UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.* Defendants.	)	Civil Action No. 12-856 (JEB)

DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of Homeland Security and United States Immigration and Customs Enforcement ("Defendants" or the "Agency"), respectfully renew their motion, by and through undersigned counsel, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as no genuine issue of material fact exists that Defendants have satisfied all of their obligations pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 in response to Plaintiff American Immigration Counsel's ("Plaintiff") request for information. As demonstrated by the attached Statement of Material Facts Not in Genuine Dispute and the following Memorandum of Points and Authorities, Defendants are entitled to judgment as a matter of law as Defendants conducted a reasonable search, produced all documents responsive to Plaintiff's request and subject to FOIA, and properly withheld information pursuant to the statutory exemptions.

Dated: November 7, 2013
Washington, DC

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

Plaintiff American Immigration Council ("Plaintiff" or "AIC") has wasted enough of the Court's and Defendants' time with their attempt at either: 1) a taxpayer-funded fishing expedition based on AIC's unfounded speculation; or 2) an improper policy attack shoehorned into a case allegedly premised on a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Unlike other recipients of AIC's FOIA requests, Defendant United States Department of Homeland Security ("DHS") through its sub-agency, Defendant United States Immigration and Customs Enforcement ("ICE," together with DHS, "Defendants," the "Government," or the "Agency") have gone above and beyond the requirements of FOIA, conducted exhaustive searches of its systems of records, and provided voluminous records to Plaintiff. Further, the Agency has been willing to provide samples of records to Plaintiff to allow it to examine them and determine whether the records were relevant to its request, then spend additional resources processing those records. Despite spending a staggering amount of time searching for responsive documents – over thirty-five (35) hours, *see* 3d Decl. of Ryan Law, Deputy FOIA Officer, ICE [ECF No. 22-1] (hereinafter "3d Law Decl.") at 6-11 – and producing

almost 7,000 pages of records (all at no cost to Plaintiff due to its public interest group status), Plaintiff continues to insist that there must be some sort of "smoking gun" document that answers specific *policy* questions it wants answered. Plaintiff misconstrues the nature of these proceedings – FOIA is not a vehicle through which a not-for-profit corporation can challenge formal policy decisions (or lack thereof) by a federal agency. Rather, it is a statute that provides the public with access to non-exempt information accessed after a reasonable and adequate search. In fact, based on the statutory requirements of FOIA, Defendants are entitled to judgment as a matter of law as, in response to AIC's request for information, Defendant: (1) conducted a reasonable and adequate search; (2) produced all documents responsive to Plaintiff's request and subject to FOIA; and (3) properly withheld information pursuant to the statutory exemptions.

I. SUMMARY OF RELEVANT FACTS

A. Plaintiff's FOIA Request

Plaintiff submitted its FOIA request to the ICE FOIA Office by letter dated March 14, 2011, which was received at the Agency on March 31, 2011. (*See* 3d Law Decl. at 3, ¶ 8.) Plaintiff's FOIA request sought information relating to an attorney's ability to be present during their clients' interaction with ICE, as well as what role the attorney may play during their clients' interactions with ICE, attorney conduct during interactions with ICE on behalf of their clients, and attorney appearances at ICE offices or other facilities. (*Id.*) By letter dated March 31, 2011, the ICE FOIA Office acknowledged receipt of Plaintiff's FOIA request and assigned it FOIA case number 2011FOIA7112. (*Id.* at 3, ¶ 9.)

Upon receiving Plaintiff's FOIA request, the ICE FOIA Office reviewed the request and determined that based on the subject matter of the FOIA request, the following offices and

divisions were the ones likely to possess responsive records: the ICE Office of Enforcement and Removal Operations (ERO), the ICE Office of Homeland Security Investigations (HSI), and the ICE Office of the Principal Legal Advisor (OPLA) (*see id.* at 3, ¶ 10).

