stated area(s) of interest." Id. Therefore, the components identified here were appropriately and reasonably determined "likely" to have records responsive to Plaintiff's request.

Plaintiff also complains that another USCIS component was "likely" to have additional information, Pltf's Opp. at 7, that the release did not include summary from a meeting and minutes of two meetings between American Immigration Lawyers Association (AILA), and that Defendant did not "turn over a publicly available document." Id. at 7. However, a search is not unreasonable simply because it fails to produce all relevant materials.[2] Meeropol, 790 F.2d at 952. Indeed, "the focus of the adequacy inquiry is not on the results."[3] Hornbostel v. Dep't of the Interior, 305 F.Supp.2d 21, 28 (D.D.C. 2003).

Plaintiff also contends that "Defendants' declaration lacks sufficient detail" because it "does not indicate what records were searched, by whom and through what process." Pltf's Opp. at 4, citing Steinberg, 23 F.3d at 551-52. However, the Eggleston Declaration explained that each of the components which conducted searches were not only sent staffing requests which

[2] There is no indication that Defendants were attempting to conceal the fact that it possessed minutes of meetings with AIC because Defendants located and identified for Plaintiff, Minutes of meetings with AILA which occurred on May 27, 2009, December 1, 2009 and October 27, 2010. These documents are referenced in the Vaughn Index. See Defs' Motion, Ex. H at 119-20, 122, 125.

[3] Plaintiff also states "that USCIS withheld [a]'draft procedures manual for [the] reasonable fear process ... [because it was] ... a draft portion of the USCIS 2003 edition of the manual for reasonable fear process.'" Pltf's Opp. at 11-12, citing Defs' Motion, Ex. H at p. 6. Plaintiff states that this "suggests that USCIS's 2003 edition of the manual for the reasonable fear process (and perhaps earlier and later editions as well) set forth its policies with respect to attorney representation during the asylum process." Id. at 12. However, Plaintiff's "mere speculation that as yet uncovered documents might exist" does not undermine the adequacy of a search. Tunchez v. DOJ, --- F.3d ---, 2011 WL 1113423, at *1 (D.C. Cir. March 14, 2011), citing Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004); see Oglesby, 920 F.2d at 67 n.13 (finding that "hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency's search"). Moreover, a search is not rendered inadequate merely because it failed to "uncover every document extant." SafeCard Servs., 926 F.2d at 1201. Instead, "the issue in a FOIA case is not whether the agencies' searches uncovered responsive documents, but rather whether the searches were reasonable." Moore, 916 F.Supp.at 35.

"detail[ed] the scope of the FOIA request" but also "the actual [FOIA] request" which specifically detailed the type of documents that were requested. Defs' Mtn, Ex. A, Eggleston Dec. at ¶11; Ex. 1, Second Eggleston Dec. at ¶12. In addition, the staffing request "asked each program office's staff [to] search the[] records, including electronic records" within that component. [4] Id. Each component then conducted the search in the manner it deemed most appropriate and best calculated to locate records responsive to the specific FOIA request. Ex. 1, Second Eggleston Dec. at ¶12. As indicated in the Eggleston Declaration, "the FOIA request and any responsive records are subjected to rigorous analyses to arrive at the proper final agency determination." Eggleston Dec. at ¶5.

Plaintiff's March 14, 2011 FOIA request asked for, inter alia, records "which relate[d] or refer[red] in any way to any of the following"

- Attorneys ability to be present during their clients' interactions with USCIS;
- What role attorneys may play during their clients' interactions with USCIS;
- Attorney conduct during interactions with USCIS on behalf of their clients;
- Attorney appearances at USCIS offices or other facilities.

See Defs' Mtn, Ex. B. The request indicated that those records could include, inter alia, guidance or any information the agency had "regarding the circumstances under which an attorney may accompany a client to an interview regarding [various types of applications, interviews, questions or petitions for immigration benefits] or what role the attorney may play during [these activities]." Id., Ex. B at 1. Plaintiff's "FOIA request was interpreted as seeking any external and internal guidance, memoranda, operation field manuals, and other instructions to staff focusing on USCIS policies and procedures related to the role of private attorneys and

[4] Specifically, the components were "asked to search for any training materials, policy memoranda, e-mails, or Standard operating procedures located in paper records, electronic records, e-mail correspondence, pictures, DVDs, videotapes, audiotapes, microfiche, or any other material recorded in any manner found responsive to the FOIA request." Ex. 1, Second Eggleston Dec. at ¶12.

other representatives that represent individuals appearing before USCIS adjudicators and other personnel in immigration related matters." Ex. 1, Second Eggleston Dec. at ¶10.

