**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **American Immigration Council** | ) | |
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| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. 12-856 (JEB)** |
| | ) | |
| **United States Department of Homeland Security, et al.** | ) | |
| | ) | |
| | ) | |
| **Defendants.** | ) | |

**AMERICAN IMMIGRATION COUNCIL'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**

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Plaintiff American Immigration Council ("AIC") submits this memorandum of law in opposition to Defendants United States Department of Homeland Security's ("DHS") and United States Immigration and Customs Enforcement's ("ICE") renewed motion for summary judgment.

## INTRODUCTION

Plaintiff AIC's suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeks records from DHS and its component ICE concerning individuals' access to legal counsel during their interactions with ICE. AIC submitted its FOIA request to Defendants on March 14, 2011. Six months later, Defendants informed AIC that they had neither located nor identified *any* responsive records to AIC's FOIA request. AIC appealed, noting that Defendants failed to search the Office of Detention Policy and Planning ("ODPP") and that responsive records existed online that Defendants failed to locate or produce. It took Defendants five months to concede that "additional responsive records may be found in locations the agency *has not yet* searched" based on the information that AIC provided in its appeal before remanding for additional processing and re-tasking to locate responsive documents.

Three months later, Defendants still had not substantively responded to AIC's requests, and in May 2012, over 14 months after submitting its request, AIC commenced this action.

After commencement of this litigation, Defendants made five productions and by November, 2012, had released 6,906 pages of records. Some records were released in full, some were released in part, and some were withheld in full based on various FOIA exemptions.

AIC and Defendants sought to narrow the issues before this Court. After reviewing the documents produced by Defendants and reviewing a summary *Vaughn* index, AIC and Defendants entered into a joint stipulation that provided that AIC would not challenge any redactions on more than 6,000 pages of the records.

Defendants then sought summary judgment, relying on a declaration from Mr. Ryan Law, Deputy FOIA Officer of the Freedom of Information Act Office at ICE, and a "summary *Vaughn* index." AIC opposed Defendants' motion, contending that Mr. Law's declaration was deficient because it described neither the search's scope nor the search methods employed, because countervailing evidence disproved Defendants' claims, and because the summary *Vaughn* index contained categorical descriptions that lacked the required descriptive accuracy for the exemptions pertaining to each withheld record. Defendants, in reply, submitted an additional declaration from Mr. Law. AIC filed a Sur-Reply, as ordered by the Court. On June 24, 2013, this Court issued an opinion denying Defendants' motion, concluding that issues of material fact existed as to the adequacy of Defendants' search and finding that Defendants' summary *Vaughn* index did not provide sufficient information to determine whether their withholdings were proper. The Court held a status conference with the parties. Based on that conference, Defendants were ordered to produce an updated *Vaughn* index and supplemental declaration by September 9, 2013.

In the interim, AIC and Defendants attempted to resolve issues regarding Defendants' search. However, these efforts were unsuccessful. AIC reviewed Defendants' updated submissions, but determined that they did not alleviate its concerns regarding the adequacy of Defendants' search or Defendants' asserted exemptions. AIC conferred with Defendants to establish a briefing schedule.

In its renewed summary judgment motion, Defendants have submitted a brief that repeatedly returns to the fact that their employees spent 35 hours searching for documents—a number Defendants refer to as a "staggering amount of time"—but does not justify the manner in which they conducted the search during those 35 hours. Furthermore, despite Defendants'

contentions that their updated *Vaughn* index ("Updated *Vaughn*") "explains with specificity the subject matter of the documents in question and why the information redacted on the documents is statutorily exempt from FOIA," (Defs.' Renewed Mot. for Summ. J. ("Defs.' Br.") at 13), Defendants still have not established that all of the documents were properly withheld.

Because Defendants' search and claimed exemptions still fail to meet the necessary standards under FOIA, Defendants have not met their burden under Fed. R. Civ. P. 56(a) and their motion must be denied.

## ARGUMENT

### I. Standard of Review.

Summary judgment is warranted when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact dispute is "'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *George v. Leavitt*, 407 F.3d 405, 410 (D.C. Cir. 2005) (quoting *Anderson*, 477 U.S. at 248). Thus, in considering a motion for summary judgment, the court must view the evidence "in the light most favorable to the nonmoving party." *Id*.

FOIA requires agencies to release all records that are responsive to a proper request unless a statutory exemption protects the records from disclosure. *See* 5 U.S.C. § 552(b); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980) ("[T]he defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements.") (internal citation and quotation omitted). Agencies bear the burden of proving that they have fulfilled their FOIA obligations. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

For summary judgment, agencies may rely on an affidavit or declaration that is relatively detailed, nonconclusory, and made in good faith. *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1116 (D.C. Cir. 2007). Summary judgment may be granted on the basis of agency declarations only "if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994) (internal citation and quotation omitted).

Good faith searches are critical to the congressional intent of FOIA—to ensure that community members can access government records and thereby be informed about "*what their government is up to*." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (emphasis in original) (internal citation and quotation omitted). Production of the requested documents vindicates the public's right to be part of "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978).

## II. Defendants Still Have Not Shown That They Conducted An Adequate Search.

The government must conduct a reasonable search for records responsive to a FOIA request. *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Specifically, the government must show "beyond material doubt that its search was reasonably calculated to uncover all relevant documents" and must search all records systems likely to contain responsive records. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325-26 (D.C. Cir. 1999) (internal citation and quotation omitted). An agency's search must be "more than perfunctory" and must

"follow through on obvious leads to discover requested documents." *Id.* at 325 (internal citation omitted).

Here, this Court previously found that Defendants failed to explain whether they searched all offices likely to contain responsive records and that their declarations lacked sufficient detail on the reasonableness of their search. Yet Defendants' third declaration from Mr. Law and the declaration from Ms. Catrina Pavlik-Keenan have not cured those failings. Instead, Defendants focus on the amount of time spent on their search and conclusorily claim that they have "conducted a thorough, broad-sweeping, time-intensive search for responsive documents" to AIC's request. (Defs.' Br. at 11.) As a result, Defendants still have not met their burden under Fed. R. Civ. P. 56, and this Court should deny their summary judgment motion.

### A. Spending 35 hours searching for records does not automatically make a search adequate.

Defendants repeatedly note the number of hours ICE employees spent conducting searches in response to AIC's FOIA request. (*See* Defs.' Br. at 1 ("a staggering amount of time searching for responsive documents – over thirty-five (35) hours"); *id.* at 5 ("the Custody Management Division, conducted an **eight (8) hour** search") (emphasis in original); *id.* at 6 ("This search took 4 hours for the Associate Legal Advisor"); and *id.* at 7 ("[T]hree separate attorneys spent over 8 hours. . .").) These statements demonstrate a misunderstanding of the government's burden in FOIA requests. "[Q]uantitative factors do not render the search adequate." *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749, 766 (E.D. Pa. 2008).

Furthermore, Defendants suggest that fulfilling FOIA's legally required searches is not one of the agency's regular responsibilities. (*See* Defs.' Br. at 6 ("[T]he District Court Litigation Division had an Associate Legal Advisor take 2 hours away from his normal duties to search the Litigation Database . . .") and *id.* at 7 ("[T]hree separate attorneys spent over 8 hours away from

their regular duties . . ..").) Defendants' assertions that their employees were taken away from their "normal" and "regular" duties is misplaced, as courts in this Circuit recognize that the time and cost associated with conducting FOIA searches is an inherent part of compliance with the law. *See, e.g., Sennett v. Dep't of Justice*, No. 12-495, -- F. Supp. 2d --, 2013 WL 4517177, *7 (D.D.C. Aug. 27, 2013) ("Admittedly, this evidentiary burden is likely to create significant costs for government agencies as they respond to FOIA requests; however, '[t]he costs must be borne ... if the congressional policy embodied in FOIA is to be well served.'") (quoting *Senate of the Com. of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir.1987)).

Instead, a reasonable reading of Defendants' own declarations by Mr. Law suggest that much of the time spent searching was a direct result of poor organization of files within ICE compounded by poorly thought-out approaches to searching those files. Defendants do not provide their employees with guidance on how to maintain their individual files (*see* First Declaration of Ryan Law ("1st Law Decl."), ¶ 8), and, at least with regard to email, do not have policies or regulations that guide employees' document retention or organization. (*Id.*, ¶ 9.) By Defendants' own admission, this results in widely varying practices of file storage, with respect to both organization and location. (*Id.*)

Without a uniform system of organization for their files, it is inevitable that searches for information will be more onerous than might otherwise be the case. The decision by Defendants' FOIA Office to leave certain search parameters to employees' discretion may have made the searches even more burdensome. (*See* Second Declaration of Ryan Law ("2d Law Decl."), ¶ 27 ("These terms and locations were used within OPLA as they were determined by the attorneys who conducted the searches . . .."); *id.*,¶ 37 ("These terms and locations were used as they were determined by the person familiar with the records within ERO . . .."); Third Declaration of Ryan

Law ("3d Law Decl."), ¶ 22 (instructing offices to conduct "a comprehensive search for records" without providing any guidance); *id.*, ¶ 23 (instructing offices to conduct supplemental searches without providing any guidance).)

AIC is not suggesting that Defendants should or must implement information management policies that would allow the efficient retrieval of information. However, Defendants should not be excused from conducting adequate searches of offices and sub-offices likely to contain responsive records simply because their own choices have made FOIA searches more burdensome on their employees.