By letter dated August 11, 2011, Plaintiff submitted an appeal to the OPLA Government Information Law Division (GILD) alleging constructive denial of their request. (*Id.* at 4, ¶ 11.) By letter dated September 23, 2011, ICE OPLA GILD responded to Plaintiff's appeal, indicating that the search was still ongoing, and that the case was currently being processed. (*Id.* at 4, ¶ 12.) By letter dated September 27, 2011, ICE responded to Plaintiff's March 14, 2011, FOIA request. (*Id.* at 4, ¶ 13.) ICE informed Plaintiff that a search of the records failed to produce records responsive to the Plaintiff request. (*Id.*)

By letter dated October 27, 2011, Plaintiff appealed ICE's September 27, 2011 response. (*Id.* at 4, ¶ 14.) ICE OPLA GILD responded to the Plaintiff's October 27, 2011 appeal challenging the adequacy of the search, and remanded the request to the ICE FOIA Office for additional searches and processing by letter dated February 29, 2012. (*Id.* at 4, ¶ 15.) In a letter dated March 1, 2012, ICE issued an acknowledgment of the remanded request and assigned the remanded request FOIA case number 2012FOIA8229. (*Id.* at 5, ¶ 17.) Subsequently, on April 27, 2012, Plaintiff appealed the constructive denial of its request and any implied fee waiver denial construed by the March 1, 2012 acknowledgment letter of ICE. (3d Law Decl. at 5, ¶ 18.) Then, on March 31, 2012, Plaintiff filed the complaint in this case [ECF No. 1]. After commencement of this litigation, the ICE FOIA Office continued the process of searching for and processing records responsive to Plaintiff's FOIA request; a process that had already begun before Plaintiff filed its lawsuit. (*See* 3d Law Decl. at 5, ¶ 20.)

B. ICE Tasks Another Office Likely to Have Responsive Records

In addition to a re-tasking of the components listed above in response to Plaintiff's request, ICE tasked the Office of Detention Policy and Planning (ODPP). (*Id*.) ODPP leads ICE's detention reform efforts by implementing short-term improvements to immediately address issues in the detention system as it currently exists and identifying longer-term improvements to help redesign the immigration detention system. (*Id.* at 12, ¶ 47.) ODPP is charged with designing a detention system that meets the unique needs of ICE's detained population. (1st Decl. of Ryan Law [ECF No. 12-2] at 12-13, ¶ 29.) ODPP shapes the future design, location and standards for civil immigration detention facilities so that ICE no longer relies primarily on existing penal models. (*Id.* at 13, ¶ 29.) ICE considers access to legal services, emergency rooms and transportation hubs, among other factors when determining future facility locations. (*Id.*)

C. ICE Continues to Search for and Process Responsive Records

As mentioned above, initially the ICE FOIA Office had at the outset thoroughly reviewed Plaintiff's request and determined that ICE ERO, HSI, and OPLA would be the ICE program offices that would likely maintain records that would be responsive to Plaintiff's FOIA request, and later instructed ODPP to conduct a search, as well. (*Id.* at 5-6, ¶ 22-23.) The ICE FOIA office asked for a supplemental search to be performed of each of these offices. (*Id.*) ICE has provided painstaking detail on the rationale behind why each division was determined to likely possess responsive records, the databases searched, and the types of searches performed. (*See id.* at 6-13.)

D. ERO Conducts an Exhaustive Search for Responsive Records

One ICE component likely to contain the responsive records Plaintiff sought was ERO. Specifically, ERO is the ICE component charged with, among other things, apprehending removable aliens, detaining them, and then removing them from the United States – a component that would probably be involved with issues of access to counsel for immigration detainees. (*Id.* at 6, ¶ 24.) ERO searched its Resource Library which is "an electronic system available to all ICE and ERO employees via the ICE intranet ***that contains current and archived policies***, templates, memoranda, worksheets, directives, handbooks, standard operating procedures, and broadcast messages related to the mission of ICE ERO." (*Id.* at 7, ¶ 27 (emphasis added).) ERO's sub-component, the Custody Management Division, conducted an **eight (8) hour** search of paper and hard-copy files, along with untimed searches of Network Shared Drives using specific, targeted terms, but also broad terms like "detention facility." (*Id.* at 7-8, ¶¶ 29-30.) Finally, the aforementioned Resource Library was again searched using the search terms "attorney," "court," "client," and "noncitizen," by an ERO writer-editor who also searched his desktop computer using the same terms. (*Id.* at 8, ¶ 30.) Amazingly, ERO did not stop there. An additional **sixteen (16) hour** search of the aforementioned Network Shared Drive was conducted using better search terms than the prior search, specifically: "Telephone Access," "Visitation," "Legal Rights," "Group Presentations," "Law Library," "Legal Material," and "Detainee Transfer." (*Id.* at 8, ¶ 31.) These searches were reasonably calculated to locate all records that would be responsive to the Plaintiff's FOIA request. (*Id.* at 8, ¶ 32.)