Plaintiff claims that Defendants' "interpretation improperly narrowed [Plaintiff's] request." Pltf's Opp. at 9. However, because Plaintiffs asked for records related to attorneys ability to be present during their clients' interactions with USCIS; what role attorneys may play during their clients' interactions with USCIS; and attorney conduct during interactions with USCIS on behalf of their clients and related guidance, Defendant reasonably interpreted the FOIA request. Plaintiff claims that Defendants failed to conduct an adequate search because the request also "asked for records that might fall outside the context of interactions during the 'adjudication process[]' … [and for] records related to USCIS's obligation to notify attorneys of their intention to question their clients. Id., citation omitted. However, as Defendants explained, the actual FOIA request was sent to the numerous components which were tasked to search for records. Therefore, each of these components was able to conduct searches based upon the specific FOIA request made by Plaintiff. Second Eggleston Dec. at ¶12. Hence, based upon the information the FOIA staff sent to the various components, the searches they conducted were adequate.

C. Defendant Properly Withheld Information Pursuant to Exemption (b)(5).

Exemption (b)(5) of the FOIA exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has interpreted Exemption 5 as allowing an agency to withhold from the public documents which a private party could not discover in litigation with the agency. U.S. v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984);

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975). Accordingly, Exemption 5 allows an agency to invoke civil discovery privileges, including the attorney-client privilege, attorney work-product privilege, and the executive deliberative process privilege, to justify the withholding of documents that are responsive to a FOIA request. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). Here, Defendants asserted the attorney-client privilege, attorney work-product privilege, and the executive deliberative process privilege, to justify the withholding of certain documents.

When addressing the assertion of Exemption 5, Plaintiff stated that the "Eggleston[] declaration and Defendants' Vaughn Index are insufficient to carry Defendants' burden of establishing the applicability of Exemption (b)(5) to most – if not all – of the documents withheld." Pltf's Opp. at 14. In its opposition, however, Plaintiff indicated that it "specifically contests" the applicability of Exemption 5 to the below-listed documents, and provided its bases for arguing why the attorney client privilege, attorney work product privilege, and/or the executive deliberative process privileges of Exemption (b)(5) were not properly applied to these documents. Id. at 15. Plaintiff did not specifically identify their objections to the application of the attorney client privilege, attorney work product privilege, and/or the executive deliberative process privileges to any of the remaining documents. See Pltf's Opp. at 29 ("Defendants have failed to carry their burden of establishing the applicability of any privilege to the *specific documents discussed above.")(*emphasis added). As Plaintiff has not specifically identified their objections to any of the other approximately 1,000 documents, arguably, any generalized argument about the applicability of Exemption (b)(5), or (b)(6) for that matter, to these documents is insufficient to require Defendant to further justify those withholdings as

Defendants have established the adequacy of the searches it conducted. As this Circuit has stated, once the agency demonstrates the adequacy of its search, the FOIA requestor must show "that the agency's search was not made in good faith[,]" Maynard, 986 F.2d at 560, and Plaintiff has failed to make such an allegation. Nevertheless, through the Vaughn Index and Amended Vaughn Index, Defendants have demonstrated that their assertions of Exemption 5, in whole or in part, to all of the records were appropriate. See Ex. 2, Amended Vaughn Index (Am. Vaughn Index). Accordingly, in the instant reply, Defendants provide responses to only the specific arguments made by Plaintiff.

1. Deliberative Process Privilege

With respect to the listed documents, Plaintiff complains that Defendants have not established what deliberative process is involved or the role played by the documents in that process. See Pltf's Opp. at 19.

1. PowerPoint presentations titled "USCIS Adjudicator Interaction with Private Attorneys and Representatives," (revisions dated Oct. 2008, Dec. 2009, Jan. 2010), Defs.' Ex. H (Dkt. No. 16 7) at 1 2, 6 7, 104, 108 (FOIA response pp. 8 56, 119 218, 1923 28, 1949 54) ("PowerPoint Presentations"), withheld under attorney client, work product, and deliberative process privileges.