### B. Defendants still fail to establish that they have searched all offices and systems likely to contain responsive records.

Agencies must show that they have conducted a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Here, Defendants' explanation of their search is flawed for three interrelated reasons: (1) Defendants do not even assert that they have searched all files likely to contain relevant documents; (2) Defendants' declarations lack an adequate explanation for how ICE selected the sub-offices (within the larger ICE components) to search; and (3) Defendants have provided no explanation for why certain sub-offices, with seemingly relevant information, were not searched. As a result, Defendants have failed to establish that they have searched all offices and systems likely to contain responsive records.

First, where the government has failed to attest that all of the files likely to contain relevant documents have been searched, courts have typically found that an issue of material fact exists as to the adequacy of the search. *See, e.g.*, *Jefferson v. Bureau of Prisons*, No. 05-848, 2006 WL 3208666, *6 (D.D.C. Nov. 7, 2006) (finding FBI's search inadequate because its declaration did not "aver that the FBI searched all files likely to contain responsive records.");

*Maydak v. U.S. Dep't of Justice*, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) (refusing to grant summary judgment because "no one avers, and the record does not otherwise permit the inference that all files likely to contain responsive records were searched."). Furthermore, in this case, the Court explicitly noted that Defendants' explanation regarding their methodology for selecting offices and files to search would only be sufficient if they "at a minimum, have [averred] that [they have] searched *all* files likely to contain relevant documents." *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, No. 12-856, -- F. Supp. 2d --, 2013 WL 3186061, *4 (D.D.C. June 24, 2013) (emphasis added).

Despite this directive, the Third Law Declaration avers only that the searches conducted within the specific offices within ICE—namely ERO, OPLA, and ODPP—were reasonably calculated to uncover potentially responsive documents but noticeably makes no statement that ICE, as a whole, has been searched for all files likely to contain relevant documents.[1] Defendants' approach is the same one that the D.C. Circuit considered and explicitly rejected in *Oglesby*, 920 F.2d at 68. In *Oglesby*, the defendant initiated a search "of the Department record system most likely to contain the information which had been requested." *Id.* The court held that a "reasonably detailed affidavit . . . averring that all files likely to contain responsive materials . . . were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Id.* Defendants' lack of attestation is

[1] Rather, Defendants spend much of the Third Law Declaration correcting statements made in the First Law Declaration regarding what was actually searched and why searching systems previously described would not be reasonably calculated to uncover responsive records. (*See, e.g.*, 3d Law Decl., ¶ 25 ("Although ENFORCE was described in ICE's previous declarations, a search of ENFORCE was not conducted in this case. . . . A search of ENFORCE would not have been reasonably calculated to uncover records responsive to the Plaintiff's FOIA request."); *id.*, ¶ 26 (regarding Alien Medical Records system); *id.*, ¶ 34 (regarding TECS).)

especially problematic here because they have provided no explanation of the process used or sources consulted to determine which divisions likely contained responsive records. *Cf. Am. Immigration Council v. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 214 (D.D.C. 2012) (noting that Defendant U.S. Customs and Immigration Services selected potentially responsive offices "by 'consult[ing] a variety of sources containing organizational and operational information about the agency and its various components, such as a reference guide entitled, *USCIS Functional Profiles*'") (modification and italics in original).

Second, regarding the searches within the chosen offices, Defendants claimed that those searches were reasonably calculated to locate all responsive records within those divisions. These attestations are suspect, however, given the content of AIC's FOIA request and the role of certain offices that were not searched. Within the divisions tasked with searching for responsive records, only certain sub-offices actually completed searches. (*See* 3d Law Decl., ¶¶ 24-51.) The Third Law Declaration briefly described the chosen sub-offices' functions but provided no explanation for how these sub-offices were selected from among the various ERO and OPLA sub-offices. (*See, e.g.*, 3d Law Decl., ¶¶ 28, 39, 41.) The declaration also failed to indicate which sub-offices (if any) had no responsive documents and whether any follow up occurred. The above information is necessary for both this Court and AIC to determine if other components should have been included in the search. *See Oglesby*, 920 F.2d at 68 (agency's affidavit must be "reasonably detailed" in describing search terms used, nature of the search performed, and "averring that all files likely to contain responsive materials (if such records exist) were searched."); *see also Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987) (affidavit must "describe at least generally the structure of

the agency's file system," which renders any further search unlikely to disclose additional relevant information).

Defendants' continued refusal to specify how offices were chosen for inclusion in their FOIA search is particularly troubling given the dearth of records from the field.[2] AIC has repeatedly requested that Defendants search for responsive records in local offices or field offices: AIC's original FOIA request,[3] AIC's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, and AIC's Sur-Reply in Opposition to Defendants' Motion for Summary Judgment. (*See* ECF No. 12-3, 15, 18.) Further, this Court stated that it could not "begin to analyze [ICE's need to search field offices] until it knows ICE's position on whether any of those locations have potentially responsive documents." *Am. Immigration Council*, 2013 WL 3186061, at *5.

Third, Defendants refuse to explain why certain sub-offices were not searched even though the Third Law Declaration concedes that ERO carries out its mission "through 24 ERO field offices, *each with its own area of responsibility*." (3d Law Decl., ¶ 24 (emphasis added).) Yet, the declaration is silent on whether these offices had no responsive documents, whether these offices were even asked, or whether searching these offices was unnecessary. This

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[2] The documents produced by Defendants are mainly from ICE leadership and headquarters offices. ICE, however, has regional and local offices nationwide, including 24 ERO field offices and 26 OPLA Chief Counsel Offices. Many of these offices regularly interact with applicants for immigration benefits and their attorneys. (*See* ECF No. 15-13, Declaration of Beth Werlin, ¶ 4.)

[3] AIC's request encompassed "any and all records which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Immigration and Customs Enforcement (ICE), whether issued or maintained by ICE Headquarters offices (including but not limited to the Office of the Assistant Secretary (OAS), Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI), Management and Administration, Office of the Principal Legal Advisor (OPLA), and the Office of Detention Policy and Planning (ODPP), including any divisions subdivisions or sections therein; ICE field offices, including any divisions, subdivisions or sections therein; local Offices of Chief Counsel; and/or any other ICE organizational structure." (*See* 3d Law Decl., Ex. D.)

information, as well as Defendants' failure in four different declarations to explain whether the offices were searched, clearly indicates that Defendants' searches of ERO and OPLA are still inadequate. *Elec. Frontier Found. v. U.S. Dep't of Defense*, No. C 09-05640, 2012 WL 4364532, *14-15 (N.D. Cal. Sept. 24, 2012) (requiring ICE to provide another declaration because its declaration failed to address why certain employees only search their own files, whether other agency-wide systems had responsive documents, and whether those systems were searched).

Further, even a basic comparison of ICE's publicly available organizational charts casts doubt on whether Defendants searched ERO's or OPLA's "most relevant subcomponents." (*See* Defs.' Br. at 5-6.) As discussed above, it appears that Defendants did not search field offices despite their relevance to AIC's request. Indeed, it appears that Defendants only searched one sub-office within ERO: Custody Management Division. (3d Law Decl., ¶ 28.) However, an organizational chart on the DHS's website indicates that ERO also has offices of Enforcement, Removal, and Field Operations. *See* http://www.dhs.gov/xlibrary/assets/org-chart-ice.pdf (last visited Dec. 11, 2013). While AIC's FOIA request sought some information related to ICE's detention operations, other portions of the request sought information related to access to counsel during enforcement operations or during the removal process. (*See e.g.* 3d Law Decl., Ex. D at 2 (requesting "[g]uidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning prior to or pursuant to an arrest, including processing and booking" or "during questioning pursuant to a request for a Stay of Removal").) Defendants have failed to address whether they searched these above-referenced sub-offices, where interactions with individuals are actually taking place. Assuming no searches have been done, Defendants have also failed to provide any explanations, which is troubling.

Similarly, Defendants' limited search of two OPLA sub-offices seems inexplicable given the breadth of AIC's FOIA request. Defendants indicated that they searched OPLA's Homeland Security Investigations Division ("HSID") and the District Court Litigation Division ("DCLD"). (Defs.' Br. at 5-6.) While parts of AIC's FOIA request might implicate "the detention and removal of aliens who are suspected of human rights violations or are of national security interest," (3d Law Decl., ¶ 39), and could lead to responsive records within HSID, AIC's request was not limited to cases involving such issues. Likewise, DCLD only covers a narrow part of AIC's request. According to Defendants, DCLD "represents the interests of the agency and its officers in all claims and litigation." (3d Law Decl., ¶ 41.) Administrative removal proceedings, however, do not occur in district courts, and DCLD likely would not have a role in many of the enforcement and removal operations that were part of the focus of AIC's request.

Additionally, these two sub-offices are not the only two divisions within OPLA. An organizational chart available on ICE's website shows that OPLA has a Field Legal Operations division, a Training division, and sections on Detention and Removal Law and Enforcement Law. *See* http://www.ice.gov/doclib/about/offices/opla/pdf/opla-org-chart.pdf (last visited Dec. 11, 2013); *see also* http://www.ice.gov/about/offices/leadership/opla/divisions.htm (last visited Dec. 11, 2013). Defendants, however, provide no explanation as to whether it is beyond material doubt that these other seemingly relevant offices would be unlikely to have responsive records.

Because Defendants have failed to establish that all locations reasonably likely to contain responsive records have been searched,[4] summary judgment must be denied.