E. ICE's Legal Advisors Conduct a Thorough Search

Next, OPLA – ICE's in-house attorneys – tasked its most relevant sub-components, the Homeland Security Investigations Law Division ("HSILD") and the District Court Litigation

Division. (*Id.* at 10, ¶ 38.) HSILD is the sub-component that, among other things, provides legal advice to ERO offices involved in the detention and removal of aliens suspected of human rights violations or national security concerns; it is therefore logical that HSILD would have responsive documents to Plaintiff's request related to access of counsel. (*Id.* at 10, ¶ 39.) A search of the Network Shared Drive using the terms "attorney representation," "access to counsel," and "right to counsel" took an hour; another search was done of the Division Chief's e-mail using the same terms and of targeted other individuals' e-mails. (*Id.* at 10-11, ¶¶ 39-40.) These searches were reasonably calculated to locate all responsive records. (*Id.* at 11, ¶ 40.)

Similarly the District Court Litigation Division had an Associate Legal Advisor take 2 hours away from his normal duties to search the Litigation Database, his computer, and his e-mail database using targeted search terms including "Sixth and 6th Amendment" for the database and "Sixth or 6th Amendment", "Detainer", "Counsel", and "Worksite" for the computer and e-mail. (*Id.* at 11, ¶ 42.) The District Court Litigation Division did not stop there, however. In fact, the Division tasked another Associate Legal Advisor who conducted a manual hand search of the office's paper files, including filing cabinets and book shelf. (*Id.* at 11, ¶ 43.) He also re-searched the Litigation Database using even more search terms, including "right to counsel," "6th amendment," "have counsel present," "seek counsel," and "right to representation." (*Id.*) Further, he searched the Division's compact discs using these same terms. (*Id.*) This search took 4 hours for the Associate Legal Advisor – hours away from his normal duties to fulfill the Agency's obligations under the FOIA. (*Id.* at 11, ¶ 43.)

Despite already spending 6 hours of employee time, the District Court Litigation Division still pressed on and had a third Associate Legal Advisor spend another 2 hours away from his regular duties and hand search the office's paper files, including the filing cabinets and search his

computer and e-mail using the terms "attorney-client," "communications," "interactions," "right to counsel," "detention facility(ies)," and "representation." (*Id.* at 12, ¶ 44.) Thus, three separate attorneys spent over 8 hours away from their regular duties to conduct thorough searches for information responsive to Plaintiff's request; these searches were reasonably calculated to locate all documents responsive to Plaintiff's FOIA request. (*Id.* at 12, ¶¶ 44-46.)

F. ODPP Completes Its Broad Search

Finally, ODPP tasked its Chief of Staff to search its Network Shared Drive, the documents on his computer, and the ERO Resource Library using the term "attorney." (*Id.* at 12-13, ¶ 48.) He also searched the ICE Policy Manual – an intranet electronic system that contains ***current and archived ICE-wide management and operational policies***, documents, templates, memoranda of agreement, memoranda of understanding, and delegation orders. (*Id.* at 13, ¶ 50.) Specifically, the Policy Manual has documents related to, among other things, ***security, training, privacy, enforcement and investigations, detention and removal, and legal issues.*** (*Id.*) These searches were reasonably calculated to locate all documents responsive to Plaintiff's FOIA request. (*Id.* at 13, ¶ 51.)