2. Document titled "Representation of an Applicant for Admission to the U.S. as a Refugee During an Eligibility Hearing," Nov. 9, 1992, Defs.' Ex. H at 2, 13, 63 (FOIA response pp. 63 66, 470 73, 1503 04) ("Refugee Representation Memorandum"), withheld under attorney client, work product, and deliberative process privileges.

3. Email between USCIS staff discussing internal procedures when attorneys have double N 400 appointments, Defs.' Ex. H at 102 (FOIA response pp. 1908 15, 1916 18) ("N 400 Internal Procedures E Mails"), withheld under work product and deliberative process privileges.

4. Undated interoffice memorandum from USCIS Legislative Counsel to USCIS Chief Counsel regarding contact by members of USCIS's Fraud Detection and National Security Division with individuals represented by counsel, Defs.' Ex. H at 90 91 (FOIA response pp. 1785 87, 1806 08) ("FDNS Interoffice Memorandum), withheld under deliberative process privilege.

5. Internal USCIS policy on interviews and interview techniques, Defs.' Ex. H at 114 15 (FOIA response pp. 1987 89) ("Interview Techniques Policy"), withheld under deliberative process privilege.

6. Policy guidance titled "Important information for applicants and petitioners know your rights—protect yourself from imposters," Defs.' Ex. at 65 (FOIA response pp. 1521 25) ("'Know Your Rights' Policy Guide"), withheld under deliberative process privilege.

7. Emails among USCIS staff "discussing procedures to handle situations that arise when attorneys get belligerent," Defs.' Ex. H at 77 (FOIA response p. 1673), withheld under work product and deliberative process privileges, and "E mail regarding field interaction with attorneys and representatives dated 25 April between agency counsels," Defs. Ex. H at 89 (FOIA response p. 1779) (collectively, "Attorney Guidance E Mails"), withheld under work product and deliberative process privileges.

8. Interoffice memorandum regarding "Access to USCIS spaces," Aug. 3, 2009, Defs.' Ex. H at 95 96 (FOIA response pp. 1849 50) ("Access to USCIS Spaces Memorandum"), withheld under deliberative process privilege.

9. Emails among USCIS staff discussing "internal agency policies on advance parole requests," Mar. 27, 2007, Defs.' Ex. H at 98 99 (FOIA response 1894 96, 1897 99) ("Advance Parole Requests E Mails"), withheld under work product and deliberative process privileges.

10. Emails among USCIS staff discussing AILA conference, Defs.' Ex. H at 99 102 (FOIA response pp. 1889 92, 1900 06) ("AILA Conference E Mails"), withheld under deliberative process and work product privileges.

11. Emails among USCIS staff discussing "a situation that occurred during an AILA meeting," Mar. 5, 2008, Defs.' Ex. H at 115 16 (FOIA response pp. 1991 92) ("AILA Incident E Mails"), withheld in part under deliberative process and work product privileges.

12. Email among USCIS staff discussing "internal procedures regarding the reception window at a field office," Mar. 26, 2009, Defs.' Ex. H at 104 (FOIA response p. 1929) ("Field Office Reception Window E Mails"), withheld under deliberative process and work product privileges.

13. Letter "given to an officer being selected to participate in the I 485 program and assigned duties," Defs.' Ex. H at 113 14 (FOIA response pp. 1981 83) ("I 485 Program Letter"), withheld under deliberative process privilege.

14. AILA/HAR CIS Liaison Minutes of meetings held on May 27, 2009, Dec. 1, 2009, and Oct. 27, 2010, Defs.' Ex. H at 116 17, 119, 122 (FOIA response pp. 1995 97, 2001 02, 2024, 2037) ("AILA Liaison Meeting Minutes"), withheld under deliberative process privilege.

15. Memorandum entitled "Role of Consultants in the Credible Fear Interview," dated November 14, 1997, Defs.' Ex. H at 5 (FOIA response pp. 103 04)("Credible Fear Interview Memorandum"), withheld under deliberative process privilege.

Pltf's Opp. at 15-18.