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[4] If this Court orders Defendants to conduct additional searches or Defendants volunteer to conduct additional searches, Defendants should provide guidance to component offices and sub-offices to ensure that uniform and adequate searches take place. Defendants' declarations indicate that, in the previously conducted searches, the search terms have varied among and

## III. Defendants Still Have Improperly Withheld Records.

FOIA requires agencies to disclose records responsive to a request "unless the documents fall within enumerated exemptions." *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water User Protective Ass'n*, 532 U.S. 1, 7 (2001) (citing 5 U.S.C. § 552(b)). The enumerated exemptions are organized into nine categories of information. *See* 5 U.S.C. § 552(b)(1)-(9). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Klamath Water User Protective Ass'n*, 532 U.S. at 7-8 (quotation omitted). Reviewing courts must be mindful that FOIA mandates a "strong presumption in favor of disclosure." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Klamath Water User Protective Ass'n*, 523 U.S. at 8 (quotation omitted).

Agencies "withholding responsive documents from a FOIA release bear[] the burden of proving the applicability of claimed exemptions." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). Where, as here, agencies seek to establish the applicability of FOIA exemptions through a declaration and *Vaughn* index, these materials must "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [not be] controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (internal quotation omitted); *see Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995) (stating that purpose of declaration and *Vaughn* index is to "establish a detailed factual basis for application of the claimed FOIA

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within offices (*see* 2d Law Decl., ¶¶ 11, 17, 30, 40), and may not have used proximity locators and variations on search terms when searching for responsive documents.

exemptions to" each withheld document). Conclusory claims simply reiterating the statutory standards for exemptions are insufficient to sustain a summary judgment motion. *See Defenders of Wildlife*, 623 F. Supp. 2d at 90-91.

The Court is empowered to "order the production of any agency records improperly withheld," and "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions" set forth in the statute. 5 U.S.C. § 552(a)(4)(B). However, the Court should not consider *in camera* review of withheld documents as an acceptable substitute for a deficient and inadequate *Vaughn* index; instead it should merely "supplement" a sufficiently detailed *Vaughn* index. *Wiener v. F.B.I.*, 943 F.2d 972, 979 (9th Cir. 1991).

In its Updated *Vaughn*, Defendants have improved the clarity of their explanations for withholding many documents. As a result, AIC has narrowed its challenge of improperly withheld documents. However, Defendants have still failed to include several records in their Updated *Vaughn* and have failed to provide sufficient justification for other withheld documents. Specifically, AIC contests the applicability of the following documents' claimed exemptions (collectively, "Index Documents," and individually, "Index Doc. #" by number):

| Record No. | Description | Exemptions at Issue | Pages | Record No. in AIC's First Opp'n Brief |
|---|---|---|---|---|
| Index Doc. # 1 | 2010 Draft Worksite Operations Plan for Great Lakes Naval Station, 2012FOIA8229.000623-57 | (b)(5) Deliberative Process<br><br>(b)(7)(E) | 2012FOIA8229.000631-38 | Index Doc. # 1 |
| Index Doc. # 2 | Emails and attachments to and from Daniel | (b)(5) Deliberative | All | Index Doc. # 2 |

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| | Ragsdale of March 18, 2009 regarding AILA Conference, 2012FOIA8229.000782-83 | Process<br><br>Attorney-Client<br><br>Attorney-Work Product[5] | | |
| Index Doc. # 3 | Emails of March 18, 2009 regarding AILA Conference, 2012FOIA8229.000788-89 | (b)(5) Deliberative Process<br><br>Attorney-Client<br><br>Attorney-Work Product[6] | All | Index Doc. # 3 |
| Index Doc. # 4 | Email from Daniel Ragsdale of February 18, 2008 regarding AS Prep question, 2012FOIA8229.000817-20 | (b)(5) Deliberative Process | 2012FOIA8229.000817-18 | Index Doc. # 5 |
| Index Doc. # 5 | Email from Riah Ramlogan of February 5, 2010 regarding MD enforcement action, 2012FOIA8229.000856-58 | Not in *Vaughn* index<br><br>"Non-responsive duplicate" – not an exemption under FOIA | 2012FOIA8229.000856-57 | Index Doc. # 6 |
| Index Doc. # 6 | Unlabeled document, 2012FOIA8229.000909-12 | Not in *Vaughn* index<br><br>"Refer to DOJ" – not an exemption under FOIA | All | Index Doc. # 8 |
| Index Doc. # 7 | Email of September 9, 2008 regarding worksite issues, 2012FOIA8229.000913-15 | (b)(5) Deliberative Process<br><br>Attorney-Client | 2012FOIA8229.000913 | Index Doc. # 9 |
| Index | Emails and drafts | (b)(5) | All | Index |

[5] Defendants' Updated *Vaughn* states that "some of the[] materials are made up [of] attorney work product" (including Index Docs. # 2 and 3) but fails to specify which pages in this entry are subject to the attorney work product privilege. (*See* 3d Law Decl., Ex. C at 3; *see also* Defs.' Br. at 17-18.)

[6] *See supra* n.5.

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| Doc. # 8 | regarding NGO questions, 2012FOIA8229.000963-64 | Deliberative Process | | Doc. # 10 |
| Index Doc. # 9 | Email regarding specific litigation or enforcement operation, 2012FOIA8229.000965-66 | (b)(5) Deliberative Process<br><br>Attorney-Client<br><br>Attorney-Work Product[7] | All | Index Doc. # 11 |
| Index Doc. # 10 | Enforcement Operations Plan, 2012FOIA8229.000985-1018 | (b)(5) Privilege not specified<br><br>(b)(7)(E)[8] | 2012FOIA8229.000990-1002 | Index Doc. # 12 |
| Index Doc. # 11 | Attorney notes regarding specific cases, 2012FOIA8229.001020-22[9] | (b)(5) Attorney-Work Product | All | Index Docs. # 13 and 14 |
| Index Doc. # 12 | Unlabeled document, 2012FOIA8229.001023-84 | Not in *Vaughn* index<br><br>(b)(6), (b)(7)(C) | All | Index Doc. # 15 |

[7] In the Updated *Vaughn*, Defendants state that Index Doc. # 9 is withheld under the deliberative-process and attorney-client privileges. (*See* 3d Law Decl., Ex. C at 6.) Yet, their brief argues that all three privileges under Exemption 5 apply. (*See* Defs.' Br. at 16, 18-19.)

[8] In the Updated *Vaughn*, Defendants assert that Index Doc. # 10 is withheld under Exemption 7(E) and claim without any explanation that it is withheld under Exemption 5 as well. (*See* 3d Law Decl., Ex. C at 7.) To further compound the problem, Defendants' brief does not even address Index Doc. # 10.

[9] In the previous summary *Vaughn* index, Defendants described Index Doc. # 11 (formerly Index Doc. # 13 (at (1020-21) and Index Doc. # 14 (at 1022)) as two separate documents: an "Email[] regarding specific litigation cases or Enforcement Operations" and a "Litigation Report[] or Attorney notes regarding ongoing cases." (*See* ECF No. 12-10 at 3-4.) The Updated *Vaughn* refers to Index Doc. # 11's three pages as one document. (*See* 3d Law Decl., Ex. C at 7.)

**A. Defendants' Updated *Vaughn* provides no explanation for the redaction of certain records and provides insufficient justification to withhold other records under a FOIA exemption.**

No set formula exists for a *Vaughn* index, but the touchstone is whether "the requester and the trial judge [are] able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Davin*, 60 F.3d at 1050. Without a *Vaughn* index that includes all withheld records, a FOIA requester has no "meaningful opportunity to contest" redactions and the court lacks "an adequate foundation to review" an agency's withholdings. *See Wiener*, 943 F.2d at 977. The D.C. Circuit has recognized that "[a] withholding agency must describe *each* document or portion thereof withheld . . .." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223 (D.C. Cir. 1987) (emphasis in original). Furthermore, the *Vaughn* index must "state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

Here, Defendants withheld information in Index Docs. # 5-6 and 12 but did not refer to (or even include) these documents in the Updated *Vaughn*. AIC previously noted this deficiency in the first round of summary judgment briefing. (*See* ECF No. 15 at 21, 34). Yet, Defendants' Updated *Vaughn* still omits these Index Documents and shifts "the burden of analyzing [these] pages of withheld documents to the shoulders of this Court." *Am. Immigration Council*, 2013 WL 3186061, at *10. Furthermore, for Index Docs. # 5 and 6, Defendants have not asserted a valid FOIA exemption that would justify withholding the information in these records.

Without a sufficient *Vaughn* index, AIC cannot "glean adequate context or engage in the type of advocacy that FOIA seeks to encourage" because Defendants withheld most or all of the information in these documents. *Id.* at *11. Index Doc. # 6 is marked as "refer to DOJ," is fully redacted, and has no identifying information in any of Defendants' submissions. Likewise, Index

Doc. # 5, which appears to be a February 5, 2012, email regarding "MD enforcement action," is marked as "non-responsive duplicate" but otherwise unidentified. Unlike other documents marked as duplicates, Defendants do not cross reference the documents that Index Doc. # 5 allegedly duplicates. (*See* Defs.' Br. at 8 n.1.) Because none of the other produced documents appear to have the same subject line and date, AIC cannot infer if other documents contain the same withheld information.