G. ICE Produces 6,906 Pages of Records to Plaintiff

After conferring, the parties agreed to a rolling production and, after five interim releases, ICE produced a total of 6,906 pages of records subject to FOIA and responsive to the Plaintiff's request. (1st Law Decl. [ECF No. 12-2] at 13, ¶ 33.) ICE informed Plaintiff through counsel that portions of the records were withheld pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). (*Id.* at 13, ¶ 34.) Upon further review of the produced records, after conferring in good faith, and to narrow the issues in dispute before the Court, Plaintiff and the Defendants jointly entered into a stipulation stating which documents remain in dispute for purposes of this

litigation [ECF No. 12-11]. The Court denied Defendants' initial motion for summary judgment [ECF No. 19, 20], but noted that Plaintiff no longer contested Defendants' assertions of Exemption 6 and 7(C), *see id.* at 20, and the information withheld under those exemptions is no longer at issue in this case. After a status conference before the Court, the Court ordered an updated *Vaughn* index and supplemental declaration by Minute Order of July 9, 2013.

The parties worked diligently to try to resolve the remaining issues in dispute, but were unable to do so and Plaintiff requested a briefing schedule requiring the instant motion. In an effort to further reduce the number of pages in dispute, ICE is also attaching 88 pages that had been labeled as "non-responsive." (*See* Decl. of Catrina Pavlik-Keenan, ICE FOIA Officer (attached to Def. St. of Mat. Facts as Exhibit "A") at 3, ¶ 7.) These documents consist of 86 pages that are identical copies of documents already processed[1] and released to Plaintiff and a single 2 page document inadvertently included in the batch of documents to be processed that is an internal search tracker created during the processing of Plaintiff's request that post-dates Plaintiff's request and is not responsive to Plaintiff's request. (*Id.* at 3, ¶ 8.) In an abundance of caution, the Agency has gone ahead and produced this single, non-responsive document with the name of the employee conducting the search redacted. (*Id.* at 3, ¶ 9.)

[1] For ease of cross-reference for the Plaintiff and the Court, the documents correspond as follows:

Reprocessed Bates # for "Non-Responsive"	**Corresponding Bates # from 1st release ("Twin")**
433 – 436	431 – 432
582 – 583	*Tracker sheet
784 – 785	782 – 783
789 – 793	782 – 783; 830 – 831
796 – 797	794 – 795
842 – 844	789; 782; 830 – 831
847 – 854	809 – 816
859 – 867	809 – 816
868 – 875	809 – 816
879 – 908	806 – 816; 845 – 847
916 – 917	822
929 – 931	814 – 816
935 – 944	807 – 816.

II. ARGUMENT

A. Standard of Review

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Id.* at 247. "The burden on the moving party may be discharged by 'showing' – that is, pointing out to the [Court] – that there is an absence of evidence to support the non-moving party's case." *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment here, the Plaintiff (as the non-moving party) must present some objective evidence that would enable the Court to find he is entitled to relief. In *Celotex Corp. v. Catrett*, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986). In *Anderson*, the Supreme Court further explained that "the mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff." *Anderson*, 477 U.S. at 252; *see also Laningham v. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (the non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor). In *Celotex*, the Supreme Court further instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the

Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. Summary Judgment Standard as Applied to FOIA Cases

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment. *See Cappabianca v. Commissioner, U.S. Customs Serv.*, 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment") (citing *Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir. 1993)). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the Plaintiff with affidavits or declarations and other evidence which show that the documents in question were produced or are exempt from disclosure. *Hayden v. NSA*, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (summary judgment in FOIA cases may be awarded solely on the basis of agency affidavits "when the affidavits describe 'the documents and the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'") (quoting *Military Audit Project v. Casey*, 656 F.2d

724, 738 (D.C. Cir. 1981)). *See also Public Citizen, Inc. v. Dep't of State*, 100 F. Supp. 2d 10, 16 (D.D.C. 2000), *aff'd in part, rev'd in part*, 276 F.3d 634 (D.C. Cir. 2002).