More specifically, with respect to Document #1, the PowerPoint presentations, Plaintiff argues that "[b]ecause this document contains a description of existing agency policies and practices and is not related to decision-making on new practices, it is neither predecisional or deliberative." Pltf's Opp. at 21 (citation omitted). However, the Vaughn Indices explained that the deliberative process privilege was applied to this document because it was drafted by agency attorneys and was used to provide internal agency training on adjudicator interactions with private attorneys and representatives." Defs' Mtn, Ex. H at 1. It contains USCIS attorneys' impressions and recommendations on developing agency policy regarding represented and unrepresented individuals appearing in USCIS proceedings, and the information in the presentation was prepared in anticipation of use in administrative hearings. Am. Vaughn Index at 2. Therefore, Defendants properly applied the deliberative process privilege to this document.[5]

Plaintiff also argues that the deliberative process privilege does not apply to the N-400 Internal Procedures emails (Doc. #3); Attorney Guidance E-Mails (Doc. #7); Advance Parole Requests E-Mails (Doc. #9); AILA Conference E-Mails (Doc. #10); and Field Office Reception Window E-Mails (Doc. #12) because Defendants have "not articulate[d] whether the[] discussions [within these emails] relate[] ... to decisions on new or revised policies or procedures as opposed to providing explanation of existing policies or procedures." Pltf's Opp. at 21. However, a document is predecisional because it is generated before the adoption of an agency

[5]To the extent that this document was not properly withheld under the deliberative process privilege, as the Vaughn Index indicates, it also was withheld under the attorney work-product and attorney-client privileges. See infra.

policy, see Coastal States Gas Corp., 617 F.2d at 866, and these documents were drafted before the final adoption of agency policy on the matter. In addition, the deliberative process privilege remains even after a final decision has been made, because "disclosure at any time could inhibit the free flow of advice." Fed. Open Market Comm. v. Merrill, 443 U.S. 340, 360 (1979).

Document #3 was properly withheld under the deliberative process privilege because it was an "[e]mail between USCIS staff [which] discuss[ed agency] internal procedures when attorneys have double N-400 appointments around the same time." Defs' Mtn, Ex. H at 104-105. This email between attorneys contained their deliberations about what the procedures should be. As such, it was deliberative because it did not "constitute or reflect the whole of the agency's final determination on the [issue.]" Id. at 105. It was also predecisional because it did not "dispense with the [agency's consideration of the] issue ... in significant part." Id. As stated in the Vaughn Index, this document was withheld in order "to prevent injury to the quality of agency decisions." Id. Withholding these types of internal communications "encourage[s] open, frank discussions on matters of policy between subordinates and superiors; ... protect[s] against premature disclosure of proposed policies before they are finally adopted; and ... protect[s] against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action." Id. Therefore, this email was properly withheld under the deliberative process privilege.[6]

Document #7 was withheld pursuant to the deliberative process privilege because it contained emails between USCIS staff regarding how to deal with private attorneys who get belligerent, Defs' Mtn Ex. H at 79, and emails between USCIS staff including Office of Chief Counsel staff "regarding field interaction between attorneys and representatives dated April

[6] Document #3 also was properly withheld under the attorney work-product privilege of Exemption 5.

25...." Id., Ex. H at 92. These emails were withheld because they occurred before the agency's adoption of any final policy on the matter. In addition, the emails were deliberative because they contained the attorney's deliberations about how such situations should be handled. These emails were properly withheld because their disclosure would discourage open and frank communication within the agency, and thereby impact the quality of agency decisions. Indeed, Exemption 5 "rests most fundamentally on the belief that were agencies forced to 'operate in a fishbowl,' the frank exchange of ideas and opinions would cease and the quality of administrative decisions would necessarily suffer." Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1567 (D.C.Cir.1987)(quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)).[7]

Document #9 was withheld under the deliberative process privilege because it contained emails dated March 27, 2007 "between USCIS staff discussing internal agency policies on advance parole requests." Defs' Mtn, Ex. H at 100. These documents were properly withheld in that they were predecisional; they were drafted prior to any final agency decision regarding internal policies to be used for advance parole requests. These emails also were deliberative because they contained USCIS staff's recommendations and opinions on what these internal policies should be. These emails should be protected because they were "a direct part of the deliberative process in that [they made] recommendations or expresse[d] opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Hence, they should be withheld in order "to protect against premature disclosure of [the] proposed policies before [they are] finally adopted." Defs' Mtn, Ex. H. at 101. [8]

[7] Document #7 also was withheld under the attorney work-product privilege of Exemption 5.
[8] Document #9 also was withheld under the attorney work-product privilege of Exemption 5.