This Court expressly stated that neither "refer to DOJ" nor "non-responsive duplicate" are among the "nine narrowly tailored" FOIA exemptions. *Am. Immigration Council*, 2013 WL 3186061, at *23. This Court then warned Defendants that it would "have no choice but to compel disclosure" unless "Defendants indicate the applicable exemption(s) . . . and provide a description of the contents sufficient to satisfy FOIA's evidentiary requirements." *Id*. Defendants' decision to exclude these documents from the Updated *Vaughn*, to remain silent regarding whether an applicable FOIA exemption exists, and to provide no description of the documents' content, ignores the Court's explicit instructions.

Because Defendants have failed to include several documents in the Updated *Vaughn* and have asserted reasons that do not justify withholding these documents, this Court should deny summary judgment and compel disclosure of Index Docs. # 5 and 6.

### B. Defendants have improperly withheld records under various FOIA exemptions.

#### 1. Inter- and Intra-Agency Exemption (b)(5).

Exemption 5 encompasses three distinct components relevant in this case – specifically, the deliberative-process privilege, the attorney work-product privilege, and the attorney-client privilege. *Am. Immigration Council*, 905 F. Supp. at 216; *see also Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). This exemption permits agencies to

withhold "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 construed this exemption to permit the withholding of "those documents, and only those documents normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

To apply, agencies must show that the withheld material is "generally protected in civil discovery for reasons similar to those . . . in the FOIA context." *Burka v. HHS*, 87 F.3d 508, 517 (D.C. Cir. 1996). Thus, agencies must "establish the claimed privilege with 'reasonable certainty.'" *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 153 (D.D.C. 2012) (quotation omitted). Exemption 5 must be "applied 'as narrowly as consistent with efficient Government operation.'" *Coastal States Gas Corp.*, 617 F.2d at 868 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)).

**(a) <u>Deliberative-Process Privilege.</u>**

The deliberative-process privilege protects the integrity of the "decisionmaking processes of government agencies" by protecting from disclosure certain internal communications directly related to agency decision-making. *Sears, Roebuck & Co.*, 421 U.S. at 150. At the same time, the deliberative-process privilege "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy." *Id.* at 153; *see Taxation with Representation Fund v. IRS*, 646 F.2d 666, 677-78 (D.C. Cir. 1981); *Judicial Watch, Inc. v. HHS*, 27 F. Supp. 2d 240, 245 (D.D.C. 1998) ("[D]eliberative process privilege does not protect documents that merely state or explain agency decisions"). Government agencies are not permitted to "develop a body of secret law, used by it in the discharge of its regulatory duties and in its dealings with the public, but [then keep that information] hidden behind a veil of privilege because it is not

designated as formal, binding, or final." *Coastal States Gas Corp.*, 617 F.2d at 867. To justify nondisclosure of information, agencies must show their communications were both (1) predecisional and (2) deliberative. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1026 (U.S. Jan. 9, 2012).

"Predecisional" communications must be "antecedent to the adoption of an agency policy." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259 (D.D.C. 2004) (quotation omitted). Before communications are found to be predecisional, "a court must be able to pinpoint an agency decision or policy to which the document contributed," *Senate of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (internal citation and quotation omitted), or, at the least, "identify a decisionmaking process to which a document contributed." *Judicial Watch*, 297 F. Supp. 2d at 259 (citation omitted). If agencies expressly "adopt[] or incorporate[] by reference" previous agency recommendations, the deliberative-process privilege no longer protects the older document. *See Sears, Roebuck, & Co*, 421 U.S. at 161.

"Deliberative" means the communication "is one that is 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Judicial Watch*, 297 F. Supp. 2d at 259 (quotation omitted). Agencies must "identify the role of a contested document in a specific deliberative process." *Id.* (citation omitted). Crucially, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2009).

To carry their burden, agencies must provide specific information establishing each element of the privilege. "[W]here no factual support is provided for an *essential* element of the claimed privilege or shield, the label 'conclusory' is surely apt," and the agency has failed to

carry its burden. *Senate of P.R.*, 823 F.2d at 585. Further, individuals' relationships also may be relevant. Although a supervisor who is actively seeking input on a decision might be able to claim deliberative-process privilege, "asking if employees have *questions* is not the same as asking if they have *suggestions*," *Am. Immigration Council*, 905 F. Supp. 2d at 220. Thus, Defendants must show that each withheld document constitutes "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters" or "provide[s] candid or evaluative commentary." *Pub. Citizen, Inc.*, 598 F.3d at 876.

Defendants' Updated *Vaughn* now avers that most communications withheld under the deliberative-process privilege are predecisional. (*See* 3d Law Decl., Ex. C.) However, to the extent that Defendants withhold Index Doc. # 10 under the deliberative-process privilege, (*see supra* n.8), they have not asserted that it was predecisional. (*See* 3d Law Decl., Ex. C at 7 (stating that document is withheld under Exemption 5, but providing no explanation).)[10] Regarding the other Index Documents, Defendants' averments are not necessarily accurate. For example, Defendants have failed to establish that the records are "antecedent to the adoption of an agency policy." *Am. Immigration Council*, 905 F. Supp. 2d at 217-18 (quoting from *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) *overruled in part on other grounds*, *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc)). They assert that certain emails discuss responses "to certain inquiries from both courts and the public related to access of counsel issues" for Index Docs. # 2, 3, 7, and 9. (Defs.' Br. at 16.) However, Defendants are silent on whether these documents discuss existing, effective policies. Rather, they conclusorily assert that these documents "contain pre-decisional . . . commentary." (*Id.*) For example, page

[10] Nor have the Defendants asserted that Index Doc. # 10 is deliberative. (*See* 3d Law Decl., Ex. C at 7.)

913 of Index Doc. # 7 appears to be a response to a request for "guidance" that would allow Defendants to process arrested individuals in a way that is "consistent with national policy" (*see* Index Doc. # 7 at 914), suggesting that the document discusses an existing policy. Likewise, Defendants assert that Index Doc. # 9 contains "a draft legal opinion as to the right to remain silent and the right to counsel" (*see* 3d Law Decl., Ex. C at 6), but have not explained whether a more final policy document exists, how Index Doc. # 9 contributed to any such policy, and whether all or part of Index Doc. # 9 was expressly adopted in any final decision. Finally, Defendants assert that Index Docs. # 2 and 3 contributed to the creation of a set of talking points. (*See id*. at 3.) Even if it is possible that these records are antecedent to a decision regarding what policy information to release, they also could describe then-final policies not released in the talking points. If so, Defendants should not be permitted to classify such information as pre-decisional.

Second, Defendants have not shown how these communications are deliberative. A "document that does nothing more than explain an existing policy cannot be considered deliberative." *Pub. Citizen, Inc.*, 598 F.3d at 876. Nonetheless, in asserting the deliberative-process privilege, Defendants do little more than state that these documents (1) "respond to certain inquiries" (Index Doc. # 2, Index Doc. # 3, Index Doc. # 7, and Index Doc. # 9); (2) "contain[] discussions . . . related to a draft answer" (Index Doc. # 4 and Index Doc. # 8); or (3) contain draft operation plans . . . , draft investigation summaries" (Index Doc. # 1). Defendants do not articulate whether these "discussions" related to decisions on new or revised policies or procedures as opposed to explaining current policies and procedures. In fact, Index Docs. # 2 and 3 describe documents regarding NGO questions as covering "ways to respond to questions on when an alien is entitled to an attorney during an I-213 interview and extending the status of

F-1 students." (3d Law Decl., Ex. C at 3.) Thus, these documents likely include discussions of existing policies and procedures *not* just new or revised policies and procedures. This same flaw exists for Index Doc. # 7, which includes an employee's request for an answer to a question. AIC seeks only the response "regarding the processing of [noncitizens] during a worksite enforcement action," which likely provides the employee with information about existing policy. (*Id*. at 5.)

Furthermore, Defendants have not shown whether these documents were seeking suggestions (and as such would be deliberative) or were simply providing answers (and would not be deliberative). Defendants' brief describes withheld portions of Index Docs. # 2 and 3 as emails between "lower-level personnel" and "between Agency employees." (Defs.' Br. at 16.) However, the Updated *Vaughn* provides no further information that clarifies whether the authors of the final emails in each Index Document were final decision-makers. (*See* 3d Law Decl., Ex. C at 3.) Based on the current information, AIC cannot determine whether the final email in each Index Document is seeking suggestions or feedback or simply providing answers. To the extent that the Index Documents are answering questions and not seeking suggestions, they are more likely to be required to be disclosed. *See Am. Immigration Council*, 905 F. Supp. 2d at 220 (finding that where there is "no hint that the superior is still weighing her options or wants feedback from the employees," and where a supervisor asks if employees have any questions, *not* suggestions, records are more likely to be non-deliberative, postdecisional policy directives). As such, Defendants have not established that such documents are exempt from disclosure. *See Pub. Citizen, Inc.*, 598 F.3d at 876.