C. ICE Conducted a Reasonable Search in Response to Plaintiff's Request

As described in the summary of facts above and demonstrated in great detail by the Third Law Declaration, ICE has more than satisfied its obligations under the FOIA and has diverted precious resources away from not only its FOIA office, but its day-to-day operations (during a time of heightened scrutiny on immigration issues) in a more than good-faith attempt to respond to Plaintiff's FOIA request. The Agency has conducted a thorough, broad-sweeping, time-intensive search for responsive documents to Plaintiff's request and there can be no genuine issue of material fact that the search was adequate. Contrary to Plaintiff's representations in its complaint and prior filings, the fact that Plaintiff's ***policy*** questions may not have been answered by its FOIA request are irrelevant to the Court's resolution of this case. A hypothetical lack of a document or documents that Plaintiff thinks should exist, but either does not exist or was not identified during a thorough search cannot overcome the facts in this case – ICE, as demonstrated by its sworn declarations, conducted a more than adequate search for documents responsive to Plaintiff's request subject to FOIA.

Additionally, as described in detail by the Law Declaration, the Agency has confirmed that it identified *the* only offices reasonably calculated to maintain records responsive to Plaintiff's request. (3d Law Decl. at 5-6, ¶¶ 22-23.) Further, the comprehensive searches conducted by each ICE component and sub-component were reasonably calculated to locate all responsive records. (*Id.* at 8, ¶ 32; *id.* at 12, ¶¶ 45-46; *id.* at 13, ¶ 51.) Thus, the Agency's search was reasonable and adequate.

In fact, as this Court recently noted, "'The standard for determining whether a search was adequate depends on the adequacy of the search for documents, not whether additional potentially responsive documents exist.'" *Lardner v. F.B.I.*, 875 F. Supp. 2d 49 (D.D.C. 2012) (quoting *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994)). Further, "[a]n adequate search consists of a good faith, reasonable search of those systems of records likely to possess the requested information." *Id.* (citing *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Here, the updated Law Declaration provides specific and precise detail about why each ICE office searched was targeted and affirmatively avers that these offices were the ones which possessed potentially responsive documents and that the searches conducted swept up all responsive documents as required. *Oglesby*, 920 F.2d at 68; *cf. Nation Magazine, Wash. Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). Further, the detailed description of the offices searched, the persons conducting the searches, the databases searched, the terms used during any electronic searches, the paper files searched, and the amount of time spent on the searches provide more than adequate detail to demonstrate satisfaction of the standard set forth in *Oglesby* and show that no genuine issue of material fact remains. In fact, the Agency expended considerable time and resources identifying the offices and components which contained potentially responsive documents, tailoring searches reasonably calculated to identify those documents, taking the time to execute the searches, and then processing the almost 7,000 pages of documents these searches identified as responsive to Plaintiff's request and subject to FOIA. Defendants are therefore entitled to judgment as a matter of law.

D. ICE's Withholdings Were Appropriate

As undersigned counsel represented to the Court at the status conference, both he and the Agency apologize to the Court for the summary *Vaughn* index initially submitted to support

Defendants' original motion for summary judgment. Defendants erroneously believed based on their prior proffer of a summary *Vaughn* index for the first 1,084 pages of its production to Plaintiff that Plaintiff agreed to a summary *Vaughn*, but no such agreement had been made. Additionally, Defendants had believed that the parties may be able to even further narrow (or possibly eliminate) any issues in dispute related to the claimed exemptions via a summary *Vaughn* due to the similar nature of a high volume of documents and the obviously exempt nature of the information withheld (particularly under the attorney work product doctrine and attorney-client privilege), but Plaintiff's filings before the Court have demonstrated otherwise. Fortunately, the parties were able to meet and confer and agree upon the prior stipulation that reduces the issues in dispute in this litigation. (*See* Joint Stip., Ex. 2 to Def. Orig. Mot. for Summ. J.) Further, Defendants have supplied Plaintiff and the Court with a traditional, detailed *Vaughn* index that explains with specificity the subject matter of the documents in question and why the information redacted on the documents is statutorily exempt from FOIA and was properly withheld.