Document #10 contained emails between USCIS staff, dated March 1, 2007, regarding "what topics should be covered by USCIS during and AILA town hall meeting[,]" id. at 100, and emails between USCIS staff, dated March 30, 2007, debriefing on the AILA Forum. Id. at 102. The March 1, 2007 emails were withheld under the deliberative process privilege because they reflected the open and frank discussions by agency superiors and subordinates about what they should discuss at the upcoming meeting. Therefore, they were deliberative. They also were predecisional as they did not reflect the final decision on what was to be discussed. Therefore, these emails were properly withheld. The March 30, 2007 emails reflected the opinions of internal staff about the AILA forum. They reflected open and frank discussions regarding the forum. They did not result in a final agency policy. Therefore, these emails were properly withheld under the deliberative process privilege.[9]

Document #12 contains emails, dated March 26, 2009, "between USCIS staff discussing internal procedures regarding the reception window at a field office and processes for reception window action ...." Defs' Mtn, Ex. H at 107. These emails were withheld because they were deliberative in that they reflected the personal opinions and recommendations of the staff. They also were predecisional because they were created prior to the agency's adoption of a final policy regarding the internal procedures and processes for the reception window. Therefore, these emails were properly withheld.[10]

Plaintiff also argues that the deliberative process privilege does not apply to Document #s 4, 5, 8 13 and 14 because the Vaughn Index does not indicate what decision was under consideration. Hence, Plaintiff contends, they cannot be predecisional. See Pltf's Opp. at 20-21.

[9] Document #10 also was withheld under the attorney work-product privilege of Exemption 5.
[10] Document #12 also was withheld under the attorney work-product privilege of Exemption 5.

However, in determining whether a document is predecisional, the Supreme Court has determined that the emphasis of the privilege does not "turn on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." Sears, Roebuck & Co., 421 U.S. at 151 n.18. Ultimately, the privilege is meant to protect the decisional process, rather than any particular document or decision. Id.; see also Dudman Commc'ns Corp., 815 F.2d at 1568 ("Congress enacted Exemption 5 to protect the executive's deliberative processes -- not to protect specific materials.").

In addition, Document #4 was properly withheld pursuant to the deliberative process privilege. This document is an "[i]nteroffice memorandum from USCIS Legislative counsel to USCIS Chief Counsel regarding F[raud Detection and National Security Division] contacts with individuals represented by counsel ...." Defs' Mtn, Ex. H at 93. This document was drafted prior to the adoption of any final agency policy regarding this matter. In addition, this document was deliberative because it contained opinions and recommendations on this legal matter. See Vaughn, 523 F.2d at 1143-44 (a deliberative document "makes recommendations or expresses opinions on legal or policy matters.") The release of this interoffice memorandum would interfere with the give and take of the agency decision making process. See U.S. v. Morgan, (Morgan IV), 313 U.S. 409, 422 (1941) (The deliberative process privilege prevents harm to the quality of agency decisions by shielding the opinions, conclusions and reasoning used in the administrative and decision-making process of the government.). Document #5 contained pages

discussing internal USCIS policy on interviews and interview techniques. This document was withheld under the deliberative process privilege because it discusses proposed policies regarding techniques to be used during future interviews. See Am. Vaughn Index at 89.

Document #8 is an internal agency memorandum, dated August 3, 2009, from a USCIS District to all District employees regarding procedures for accessing USCIS internal space. It was withheld because it was developed to offer guidance to USCIS employees regarding limitations on non-employees, including benefit applicants, entering USCIS space for the hearings process.[11] See Defs' Mtn, Ex. H at 98. Document #13 is an "internal letter given to an officer being selected to participate in the I-485 program and assigned duties ...." Defs' Mtn, Ex. H at 116. This document contains information regarding internal agency procedures that the officer may be required to follow and was properly withheld. Document #14 consists of AILA/HAR CIS Liaison Minutes of meetings held on May 27, 2009, December 1, 2009 and October 27, 2010. These minutes were prepared by a USCIS employee for use in future discussions by USCIS of its policies and procedures. As this Court has indicated, "'[a]gencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and lower courts should be wary of interfering with this process.'" Mayer, Brown, Rowe & Maw LLP v. IRS, 537 F.Supp.2d 128, 138 (D.D.C. 2008), quoting Sears, Roebuck & Co., 421 U.S. at 151 n.18.