Finally, Defendants have failed to establish that they have withheld only the "portions" of the records "reflect[ing] the give and take of the deliberative process." *Id.* Defendants assert

that Index Doc. # 1, Index Doc. # 4, and Index Docs. # 8-9 contain "red-lined" edits, corrections, modifications, and comments on draft or proposed documents.[11] (3d Law Decl., Ex. C at 2, 6; Defs.' Br. at 16.) For example, AIC challenges eight pages of Index Doc. # 1 that Defendants nearly redacted in full. These pages appear to provide the administrative processing procedures attached to an ICE Operations Plan. (*See* Index Doc. # 1 at 631-38.) To the extent parts of these pages merely describe finalized ICE policies incorporated into the operations plan, those pages should not be withheld under this privilege as they do not reflect any give and take among those at the agency. Similarly, the challenged portions of Index Docs. # 4 and 8 include "a draft answer to [a] right to counsel question" (3d Law Decl., Ex. C at 4) responding to NGO complaints that ICE had denied arrested individuals in a worksite raid access to their attorneys. (*See* Index Doc. # 4 at 819.) Again, to the extent that these withheld portions include statements about Defendants' already existing and final policies, Defendants should not be permitted to withhold those portions under this privilege.[12]

Because Defendants have failed to satisfy the necessary elements of the deliberative-process privilege, this Court should deny summary judgment and compel disclosure of the Index Documents not appropriately withheld pursuant to the deliberative-process privilege or another validly asserted FOIA exemption.

**(b) <u>Attorney Work-Product Privilege.</u>**

The attorney work-product privilege protects materials "prepared in anticipation of litigation or for trial by or for [a] party or its representative." Fed. R. Civ. P. 26(b)(3)(A). Consistent with the general principle that FOIA exemptions are narrowly construed and applied,

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[11] Defendants have not produced final versions of these documents.

[12] The same may be true for the redacted portions of Index Docs. # 9 and 10.

the D.C. Circuit has emphasized repeatedly the limits of agencies' work-product privilege. If agencies were allowed "'to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated.'" *Senate of P.R.*, 823 F.2d at 587 (quotation omitted). Courts are "mindful of the fact that the prospect of future litigation touches virtually every object of a prosecutor's attention, and that the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with responsibilities for law enforcement." *Judicial Watch*, 841 F. Supp. 2d at 159 (quotation omitted).

For work-product privilege to apply, the government must show, at a minimum, that the lawyer who prepared the document had "subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *see also Equal Emp't Opportunity Comm'n v. Lutheran Soc. Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999) (Essential inquiry in applying this privilege is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation") (internal citation and quotation omitted). The exemption further requires that "the document be prepared or obtained *because of* the prospect of litigation." *Judicial Watch*, 841 F. Supp. 2d at 156.

The privilege may apply if the documents are analyzing "types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987). If the documents contain "mere 'neutral, objective analyses of agency regulations,'" set forth the "agency's view of the law," or express agency policy, they are in no way subject to the

work-product privilege, even if they relate to litigation in a general way. *See id.* (quotation omitted). This Court previously reminded Defendants that

> for the government to discharge its evidentiary burden, it must 1) provide a description of the nature and contents of the withheld document, 2) identify the document's author or origin (by job title or otherwise), 3) describe the factual circumstances that surround the document's creation, and 4) provide some indication of the type of litigation for which the document's use is at least foreseeable.

*Am. Immigration Council*, 2013 WL 3186061, at *16.

As in their first summary judgment motion, Defendants have chosen to address attorney work-product and attorney-client privileges in the same intertwined argument. (*See* Defs.' Br. at 17-19); *see also Am. Immigration Council*, 2013 WL 3186061, at *17 ("[A]ll of Defendants' submissions lump the analyses of attorney-client and work-product documents together, offering practically indistinguishable justifications for the use of both prongs.").) The Court determined that it could not "distinguish true work-product documents from those that happened to have been penned by someone with a law degree." *Am. Immigration Council*, 2013 WL 3186061, at *17. Defendants' continued failure to extricate their arguments on these privileges shows their apparent disregard for the difference between the two privileges and their failure to meet the required showings for each privilege.

Defendants have failed to make any argument in their brief or provide any explanation in their Updated *Vaughn* regarding how the attorney-work product privilege applies to certain documents. Index Doc. # 8 is marked as "b5AC/AWP." (*See* Index Doc. # 8 at 963-64.) Defendants assert Exemption 5 for Index Doc. # 10 in their Updated *Vaughn* but provide no additional detail. (*See* 3d Law Decl., Ex. C at 7; *see also* n.8, *supra*.) Neither Index Document, however, is mentioned in Defendants' argument on the attorney-client and work-product privileges. (*See* Defs.' Br. at 17-19.) Defendants discuss Index Doc. # 7 in that section of the

brief (Defs.' Br. at 18), but their Updated *Vaughn* does not state that the work-product privilege applies. (*See* 3d Law Decl., Ex. C at 5.) Furthermore, Defendants provide no "indication of the type of litigation for which" any of these documents' "use is at least foreseeable." *Am. Immigration Council*, 2013 WL 3186061, at *16.

Even when Defendants include the work-product privilege in their brief or Updated *Vaughn*, their arguments regarding the privilege's applicability are still insufficient. For example, Defendants contend that information withheld in Index Doc. # 2 and 3 "is either the seeking of legal advice . . . or the attorney's work product discussing the advice to be given." (Defs.' Br. at 17-18.) However, beyond making conclusory statements, Defendants provide no any indication that these documents relate to *any* litigation, let alone that "litigation was a real possibility, and that belief [was] objectively reasonable." *In re Sealed Case*, 146 F.3d at 884.

Likewise, Defendants contend that the work-product privilege protects Index Docs. # 9 and 11. (Defs.' Br. at 18-19; 3d Law Decl., Ex. C at 6-7.) Although Defendants state that Index Doc. # 9 includes "commentary discussing a court holding" (Defs.' Br. at 18-19), Defendants never assert that Index Doc. # 9 was "prepared or obtained *because of* the prospect of litigation." *Judicial Watch*, 841 F. Supp. 2d at 156 (emphasis in original). Further, Defendants' Updated *Vaughn* never even asserts the work-product privilege for Index Doc. # 9. (3d Law Decl., Ex. C at 6; *see* n.7, *supra*.) Similarly, Defendants state that Index Doc. # 11 "analyz[es] specific cases involving aliens." (*See* Defs.' Br. at 19.) However, this Court has already noted that the first two pages of Index Doc. # 11 "neither bear[] the name and function of the author, nor identif[y] the document's purpose." *Am. Immigration Council*, 2013 WL 3186061, at *17. Although Defendants now provide slightly more information about Index Doc. # 11 (*see* 3d Law Decl., Ex. C at 7), Defendants have failed to follow this Court's specific directives to include the

identification of "the document's author or origin (by job title or otherwise)" and a description of "the factual circumstances that surround the document's creation." *See Am. Immigration Council*, 2013 WL 3186061, at *16.

For those reasons, this Court should deny Defendants' claims regarding work-product privilege and compel disclosure of the Index Documents not appropriately withheld pursuant to the attorney-work product privilege or another validly asserted FOIA exemption.

**(c) Attorney-Client Privilege.**

Attorney-client privilege "protects confidential communications from clients to their attorneys made for the purpose of securing legal advice" as well as "communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.'" *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (quotation omitted). Defendants must establish five elements to merit summary judgment:

> (1) The holder of the privilege is, or sought to be, a client; (2) the person to whom the communication is made is a member of the bar or his subordinate and, in connection with the communication at issue, is acting in his or her capacity as a lawyer; (3) the communication relates to a fact of which the attorney was informed by his client, outside the presence of strangers, for the purpose of securing legal advice; and (4) the privilege has been claimed by the client. Additionally, (5) a fundamental prerequisite to the assertion of the privilege is confidentiality both at the time of the communication and maintained since.

*Am. Immigration Council*, 2013 WL 3186061, at *18 (quoting *Judicial Watch, Inc.*, 841 F. Supp. 2d at 153-54) (internal quotation marks omitted) (alterations omitted). Importantly, communications originating with the attorney rather than the client are only deemed privileged if they are "based on confidential information provided by the client." *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (internal citation and quotation omitted).

Courts construe this privilege narrowly, recognizing that it "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent

the privilege." *Coastal States Gas Corp.*, 617 F.2d at 862 (quotation omitted). One "fundamental prerequisite" of the attorney-client privilege is "confidentiality both at the time of the communication and maintained since." *Id.* at 863. Because agencies bear the burden under FOIA of establishing an exemption's applicability, agencies cannot withhold records under the attorney-client privilege unless they offer specific support to establish each element of the privilege. *See, e.g., Senate of P.R.*, 823 F.2d at 585; *see also Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977); *Judicial Watch*, 841 F. Supp. 2d at 153-54.

As discussed in Section III.B.1.(b) *supra*, Defendants have made the task of determining whether the attorney-client privilege applies more onerous by lumping together attorney-client privilege and attorney work-product privilege in their renewed motion. The Updated *Vaughn* does not clearly distinguish between arguments made to support each of the Exemption 5 privileges. (*See, e.g.*, 3d Law Decl., Ex. C at 3.)

Defendants have not made any argument regarding how the attorney-client privilege applies to certain documents. For example, Defendants assert Exemption 5 for Index Doc. # 10 in their Updated *Vaughn* without any further detail about which privilege applies. (*See* 3d Law Decl., Ex. C at 7; *see also* n.8, *supra*.) Further, Defendants' brief does not even mention this document in the section on attorney-client and work-product privileges. (*See* Defs.' Br. at 17-19.) With respect to Index Doc. # 11, Defendants mentioned it in the attorney-client and work product privileges section of their brief, but Defendants do not specifically argue (nor assert in their Updated *Vaughn*) that the attorney-client privilege applies to Index Doc. # 11. (*See* Defs.' Br. at 17-19; *see also* 3d Law Decl., Ex. C at 7; n.9, *supra*.)