1. Exemption (b)(5)

First, the Agency properly withheld information pursuant to FOIA Exemption 5. Exemption (b)(5) protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption applies to materials that would be privileged in the civil discovery context, including materials that would be protected by the deliberative process privilege, the attorney work product privilege and the attorney-client privilege. *NLRB v. Sears, Roebuck Bd.*, 421 U.S. 132, 149 (1975); *see also Stonehill v. I.R.S.*, 558 F.3d 534, 538-39 (D.C. Cir. 2009). In *Stonehill*, the D.C. Circuit analyzed the interaction between Exemption 5 and the civil litigation

discovery process and found Exemption 5 to be more expansive than civil discovery privileges. 558 F.3d at 539. The D.C. Circuit explained that "not all documents available in discovery are also available pursuant to FOIA." *Id.* Exemption 5 protects "those memoranda which would not *normally* be discoverable in civil litigation against an agency," whereas in civil litigation "case-specific exceptions can sometimes permit discovery of otherwise privileged material." *Id.* (internal citation and quotation omitted) (citing *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983) ("It is not 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.")). Thus, Exemption 5 protects all information that would "not normally be discoverable in civil litigation against an agency," regardless of whether – if this were an ordinary civil suit – a litigant might be able to establish special circumstances justifying disclosure of the information in discovery.

Here, the Agency properly invoked exemption (b)(5) to withhold and redact inter-agency and intra-agency draft documents, comments by reviewers, marked revisions to drafts, as well as documents that consist of either a) Agency employees requesting legal advice; or b) Agency counsel's work product/information created at their behest, or a combination of these two. The withheld and redacted information meets the threshold for "inter-agency or intra-agency memorandums or letters," none of which are communications with third parties. The Agency properly withheld the information as exempt from disclosure under three privileges contemplated by Exemption 5: 1) deliberative process; 2) attorney-client; or 3) attorney work-product.

i. Deliberative Process

The deliberative process privilege naturally protects the "decision making processes of government agencies." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). As the

Supreme Court stated in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, "deliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" 532 U.S. 1, 8-9 (2001) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted)). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' *Sears, Roebuck & Co.*, at 151, by protecting open and frank discussion among those who make them within the Government." *Id.* at 9 (citing *EPA v. Mink*, 410 U.S. 73, 86-87 (1973); *United States v. Weber Aircraft Corp.*, 456 U.S. 792, 802 (1984)). To qualify for the deliberative process privilege, the government must show that the documents are both "pre-decisional" and "deliberative." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 186 (1975). Documents are pre-decisional when they precede an agency decision and are prepared in order to assist an agency in arriving at its decision. *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006); *see also Grand Central Partnership v. Cuomo*, 166 F.3d 473, 482 (2d Cir.1999). Documents are deliberative when they comprise any part of the process by which government decisions are made. *Id.*; *see also Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) ("[I]t is the document's role in the agency's decision-making process that controls.")

The information withheld in this case pursuant to the deliberative process prong of exemption (b)(5) was part of the internal deliberations of federal government employees regarding issues that resulted in final agency decisions. First, documents 522-528 are draft declarations with red-lined suggestions or corrections on both stylistic and substantive matters;

the final versions of these declarations represent the final agency decisions and were submitted to the district court and publicly released. Next, documents 624-657 contain draft ICE operation plans including comments on the premises description, draft investigation summaries, draft Operational Procedures, and proposed personnel assignments. Each of these documents is a pre-decisional document that reflects the advisory opinions or recommendations of ICE employees related to the final ICE operation plans. Therefore, as these documents are both pre-decisional and part of the Agency's deliberative process, they are exempt from public disclosure and the Agency's withholding was proper. *See Klamath*, 532 U.S. at 8-9.

Further, ICE withheld information on document pages 817-20 and 963-64 that contains discussions between a senior ICE employee, Dan Ragsdale, who is an attorney, but was acting in a non-attorney capacity, related to a draft answer to a right to counsel question which had already been prepared by an ICE attorney. This discussion is statutorily exempt as it contains the comments, suggestions, and edits of a draft document and is highly deliberative in nature.