Finally, Document #15 was withheld pursuant to the deliberative process privilege. This document is a memorandum, dated November 14, 1997, entitled "Role of Consultants in the

[11]In light of the safety concerns at issue, this document could be withheld under Exemption 7(F) which allows for the withholding of "records or information compiled for law enforcement purposes" the disclosure of which "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F).

Credible Fear Interview,' which was from the then Immigration and Naturalization Service Director of the Office of International Affairs, Asylum Division. As indicated in the Vaughn Index, this internal agency memorandum addressed the role ... a consultant, including an alien's counsel, played during a credible fear interview and included proposed guidance to immigration officers on dealing with consultants during credible fear interviews." Defs' Mtn, Ex. H at 5. This document was deliberative because it contained the recommendation of a staff member on how to deal with this issue. Releasing this information would reveal the reasoning used in the administrative and decision-making process of the government, and cause harm to these processes. This document also was predecisional in that it "was developed prior to issuance of formal guidance on this topic and referred staff to forthcoming guidance on this issue." Id. Releasing it would potentially cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for an agency's action. Plaintiff, nevertheless, claims that this document was a final policy statement and should be disclosed. However, the fact that, as Plaintiff notes, the "memorandum … explain[s] that further guidance will be issued," Pltf's Opp. at 22, indicates that this was not a final policy statement. As the Vaughn Index indicated, this document "was developed *prior* to the issuance of formal guidance on this topic," and it was appropriately withheld.[12]

Hence, as established in the Vaughn Index and the Eggleston Declarations, the above documents were properly withheld under the deliberative process privilege, and the assertion of Exemption 5 with respect to these and the remaining documents should be withheld. See Mo.

[12]Plaintiff complains that Defendants did not release an earlier or subsequent guidance. However, a search is not rendered inadequate merely because it failed to "uncover every document extant." SafeCard Servs., 926 F.2d at 1201. "[T]he issue in a FOIA case is not whether the agencies' searches uncovered responsive documents, but rather whether the searches were reasonable." Moore, 916 F.Supp. at 35.

Coal. for the Env't. Found. v. Army Corps of Eng'rs, 542 F.3d 1204, 1211(8th Cir. 2008) (upholding agency's use of deliberative process privilege where it could be "fairly concluded""from Vaughn Index and declaration that release of documents could reveal deliberative process).

Plaintiff provided no argument for why the deliberative process privilege did not apply to documents 2, 6 or 11. Therefore, Defendants arguments regarding this privilege's applicability to these documents should be deemed conceded. See Buggs v. Powell, 293 F.Supp.2d 135, 141 (D.D.C. 2003)(If "a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."), citing FDIC v. Bender, 127 F.3d 58, 67 68 (D.C. Cir.1997). Nevertheless, Defendants have addressed the application of the deliberative process privilege to these documents in their Vaughn Index. See Am. Vaughn Index at ¶¶ 2, 16, 65, 89; Defs' Mtn., Ex. H at 66.

Finally, Plaintiff states that "Defendants have offered no basis to conclude that they have released segregable, nonexempt portions of the documents." Pltf's Opp. at 23. In order to demonstrate that all reasonably segregable material has been released, the agency must provide a "detailed justification." However, the agency is not required "to provide such a detailed justification" that the exempt material would effectively be disclosed. Id. All that is required is that the government show "with 'reasonable specificity'" why a document cannot be further segregated. Armstrong v. Exec. Office of the President, 97 F.3d 575, 578-79 (D.C. Cir. 1996). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal

or no information content." Mead Data Cent. Inc. v. Dep't of the Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977). To support its argument, Plaintiff cites to Document 6, which was withheld in full pursuant to Exemption 5, and indicates that it contains factual information -- "the names of attorneys that are NOT eligible to represent clients before USCIS." Id. However, in addition to the fact that this entire document is subject to protection under the privilege, a fact which Plaintiff did not address, these names would be subject to protection pursuant to Exemption 6 because their disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). As the Supreme Court has stated, the primary purpose of enacting Exemption (b)(6) was "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