Furthermore, even where Defendants have argued that the privilege applies, they have not shown that the records rest on confidential information from the client. *In re Sealed Case*,

737 F.2d 94, 98–99 (D.C. Cir. 1994). For example, Defendants state that Index Docs. # 2 and 3 were "seeking . . . legal advice by a senior official," in part regarding "a specific regulation" and appropriate agency action during "a specific type of interview." (Defs.' Br. at 17.) The description undermines Defendants' assertion of privilege because general communications between attorney and client—and even legal analyses and opinions on agency policies and processes—do not merit protection. *See Coastal States Gas Corp.*, 617 F.2d at 863 (finding that attorney-client privilege did not apply to "neutral, objective analyses of agency regulations" that did not contain "private information concerning the agency"). Similarly, AIC seeks portions of Index Doc. # 7 responding to an employee's effort to seek "specific legal guidance . . . related to the processing of aliens during a worksite enforcement," but Defendants have not shown that this response even contains private confidential information from the client. (Defs.' Br. at 18; *see also id*. at 18-19 (describing Index Doc. # 9 as "contain[ing] drafts of legal opinions").)

Additionally, Defendants have not fulfilled the burden of establishing the confidentiality of the allegedly exempt documents at the time of the communication or the maintenance of that confidence. Even if a subjective intent to maintain confidentiality could be inferred from ICE's resistance to producing these responsive documents, Defendants would still be required to demonstrate confidentiality in fact. *See In re Sealed Case*, 737 F.2d at 100. This Court made it quite clear that it could not "issue summary judgment on the grounds that the disputed materials were 'intended' to be held in confidence," and that "[t]he confidentiality of a communication was not something this Court [was] at liberty to assume." *Am. Immigration Council*, 2013 WL 3186061, at *18-19. Nonetheless, Defendants still fail to meet this burden. (*See* Defs.' Br. at 17-19; 3d Law Decl., Ex. C at 3, 5-6.)

Because Defendants have not proven that these Index Documents are anything more than unprotected, general descriptions of Defendants' routine legal positions regarding access to counsel, this Court should deny Defendants' summary judgment motion and compel disclosure of the Index Documents not appropriately withheld pursuant to the attorney-client privilege or another valid FOIA exemption.

**2. FOIA Exemption (b)(7).**

FOIA provides an exemption for "records or information compiled for law enforcement purposes, *but only to the extent* that the production of such law enforcement records or information" meets one of the exemption's six subparts. 5 U.S.C. § 552(b)(7) (emphasis added). As with all other exemptions, the government has the burden of proving the exemption applies. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("[W]hen the Government declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the FOIA").

The D.C. Circuit has adopted a two-part threshold test to determine if records were truly "compiled for law enforcement purposes." *See Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). First, agencies must "identify a particular individual or a particular incident as the object of its investigation" and specifically state "the connection between that individual or incident and a possible security risk or violation of federal law." *Id.* Second, agencies must show that "the nexus between the investigation and one of the agency's law enforcement duties [is] based on information sufficient to support at least 'a colorable claim' of its rationality . . .." *Id.* at 421. Thus, agencies must provide information as to "how and under what circumstances the requested files were compiled, . . . and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. U.S. Dep't of Justice, Office of Prof'l*

*Responsibility*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (internal quotation marks omitted) (citations omitted).

Assertions of Exemption 7 do not flow inherently from ICE's status as a law enforcement agency. Although ICE is entitled to a deferential standard of review as a law enforcement agency, the standard is not "vacuous," and "it does not authorize a wholesale departure from all evidentiary requirements." *Am. Immigration Council*, 2013 WL 3186061, at *20; *see also King*, 830 F.2d at 229 (holding that records cannot be considered prepared for law enforcement purposes "simply by virtue of function that [the agency] serves") (quoting *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986)). Defendants withheld Index Docs. # 1 and 10 under Exemption 7 and stated that the withholdings relate to a law enforcement purpose because they "pertain to the access of counsel for individuals once they are in ICE custody pursuant to federal criminal and immigration law." (Defs.' Br. at 19.) Here, AIC only challenges the parts of Index Doc. # 1 relating to *administrative* processing of individuals not the portions related to investigation or arrest of noncitizens. (*See* Index Doc. # 1 at 633-38.)[13] Parts of Index Doc. # 10 are less clearly marked, and, as a result, AIC challenges a larger portion of those redactions. However, AIC again only seeks those portions of Index Doc. # 10 relating to access to counsel. (*See* Index Doc. # 10 at 990-1002.)[14] Defendants have not established the nexus between the challenged portions of those Index Documents and ICE's law enforcement purposes.

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[13] Some pages of Index Doc. # 1 are withheld under Exemptions 6 and 7(C) (*see* Index Doc. # 1 at 633-37), and AIC does not challenge information that is properly withheld under Exemptions 6 and 7(C) as well as Exemption 7(E). Additionally, AIC is challenging the preceding two pages of Index Doc. # 1, which also relate to administrative processing, but appear to be withheld only under Exemption 5, not Exemption 7(E). (*See* Index Doc. # 1 at 631-32.)

[14] Defendants' brief does not expressly argue that Exemption 7 applies to Index Doc. # 10. (*See* Defs.' Br. at 19-21.) Certain pages of Index Doc. # 10 are marked as withheld under Exemptions 6 and 7(C) (*see* Index Doc. # 10 at 994-99); AIC does not challenge information that is properly

**(a) FOIA Exemption (b)(7)(E).**

Even if this Court assumes that Defendants have satisfied Exemption 7's threshold requirements, Defendants must still show that disclosure will reveal guidelines, techniques or procedures for law enforcement investigations or prosecutions that are not generally known to the public, *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp. 2d 13, 36 (D.D.C. 2012), and that disclosure of these techniques could "reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Defendants must provide "a relatively detailed justification for each record that permits the reviewing court to make a meaningful assessment of the redactions and to understand how disclosure would create a reasonably expected risk of circumvention of the law." *Am. Immigration Council*, 2013 WL 3186061, at *22 (quoting *Strunk v. Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012)) (internal quotation marks omitted).

Generally courts have found that the government carries its evidentiary burden under (b)(7)(E) when it provides:

> 1) a description of the technique or procedure at issue in each document, 2) a reasonably detailed explanation of the context in which the technique is used, 3) an exploration of why the technique or procedure is not generally known to the public, and 4) an assessment of the way(s) in which individuals could possibly circumvent the law if the information were disclosed.

*Id.* at *23 (citing *Skinner v. U.S. Dep't of Justice*, 893 F. Supp. 2d 109, 113-14 (D.D.C. 2012); *Strunk v. U.S. Dep't of State*, 905 F. Supp. 2d 109, 142, 147 (D.D.C. 2012)).

Here, Defendants have failed to carry their burden and offered only conclusory allegations, descriptions, and explanations that may relate to only portions of the withheld documents. First, Defendants provided some detail regarding the techniques and procedures at

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withheld under Exemptions 6 and 7(C) as well as Exemption 7(E).

issue in their Updated *Vaughn*, but they failed to explain whether *all* of the information is appropriately withheld. Defendants describe the redacted material to include descriptions of the location to be investigated, agency codes, team assignments, and use of undercover agents (*see* 3d Law Decl., Ex. C at 2), but they have not clearly explained whether a "premise description" is a technique, procedure, or guideline. (*See* Index Doc. # 1; Defs.' Br. at 21; 3d Law Decl., Ex. C at 2.) Similarly, Defendants state that they withheld "radio channels used, assignment codes, teams and assignments, and the particulars of each phase of the operation" from Index Doc. # 10. (*See* 3d Law Decl., Ex. C at 7.) Again, Defendants have not clearly explained whether "the particulars of each phase of the operation," (*see id.*), are comprised entirely of guidelines, techniques, or procedures or whether other types of information may have been redacted from this document's 19 pages.

Additionally, Defendants have not clarified how the release of *all* withheld portions of the Index Documents risks circumvention of the law.[15] Defendants have not explained what harms (if any) would apply to disclosures of parts of Index Doc. # 1 relating to administrative processing. Because Defendants have not indicated which portions of their lengthy redactions in Index Docs. # 1 and 10 relate to specific techniques and procedures, the Court will be unable to assess in a meaningful way the asserted risk of circumvention of the law without conducting an *in camera* review.

Furthermore, Exemption 7(E) justifies redaction of materials that pass the threshold requirements "only to the extent that [their] production . . . would disclose" guidelines, techniques, or procedures "for law enforcement *investigations or prosecutions*." 5 U.S.C. §

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[15] AIC does not dispute that certain information, such as "when undercover agents are used," could risk circumvention of the law. (3d Law Decl., Ex. C at 2; *see* Defs.' Br. at 21.)