Finally, the Agency withheld information contained in e-mails where Agency management as well as lower-level personnel sought specific advice from counsel on how to respond to certain inquiries from both courts and the public related to access of counsel issues. (*See Vaughn* Index, Ex. C to 3d Law Decl. [ECF No. 22-2] at 2-5 (describing documents 782-83, 788-89, 794-95, 798-802, 876-79, 913-15, 932-33, 946, and 965-66).) While these communications are clearly exempt under the attorney-client privilege and/or the attorney work product doctrine as discussed below, as they are deliberative in nature and in an abundance of caution, the Agency has asserted the deliberative process privilege, too. As these e-mail communications contain pre-decisional, deliberative commentary between Agency employees, they are exempt from disclosure. The public disclosure of highly deliberative discussions such

as these would decrease the quality of Agency decision-making and, therefore, under both the plain language of the statute and binding precedent, the information is exempt from public disclosure. *See Klamath*, 532 U.S. at 8-9.

ii. Attorney-Client and Attorney Work-Product Privileges

Next, the Agency properly withheld or redacted information under exemption (b)(5) as it was protected by either the attorney-client privilege or attorney work-product doctrine. As outlined above, Exemption (b)(5) protections run parallel to the civil discovery privileges. *Sears, Roebuck & Co.*, 421 U.S. at 149. The attorney-client privilege protects confidential information shared between an attorney and his client relating to the legal matter on which the client seeks advice. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The attorney work-product privilege protects documents prepared by an attorney in contemplation of litigation. *Cities Serv. Co. v. FTC*, 627 F. Supp. 827, 832 (D.D.C. 1984) (holding the work-product privilege to cover documents relating to settlement); *see also* Fed. R. Civ. P. 26(b)(3).

Here, the *Vaughn* index provides precise and specific reasons for the information withheld or redacted pursuant to Exemption 5 protected by either the attorney-client privilege or the attorney work-product doctrine, or, in some cases, both privileges. First, documents 782-83, 788-89, and 794-95 all discuss requests for legal advice from a senior ICE official related to questions about a specific visa interview, a specific regulation, and proposals on various ways to respond to questions surrounding when an alien is entitled to an attorney during a specific type of interview. The information withheld is either the seeking of legal advice by the senior official, Dan Ragsdale, the responses to that request, or the attorney's work product discussing the advice

to be given – all information exempt from disclosure under the FOIA. *Mead Data*, 566 F.2d at 252; *Cities Serv. Co.*, 627 F. Supp. at 832.

Next, documents 798-802 contain discussions between ICE attorneys and an assistant U.S. attorney of the Department of Justice representing the Agency's interests in litigation. (*See Vaughn* Index at 4.) These documents were prepared in contemplation of litigation and are among attorneys in an attorney-client relationship discussing the preparation of a declaration. Thus, this information is protected by both the attorney-client and attorney work product privileges and is exempt from disclosure. The information withheld on documents 876-79 consists of edits to a draft response to the public made by ICE attorneys for circulation among other ICE attorneys. The issue discussed is a legal one, namely, the rights of aliens when interviewed at a detention facility, and this information is therefore properly withheld under the both the attorney-client and attorney work product privileges contemplated by Exemption 5. Similarly, the information withheld under Exemption 5 on documents 913-15 consists of e-mails where an ICE employee sought specific legal guidance from ICE attorneys related to the processing of aliens during a worksite enforcement and a direct response from an ICE attorney providing a legal opinion about the processing of aliens. Further, the information withheld on documents 932-33 consists of Dan Ragsdale requesting and ICE supervisory attorneys providing their client, Dan Ragsdale, with draft comments and recommendations based on their legal experience on a draft operation plan – information protected by the attorney-client privilege. Document 946 contains exempt information stemming from the request by Dan Ragsdale tasking OPLA with providing him legal advice regarding interrogations and transfers for alien detainees.

Next, documents 965-66 contain drafts of legal opinions on the issue of detainees' right to remain silent and the right to counsel, including "red-lined" edits and commentary discussing

a court holding and its implication. This information is exempt under the attorney work product doctrine and the attorney-client privilege. Finally, documents 1020-22 contain handwritten notes by an ICE attorney analyzing specific cases involving aliens and the attorney's legal conclusions.

These documents are the textbook examples of attorney work product and information protected from disclosure by the attorney-client privilege. Indeed, the information withheld was all created in contemplation of litigation, or, in most cases, in furtherance of ongoing litigation and contains the frank and candid assessment of various legal options by Agency counsel. To compel the disclosure of this type of information would have an immediate and drastic chilling effect on all interactions between Agency counsel and Agency employees and among Agency counsel themselves; therefore, this information is properly withheld under the attorney-client and attorney work product prong of Exemption 5. *Mead Data Cent.*, 566 F.2d at 252.