With respect to the remainder of the documents, the Eggleston Declaration indicated that "USCIS staff determined [that] the withheld records contained no reasonably segregable portions of non-exempt information." Eggleston Dec. at ¶19. Moreover, the Second Eggleston Declaration indicates that "[a]ll responsive documents were reviewed with an eye toward providing the fullest possible disclosure and, in furtherance of this goal, received a line-by-line examination in an effort to identify all reasonably segregable, unprivileged, nonexempt portions for release to Plaintiff. [Further, n]on-exempt portions of records were inextricably intertwined with exempt portions thereby precluding their release." Second Eggleston Dec. at 6-7; 5 U.S.C. § 552(b). Hence, the Defendants have shown, with reasonable specificity why further information cannot be disclosed from these documents.

2. Attorney Work-Product Privilege

Plaintiff contends that the attorney work-product privilege is inapplicable to Document #1, the PowerPoint presentations. Plaintiff states that the presentations merely "serve as an instructional tool to teach USCIS adjudicators ... about 'internal practices, techniques and procedures used ... during administrative hearings ...." Pltf's Opp. at 26. However, the PowerPoint presentations were "generated by the Office of Chief Counsel to provide internal agency training on the interaction with private attorneys and representatives." Defs' Mtn, Ex. H at 106. The release of the presentations would "disclose substantial internal practices techniques, and procedures used by the Agency ...." Id. at 106. They contain legal opinions on the development of USCIS policy and procedures for administrative hearings in which an individual appears with or without a representative. Because individuals seeking benefits from USCIS often appeal adverse rulings to federal court, the[] procedures taught in these PowerPoint presentations were prepared in anticipation of litigation. Indeed, as this Court has stated, "administrative litigation certainly can beget court litigation and may in many circumstances be expected to do so." Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 700 (D.D.C.1983). Moreover, the litigation which is anticipated need not be imminent, as long as the motivating factor behind the creation of the document was to aid in possible future litigation. U.S. v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981); A. Michael's Piano, 18 F.3d. at 146; Hickman v. Taylor, 329 U.S. 495, 511 (1947). Therefore, these internal presentations were properly withheld under the attorney work-product privilege of Exemption 5.

Plaintiff also argues that Document #2, the Refugee Representation Memorandum, dated November 9, 1992, should not be protected by the attorney-work product privilege. Plaintiff

states that this document is merely "the agency's view of the law ...." Pltf's Opp. at 27. However, this document provides legal advice, from INS counsel, to the agency in contemplation of contested administrative hearings "regarding when a person, applying abroad for admission to the United States as a refugee is entitled to representation at the hearing to determine the applicant's admissibility." Defs' Mtn, Ex. H at 2. As indicated in the Vaughn Index, the disclosure of this information "would disclose substantial internal practices, techniques, and procedures used by the Agency during administrative hearings." For the attorney work product privilege to apply, the litigation at issue need not be judicial, rather, courts have found that the attorney work-product privilege extends to documents prepared in anticipation of administrative litigation. See Exxon Corp., 585 F.Supp. at 700. Moreover, the litigation which is anticipated need not imminent, as long as the motivating factor behind the creation of the document was to aid in possible future litigation. Davis, 636 F. 2d at 1040. Therefore, this document was properly withheld pursuant to the attorney work-product privilege.

Plaintiff also contends that the attorney work-product privilege does not apply to Document #s 3, 7, 9, 10, 11 and 12 because Defendant did not show that these documents were prepared because of the prospect of litigation. See Pltf's Opp. at 25. However, the documents appropriately were withheld. "Any part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under Exemption 5." Judicial Watch, Inc. v. DOJ, 432 F.3d 366, 369 (D.C. Cir. 2005). Specifically, Document #s 3, 7, 9 and 12 concern the processes and procedures for attorneys to follow when they are representing the interests of USCIS in administrative hearings. See Defs' Mtn., Ex. H. at 77, 98, 99, 102, 104, 117-18; Am. Vaughn Index at 70, 80-