552(b)(7)(E) (emphasis added); *see also PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d at 251 (holding that records which included "documents, records and sources of information available to Agents investigating obscenity violations, as well as the type of patterns of criminal activity to look for when investigating certain violations" were properly withheld); *Nat'l Whistleblower Ctr.*, 849 F. Supp. 2d at 36 (finding that records with procedures for gathering and analyzing evidence were properly withheld). Even if an agency is not required to show that materials relate to a specific investigation to meet Exemption 7's threshold requirement, agencies still must demonstrate that the materials are "agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions." *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002). Where records with a law enforcement purpose do not encompass *investigatory* or *prosecutorial* techniques, procedures, or guidelines, courts have not permitted agencies to withhold those records pursuant to Exemption 7(E). *See Cowsen-El v. U.S. Dept. of Justice*, 826 F. Supp. 532, 534 (D.D.C. 1992) (denying summary judgment for Exemption 7(E) claims to Bureau of Prisons program statement because "[b]y its express terms, [Exemption 7(E)] authorizes the withholding of information consisting of, or reflecting, a law enforcement 'technique' or a law enforcement 'procedure' *if* it is 'for law enforcement investigations and prosecutions,' not internal agency policies wholly unrelated to investigations or prosecutions");[16] *see also Raher v. Fed. Bureau of Prisons*, CV-09-526-ST, 2011 U.S. Dist. LEXIS 56211, at *24-25 (D. Or. May 24, 2011) (holding that Bureau of Prisons' Exemption 7(E) withholdings lacked

[16] Although courts in this District have stated that Exemption 7(E) protects "investigatory or *procedural* techniques" from disclosure, *see, e.g.*, *ACLU v. U.S. Dept. of Homeland Sec.*, 738 F. Supp. 2d 93, 119 (D.D.C. 2010) (emphasis added), "procedural techniques" are not included in the statute's language. In this regard, courts in this District have relied upon *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007), which protected certain information related to "security clearance procedures" from disclosure. However, the procedures at issue in *Morley* were part of CIA background investigations into its officers. *Id.* at 1129.

adequate justification where, "[a]lthough BOP has shown that disclosure . . . raises security concerns with respect to its custodial functions," agency had not shown (1) that "the withheld documents pertain[ed] to law enforcement functions" and (2) assuming Bureau of Prisons qualified to be a law enforcement agency, that "the withheld records are techniques, procedures or guidelines for 'law enforcement investigations or prosecutions' under Exemption (7)(E)").

Here, portions of the material withheld by Defendants under Exemption 7(E) appear to relate to the administrative processing of individuals in the agency's custody—not to the investigations described in the Updated *Vaughn*. For example, the entire section of Index Doc. # 1 challenged by AIC is entitled "Administrative Processing." (*See* Index Doc. # 1 at 631.) Thus, even if these records were compiled for a law enforcement function and include agency procedures, techniques or guidelines, they should not be withheld unless Defendants also show that all of the procedures relate to investigations or prosecutions.

Finally, neither in their brief, the Third Law Declaration, or the Updated *Vaughn* do Defendants offer details, let alone "an exploration," of why the techniques or procedures are not generally known to the public. In fact, Defendants never assert that all of the information in Index Docs. # 1 and 10 has been withheld from the public. (*See* Defs.' Br. at 21 (stating that information from documents listed on page 1 of their Updated *Vaughn* "is withheld from the public" but making no such assertions regarding Index Docs. # 1 or 10.)) Thus, neither AIC nor the Court has an understanding of whether or how all of the redacted information is still unknown to the public.

Thus, even if this Court assumed that the Defendants met the threshold requirements, Defendants have not established that information was properly withheld under Exemption 7(E). This Court should deny Defendants' renewed motion and compel disclosure of the portions of

Index Docs. # 1 and 10 that were not appropriately withheld under Exemption 7(E) or another validly asserted FOIA exemption.

**C. Defendants Did Not Release All Reasonably Segregable Information.**

Even if portions of the redacted information in the Index Documents are subject to Defendants' asserted FOIA exemptions, agencies must release "[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Pub. Citizen, Inc.*, 598 F.3d at 876 (noting that documents under Exemption 5 "that contain factual information that does not inevitably reveal the government's deliberations" must be released) (internal citation omitted) (quotation omitted)). In the D.C. Circuit, a document's non-exempt portions must be disclosed unless those portions "are inextricably intertwined with exempt portions." *Mead Data Ctr.*, 566 F.2d at 260. Agencies must provide "a more detailed justification" rather than mere "conclusory statements" to establish that non-exempt material was not reasonably segregable. *Id.* at 261.

In its prior opinion, this Court indicated that it was unnecessary at that time to address AIC's segregability arguments. *Am. Immigration Council*, 2013 WL 3186061, at *23. However, the Court provided Defendants with the following guidance in advance of their next submission: "Once Defendants have specifically identified the exempted portions of their records and described them in accordance with the requirements set out above . . . they must also provide descriptions of excerpts deemed to be non-segregable, with explanations as to these decisions." *Id.* Furthermore, this Court determined that Defendants' previous assertion "that ICE 'has reviewed each record line-by-line to identify information exempt from disclosure . . . [finding that] all information not exempted . . . was correctly segregated' . . . will not suffice to discharge this burden." *Id.* at *24.

Defendants, however, still rely upon conclusory assertions regarding segregability. The Third Law Declaration states that Mr. Law "reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied," that "all information not exempted from disclosure pursuant to FOIA exemptions specified above was correctly segregated and non-exempt portions were released," and that "[n]o documents were withheld in their entirety."[17] (3d Law Decl., ¶¶ 78-80.) Defendants' brief repeats in more summary fashion the assertions from the Third Law Declaration. (*See* Defs.' Br. at 22.)

Defendants have offered no basis to conclude that they have released all segregable, non-exempt portions of the documents. Index Doc. # 12, which was neither identified in the summary *Vaughn* index nor the Updated *Vaughn*, only lists Exemptions 6 and 7(C) on the face of the document, but the 62-page document was withheld in full.[18] The Third Law Declaration generally describes what type of information is withheld under Exemption 6 and 7(C), but does not state that the exemptions apply to the entirety of Index Doc. # 12 or specifically address whether the document contains segregable information. (*See* 3d Law Decl., ¶¶ 59-64, 67-71.) Exemptions 6 and 7(C) deal with invasion of privacy and involve personal information like names, medical information, and social security numbers. *See* 5 U.S.C. § 552(b)(6); 5 U.S.C. § 552(b)(7)(C); *Black v. U.S. Dep't of Homeland Sec.*, No. 10-CV-2040, 2012 WL 3155142, *5

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[17] Defendants' contention that no document was withheld in its entirety is incorrect. Index Docs. # 6 and 12 were withheld in their entirety.

[18] The Court's opinion correctly noted that AIC waived any challenges to Exemptions 6 and 7(C). However, as noted in its original opposition brief, AIC challenged the segregability of Index Doc. # 12 because AIC does not believe that Defendants' assertions of Exemptions 6 and 7(C) were reasonably segregable given that the entire document was withheld. (*See* ECF No. 15 at 33-34.) Because the Court indicated that it was unnecessary to address the segregability issue in its opinion, the Court has not yet ruled on AIC's argument regarding the segregability of Index Doc. # 12.

(D. Nev. Aug. 2, 2012) (government failed to show that disclosure would be unwarranted invasion of personal privacy); *Kubik v. U.S. Fed. Bureau of Prisons*, No. 10-6078-TC, 2011 WL 2619538, *11 (D. Or. July 1, 2011) (even if documents were compiled for law enforcement purposes, public interest outweighed privacy interests), *subsequent determination*, 2011 WL 4372188 (D. Or. Sept. 19, 2011).

Furthermore, Index Docs. # 4 and 8 appears to be based in part on previously prepared talking points for a meeting with an outside organization, suggesting that the email contains some statements of final policy that could be segregated and released. (*See* Index Doc. # 4 at 817 ("Much of this came from the AS talking points prepared for the AILA liaison meeting on 12/12/07.").) Likewise, Index Doc. # 1 and Index Doc. # 10 may contain segregable information. (*See* Section III.B.2 *supra* at pages 31-37.) These documents indicate that Defendants' claim of a line-by-line review is incorrect.

Defendants failed to follow this Court's guidance and did not offer a sufficient basis to conclude that they have released segregable, nonexempt portions of the documents. For those reasons, the Court should reject Defendants' arguments regarding segregability and deny their renewed motion.

## CONCLUSION

Defendants failed to carry their burden of demonstrating that they conducted an adequate search, and that the records identified in the Updated *Vaughn* are exempt from disclosure. Accordingly, AIC respectfully requests that the Court deny Defendants' renewed summary judgment motion for the reasons set forth above.

Dated: December 11, 2013

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **American Immigration Council,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**U.S. Department of Homeland Security, et al.,**<br><br>**Defendants.** | **Civil Action No. 12-856 (JEB)** |

**AMERICAN IMMIGRATION COUNCIL'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE**

Plaintiff American Immigration Council ("AIC") responds as follows to the numbered paragraphs of Defendants' Statement of Material Facts As To Which there Is No Genuine Dispute ("Defendants' Statement"):

1. Undisputed.

2. AIC denies that its FOIA request to Defendants U.S. Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE") was limited to the four points listed in paragraph 2 of Defendants' Statement. (*See* Third Declaration of Ryan Law ("3d Law Decl."), Ex. D at 2-4.) The four points are the general topic areas of AIC's FOIA request, but AIC's request describes thirteen different categories in its March 14, 2011, request that may be found in those four topic areas. (*See id.*)

3. Undisputed.

4. Undisputed.

5. Undisputed. However, AIC notes that Exhibit F, which is cited in Mr. Law's Third Declaration, is an appeal letter to USCIS, not ICE. ICE's letter is attached as Exhibit A to AIC's submission in opposition to Defendants' renewed motion for summary judgment. (*See* Declaration of Emily Creighton, Ex. A.)

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Undisputed.