2. ICE Is a Law Enforcement Agency and the Records in this Case Were Compiled for a Law Enforcement Purpose

ICE is the largest investigation arm of DHS and "is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises." (3d Law Decl. at 17, ¶ 66.) The information subject to FOIA and responsive to Plaintiff's request here pertain to the access of counsel for individuals once they are in ICE custody pursuant to federal criminal and immigration law. (*See id.*) Therefore, all of the information withheld under Exemption 7 at issue here was compiled for a law enforcement purpose. (*Id.* at 17-18, ¶ 66); *see also Abdelfattah v. U.S. Imm. & Customs Enforcement*, 851 F. Supp. 2d 141, 145 (D.D.C. 2012) ("[W]here an agency [ICE] specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.") (first alteration in original, additional quotation and citation omitted). Thus, as ICE is a law enforcement agency

and the records at issue were compiled for a law enforcement purpose, the Agency properly invoked Exemption 7(E).

3. Exemption (b)(7)(E)

Under Exemption 7(E), a law enforcement agency may withhold "'records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.'" *Blackwell v. F.B.I.*, 646 F.3d 37, 40 (D.C. Cir. 2011) (quoting 5 U.S.C. § 552(b)(7)(E)). In this Circuit, "'the exemption looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.'" *Id.* at 42 (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)). In fact, "Exemption 7(E) sets a relatively low bar for the agency to justify withholding: 'Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.'" *Id.* (quoting *Mayer Brown*, 562 F.3d at 1194) (internal quotation marks and alterations omitted).

Here, the Agency has identified with specificity documents that contain several categories of law enforcement techniques and procedures that are exempt from public disclosure. First, documents 90, 171-74, 176-77, 179-202, 204-09, and 211-12 are Detention Management Division Facility Reviews. The only information withheld is the timing and under what

circumstances ICE conducts searches for contraband in detention facilities. This information is withheld from the public and describes a law enforcement technique that, if disclosed, would endanger the safety of both ICE personnel and detainees as it would allow detainees to anticipate searches which would "endanger the lives and safety of agents, inmates, other agency employees, and visitors." (*Vaughn* Index at 1.) Next, the Agency properly withheld information from an ICE affidavit that describes the factors that ICE special agents use in identifying individuals believed to be unauthorized to be present in the United States, techniques kept from the public to prevent those seeking to violate federal immigration laws to avoid apprehension and detection. (*Id.*)

Exemption 7(E) also exempts the information redacted on documents 624-57, the Draft ICE Operation Plan for SAC Chicago, as it describes the usage or non-usage of undercover agents and highly specific details related to, among other things, how law enforcement will contact suspects, the composition of a mobile command center, codes used, and how to divide law enforcement teams under specific circumstances. Release of these law enforcement techniques would not only directly affect ICE's mission, but would provide those seeking to break federal immigration laws with a virtual roadmap of certain ICE activities. (*See* 3d Law Decl. at 22, ¶ 75.)

Each of these categories of information is clearly a law enforcement technique or procedure within ICE's law enforcement mission and the public disclosure of it creates, at the very least, "the chance of a reasonably expected risk" of circumvention of these techniques and procedures by the targets of ICE's law enforcement activities and, therefore, the information is exempt from FOIA pursuant to Exemption 7(E). *Blackwell*, 646 F.3d at 40.

4. All Reasonably Segregable Information Was Released

Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Although the agency "must provide a 'detailed justification' for its non-segregability," it "is not required to provide so much detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting *Mead Data*, 566 F.2d at 261). Here, the Agency has declared that it reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied to ensure that all non-exempt information was released, and with respect to the records that were released in part, all information not exempted from disclosure pursuant to FOIA exemptions specified above was correctly segregated and non-exempt portions were released. (*See* Law Decl. at 23, ¶¶ 77-8060.) Therefore, all segregable information has been released and Defendants are entitled to judgment as a matter of law.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court enter judgment in their favor. A proposed order is attached.

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Washington, DC

Respectfully submitted,

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