83, 90. Document #10's emails were properly withheld under the attorney work product privilege because they contained information that is often the subject of USCIS' administrative litigation and how its attorneys are to handle that litigation. Document #11 contains emails "between USCIS staff and attorneys re[garding] a situation that occurred during and AILA meeting." Defs' Mtn, Ex. H at 118. These emails were withheld under the attorney work-product privilege because, through discussion of the incident, the emails offered internal guidance to the recipients about how to handle such incidents in the future. Therefore, as established in the Vaughn Index and the Amended Vaughn Index, the above documents were properly withheld under the attorney work-product privilege, and the assertion of Exemption 5 should be withheld.[13]

3. Attorney Client Privilege

Defendants have asserted the attorney client privilege to protect Document #s 1 and 2. Plaintiff, however, contends that the privilege is not applicable to these documents because Defendants have not shown that the communications "rest on confidential information obtained from the client." Pltf's Opp. at 28 (citation omitted). In addition, Plaintiff argues that Defendants cannot show that the confidentiality of the communication at issue has been maintained." Id. However, Document #1, the PowerPoint Presentations, were prepared by the Office of Chief Counsel for the use of USCIS attorneys and staff. Therefore, they are attorney-client communications. This is because the attorney client privilege "protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." See In re Sealed Case, 737 F.2d 94, 98 99 (D.C.

[13] Even if these documents were not properly withheld pursuant to the Attorney Work-Product Privilege, they were properly withheld pursuant to the Deliberative Process Privilege of Exemption 5.

Cir. 1984). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997). In addition, the information in the PowerPoint Presentations contain attorneys impressions of developing agency policy regarding USCIS immigration proceedings involving represented and unrepresented individuals, and contained legal advice for the recipients. In addition, these confidential communications between the government attorneys were created for internal training purposes. In addition, Document #2, the Refugee Representation Memorandum, "addressed the legal opinion of [the] INS general counsel on the rights of a refugee to be represented at a hearing to determine eligibility." Defs' Mtn, Ex. H at 65. This document should be protected pursuant to the attorney-client privilege because it is a memorandum prepared by then INS General counsel to the Office of International Affairs and provides legal advice in anticipation of contested administrative hearings. See Am. Vaughn at 16. Therefore, as established in the Vaughn Indices, Documents 1 and 2 were properly withheld pursuant to the attorney-client privilege, and the assertion of Exemption 5 should be withheld.

D. Defendant Properly Withheld Information Pursuant to Exemption (b)(6).

Exemption (b)(6) of the FOIA provides for the withholding of matters contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). The primary purpose of enacting Exemption (b)(6) was "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Washington Post Co., 456 U.S. at 599. Defendant asserted Exemption 6 to protect employee cell phone numbers, conference call passcodes, employee's personal leave information, contractor's personal

information, immigration file numbers and names and details about individuals in specific immigration proceedings. See Defs' Mtn at 26-27. This information was properly withheld because its release was not in the public interest and would not "she[d] light on [USCIS]'s performance of its statutory duties ...." Lepelletier v. FDIC, 164 F.3d 37, 46 (D.C. Cir. 1999). Moreover, Plaintiff has failed to present any arguments regarding why Defendants' specific withholdings pursuant to Exemption 6 are insufficient. As indicated supra, if "a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." Buggs, 293 F.Supp.2d at 141, citing Bender, 127 F.3d at 67 68; Stephenson v. Cox, 223 F. Supp. 2d 119, 121 (D.D.C.2002). See Brown v. Broadcasting Bd. of Governors, 662 F. Supp.2d 41, 47 (D.D.C. 2009). Therefore, because Plaintiff has failed to address Defendants' arguments regarding the application of Exemption 6 to the documents withheld, in full or in part, Plaintiff has conceded them. Hence, Defendants' withholdings pursuant to Exemption 6 should be upheld. See Twelve John Does v. D.C., 117 F.3d 571, 577 (D.C.Cir.1997)("Where the district court relies on the absence of a response as a basis for treating the motion as conceded, [the District of Columbia Circuit will] honor its enforcement" of Local Civil Rule 7(b)); see also Fox v. Am. Airlines, Inc., 389 F.3d 1291, 1294 (D.C. Cir. 2004).

II. CONCLUSION

For the reasons explained herein, and in Defendants' Motion to Dismiss and for Summary Judgment, Defendants respectfully request that the Court grant the government's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 6th day of September 2012, the foregoing was sent via the Court's Electronic Mail System to Plaintiff's counsel:

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