12. Undisputed.

13. AIC denies that it filed the complaint in this case on March 31, 2012. AIC filed its complaint in this case on May 31, 2012. (*See* ECF No. 1.)

14. Undisputed.

15. Undisputed.

16. These statements are not material to Defendants' renewed motion for summary judgment.

17. These statements are not material to Defendants' renewed motion for summary judgment.

18. AIC does not dispute Defendants' description of ERO. AIC, however, denies any implication that this description includes all of the relevant offices and/or sub-offices to be searched in response to AIC's FOIA request as outlined in AIC's Opposition to Defendants' Renewed Summary Judgment Motion. AIC also denies that its FOIA request was limited to

"immigrant detainees," as its FOIA request pertains to a broader group of noncitizens. (*See, e.g.*, 3d Law Decl., Ex. D at 1 ("Attorneys' ability to be present during *their clients' interactions* with ICE") (emphasis added); *id.* at 2 ("Guidance . . . regarding noncitizens' access to counsel during or after worksite or other enforcement actions").) Furthermore, Defendants' citation appears to be to the First Law Declaration, but the information contained in this paragraph comes from the Third Law Declaration. (3d Law Decl., ¶ 24.)

19. AIC does not dispute Defendants' description of the ERO Resource Library. However, AIC denies any implication that the ERO Resource Library was searched three times. (*See* Defs.' Statement of Material Facts Not in Genuine Dispute in Support of their Renewed Motion for Summary Judgment ("Defs.' SOF"), ¶¶ 19, 21, and 34.) The Third Law Declaration states that the ERO Resource Library was searched by Custody Management Division ("CMD") and by ODPP, but says nothing about a search by ERO generally. (3d Law Decl. ¶¶ 30, 48.) Finally, it is unclear to AIC what portion of the quotation in paragraph 19 is emphasized.

20. AIC denies any implication that CMD's eight-hour search constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) Further, AIC states that Defendants' statement of "specific, targeted terms" calls for a legal conclusion and is improper for a Local Rule 7(h)(1) Statement.

21. AIC denies any implication that Defendants' search constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) Likewise, AIC denies any implication that the ERO Resource Library was searched three times. (*See* Defs.' SOF, ¶¶ 19, 21, and 34.) The Third Law Declaration states that the ERO Resource Library was searched by CMD and by ODPP, but says nothing about a search by ERO generally. (3d Law Decl. ¶¶ 30, 48.)

22. AIC denies any implication that the sixteen-hour search on the Network Shared Drive constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) Furthermore, AIC denies that Defendants' search "us[ed] better search terms than the prior search." AIC contends that this statement calls for a legal conclusion and is improper for a Local Rule 7(h)(1) Statement. (*See id.* at 11.)

23. AIC states that this is a legal conclusion, not a material fact, and improper for a Local Rule 7(h)(1) Statement.

24. AIC states that the assertion that Homeland Security Investigations Law Division ("HSILD") and the District Court Litigation Division ("DCLD") are the "most relevant sub-components" of OPLA calls for a legal conclusion. Additionally, AIC denies that Defendants' search of only HSILD and DCLD constituted a reasonable and adequate search. (*See* ECF No. 20 at 5-11.) AIC notes that OPLA includes the Training Division, sections on Detention and Removal Law and Enforcement Law, and Field Legal Operations. (*See* http://www.ice.gov/doclib/about/offices/opla/pdf/opla-org-chart.pdf; http://www.ice.gov/about/offices/leadership/opla/divisions.htm.)

25. AIC does not dispute Defendants' description of HSILD. AIC, however, denies any implication that this description includes all of the relevant offices and/or sub-offices to be searched in response to AIC's FOIA request as outlined in AIC's Opposition to Defendants' Renewed Summary Judgment Motion. AIC states that Defendants' statement that "it is therefore logical that HSILD would have responsive documents to Plaintiff's request related to access of counsel" calls for a legal conclusion and is improper for a Local Rule 7(h)(1) Statement.

26. AIC denies any implication that the hour-long search on the Network Shared Drive constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) Further, AIC

states that Defendants' statement of "of targeted other individuals' emails" calls for a legal conclusion and is improper for a Local Rule 7(h)(1) Statement.

27. AIC states that this is a legal conclusion, not a material fact, and improper for a Local Rule 7(h)(1) Statement.

28. AIC denies any implication that the two-hour search by the Associate Legal Advisor of DCLD constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) AIC further states that Defendants' statement that "an Associate Legal Advisor [took] 2 hours away from his normal duties" to conduct searches is not material to Defendants' renewed motion for summary judgment and is improper for a Local Rule 7(h)(1) Statement.

29. AIC states that the first sentence of this paragraph is not material to Defendants' renewed motion for summary judgment and is improper for a Local Rule 7(h)(1) Statement. AIC denies any implication that the manual hand search by a Second Associate Legal Advisor of DCLD constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.)

30. AIC denies any implication that Defendants' search constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.)

31. AIC denies any implication that the four-hour search by a second Associate Legal Advisor constituted an adequate and reasonable search. (*See id.*) Additionally, based on Mr. Law's Third Declaration, it appears that the four-hour search encompassed not only the compact disc search described in this paragraph but also the searches described in paragraphs 29 and 30 of Defendants' SOF. (*See* 3d Law Decl. ¶ 43.)

32. AIC denies any implication that the two-hour search by the third Associate Legal Advisor of the DCLD constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) AIC further states that Defendants' statement that "[d]espite already spending 6 hours of

employee time, . . . a third Associate Legal Advisor spen[t] another 2 hours away from his regular duties" to conduct searches is not material to Defendants' renewed motion for summary judgment and is improper for a Local Rule 7(h)(1) Statement.

33. AIC denies any implication that the eight-hour search by the DCLD constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) AIC further states that Defendants' statement that "three separate attorneys spent over 8 hours away from their regular duties" to conduct searches is not material to Defendants' renewed motion for summary judgment and is improper for a Local Rule 7(h)(1) Statement. Likewise, Defendants' statements that they "conduct[ed] thorough searches for information responsive to Plaintiff's request" and "these searches were reasonably calculated to locate all documents responsive to Plaintiff's FOIA request" call for legal conclusions, are not material facts, and are improper for Local Rule 7(h)(1) Statements.

34. AIC denies any implication that Defendants' search constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) Furthermore, AIC denies any implication that the ERO Resource Library was searched three times. (*See* Defs.' SOF, ¶¶ 19, 21, and 34.) The Third Law Declaration states that the ERO Resource Library was searched by CMD and by ODPP, but says nothing about a search by ERO generally. (3d Law Decl. ¶¶ 30, 48.)

35. AIC denies any implication that this search constituted an adequate and reasonable search. (*See* ECF No. 20 at 5-11.) AIC does not dispute Defendants' description of "the ICE Policy Manual."

36. Undisputed.

37. AIC states that this is a legal conclusion, not a material fact, and improper for a Local Rule 7(h)(1) Statement.

38. AIC admits that Defendants produced 6,906 pages of records in five rolling productions, but denies that ICE's production is the totality of documents responsive to AIC's FOIA request.

39. AIC admits that Defendants withheld portions of records pursuant to FOIA Exemptions 5, 6, 7(C), and 7(E), but denies that these are all of the bases that Defendants withheld portions of records produced to AIC. Defendants have withheld portions of records produced to AIC as "referred to DOJ" and "non-responsive duplicate." AIC also denies that the exemptions claimed by Defendants that remain at issue were properly invoked to withhold those records for the reasons set forth in AIC's Memorandum of Law in Opposition to Defendants' Renewed Motion for Summary Judgment.

40. Undisputed.

41. Undisputed that the Court denied Defendants' first motion for summary judgment and that the Court noted that Exemptions 6 and 7(C) were no longer at issue in this case. (*See* ECF Nos. 19-20.) However, AIC notes that the Court did not decide the issue of segregability in its first opinion. (*See* ECF No. 20 at 39-40.) Index Doc. # 12 (redacted in full under Exemptions 6 and 7(C)), was (and is) challenged on segregability grounds as set forth in AIC's first Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (*see* ECF No. 15 at 33-35), and AIC's current Memorandum of Law in Opposition to Defendants' Renewed Motion for Summary Judgment.

42. Undisputed. Pursuant to the July 9, 2013, Minute Order, AIC notes that Defendants' updated *Vaughn* index and supplemental declaration were to be filed on or before September 9, 2013, and that AIC was to review these documents and determine whether to submit a proposed briefing schedule on or before October 9, 2013. Furthermore, Defendants

submitted the required documents on September 9, 2013; after reviewing that documentation, AIC determined that a briefing schedule was necessary. (*See* ECF Nos. 22-23.)

43. Undisputed that Defendants attached 88 pages to their renewed motion for summary judgment. (*See* Declaration of Catrina Pavlik-Keenan, Ex. A.) AIC denies any implication that these 88 produced pages constitute all of the documents labeled and produced by Defendants as "non-responsive." (*See, e.g.*, Index Doc. # 5.)

44. Undisputed.

45. These statements are not material to Defendants' renewed motion for summary judgment.

This record presents the following genuine issues of material fact:

1. Whether Defendants conducted an adequate search for responsive documents in relation to AIC's FOIA requests.

2. Whether Defendants' updated *Vaughn* index still fails to meet the necessary requirements.

3. Whether Defendants have carried their evidentiary burden of establishing that the withheld documents are properly exempt from disclosure.

Dated: December 11, 2013

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