UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF
THEIR RENEWED MOTION FOR SUMMARY JUDGMENT

In its prolix opposition to Defendants' renewed Motion for Summary Judgment, Plaintiff American Immigration Council ("Plaintiff" or "AIC") tries desperately to save its complaint from dismissal by, among other things: 1) misstating the record in this case; 2) ignoring key points of the Third Law Declaration; and 3) attempting to relitigate matters already addressed. In fact, Defendant United States Department of Homeland Security ("DHS") through its sub-agency, Defendant United States Immigration and Customs Enforcement ("ICE," together with DHS, "Defendants," the "Government," or the "Agency") have gone above and beyond the requirements of FOIA, conducted exhaustive searches of its systems of records, and provided voluminous records to Plaintiff. Defendants, contrary to Plaintiff's unsupported accusations and unfounded speculation, have conducted a more than adequate and reasonable search and provided Plaintiff with all of the information subject to FOIA responsive to Plaintiff's request. Defendants are entitled to judgment as a matter of law.

I. SUMMARY OF UNDISPUTED FACTS[1]

A. Plaintiff's FOIA Request

Plaintiff submitted its FOIA request to the ICE FOIA Office by letter dated March 14, 2011, which was received at the Agency on March 31, 2011. (*See* 3d Law Decl. at 3, ¶ 8.) Plaintiff's FOIA request sought information relating to an attorney's ability to be present during their clients' interaction with ICE, as well as what role the attorney may play during their clients' interactions with ICE, attorney conduct during interactions with ICE on behalf of their clients, and attorney appearances at ICE offices or other facilities. (*Id.*[2]) By letter dated March 31, 2011, the ICE FOIA Office acknowledged receipt of Plaintiff's FOIA request and assigned it FOIA case number 2011FOIA7112. (*Id.* at 3, ¶ 9.)

Upon receiving Plaintiff's FOIA request, the ICE FOIA Office reviewed the request and determined that based on the subject matter of the FOIA request, the following offices and divisions were the ones likely to possess responsive records: the ICE Office of Enforcement and Removal Operations (ERO), the ICE Office of Homeland Security Investigations (HSI), and the ICE Office of the Principal Legal Advisor (OPLA) (*see id.* at 3, ¶ 10).

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

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[1] All facts are not in dispute except where noted.

[2] Plaintiff's opposition [ECF No. 26] attempts to quibble with the Agency's characterization. The request speaks for itself.

(*Id.* at 4, ¶ 13.) ICE informed Plaintiff that a search of the records failed to produce records responsive to the Plaintiff's request. (*Id.*)

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

B. ICE Tasks Another Office Likely to Have Responsive Records

In addition to a re-tasking of the components listed above in response to Plaintiff's request, ICE tasked the Office of Detention Policy and Planning (ODPP). (*Id.*) ODPP leads ICE's detention reform efforts by implementing short-term improvements to immediately address issues in the detention system as it currently exists and identifying longer-term improvements to help redesign the immigration detention system.[3] (*Id.* at 12, ¶ 47.) ODPP is charged with designing a detention system that meets the unique needs of ICE's detained

[3] Curiously, Plaintiff continuously attacks the parameters of Defendants' search, but then claims that Defendants' description of the mission (and therefore the relevance of those offices to Plaintiffs' request) of the specific components tasked with conducting searches is not material to Defendants' motion. Plaintiff cannot claim that Defendants did not search the right components, but then claim that detailed descriptions of what the components searched actually *do* is not material. Thus, there is no genuine dispute of these material facts.

population. (1st Decl. of Ryan Law [ECF No. 12-2] at 12-13, ¶ 29.) ODPP shapes the future design, location and standards for civil immigration detention facilities so that ICE no longer relies primarily on existing penal models. (*Id.* at 13, ¶ 29.) ICE considers access to legal services, emergency rooms and transportation hubs, among other factors when determining future facility locations. (*Id.*)

C. ERO Conducts an Exhaustive Search for Responsive Records

One ICE component likely to contain the responsive records Plaintiff sought was ERO. Specifically, ERO is the ICE component charged with, among other things, apprehending removable aliens, detaining them, and then removing them from the United States – a component that would probably be involved with issues of access to counsel for immigration detainees.[4] (3d Law Decl. at 6, ¶ 24.) ERO searched its Resource Library which is "an electronic system available to all ICE and ERO employees via the ICE intranet ***that contains current and archived policies***, templates, memoranda, worksheets, directives, handbooks, standard operating procedures, and broadcast messages related to the mission of ICE ERO." (*Id.* at 7, ¶ 27 (emphasis added).) ERO's sub-component, the Custody Management Division, conducted an eight (8) hour search of paper and hard-copy files, along with untimed searches of Network Shared Drives using specific, targeted terms, but also broad terms like "detention facility."[5] (*Id.*

[4] *See supra* note 3.

[5] Plaintiff states that it "denies any implication that CMD's eight-hour search constituted an adequate and reasonable search." [ECF No. 26, ¶ 20.] Nowhere in Paragraph 20 do Defendants make such an implication. Plaintiff's "denial" is a complete waste of time and further demonstrates Plaintiff's lack of credibility in its opposition as Plaintiff not only attempts to re-litigate issues already decided, but also attempts to create issues out of thin air. Thus, this fact cannot be in genuine dispute. Next, Plaintiff states that the description of "specific, targeted terms" is a legal conclusion. The Government, as is entirely proper for a Statement of Material Facts, was attempting to summarize a portion of the Third Law Declaration for ease of reference. To remove this material fact from any possible claim of genuine dispute, the Government notes that the Third Law Declaration states that the search was "conducted using the search terms 'RA Memos', 'SPC', 'Jena', 'Florence', 'El Paso', 'DEAC', 'Detention Facility', 'LCI', and 'Broward.'" (3d Law Decl. at 8, ¶ 29.) The Government notes that in this list, some terms refer to specific facilities and terms, the term "detention facility" covers a number of facilities and is, therefore, a more general term.

at 7-8, ¶¶ 29-30.) Finally, the aforementioned Resource Library was again searched using the search terms "attorney," "court," "client," and "noncitizen," by an ERO writer-editor who also searched his desktop computer using the same terms. (*Id.* at 8, ¶ 30.) An additional sixteen (16) hour search of the aforementioned Network Shared Drive was conducted using better search terms than the prior search, specifically: "Telephone Access," "Visitation," "Legal Rights," "Group Presentations," "Law Library," "Legal Material," and "Detainee Transfer." (*Id.* at 8, ¶ 31.) These searches were reasonably calculated to locate all records that would be responsive to the Plaintiff's FOIA request. (*Id.* at 8, ¶ 32.)

D. ICE's Legal Advisors Conduct a Thorough Search

Next, OPLA – ICE's in-house attorneys – tasked the Homeland Security Investigations Law Division ("HSILD") and the District Court Litigation Division.[6] (*Id.* at 10, ¶ 38.) HSILD is the sub-component that, among other things, provides legal advice to ERO offices involved in the detention and removal of aliens suspected of human rights violations or national security concerns; it is therefore logical that HSILD would have responsive documents to Plaintiff's request related to access of counsel.[7] (*Id.* at 10, ¶ 39.) A search of the Network Shared Drive using the terms "attorney representation," "access to counsel," and "right to counsel" took an

[6] Plaintiff states that it "denies any implication that Defendants' search of HSILD and DCLD constituted an adequate and reasonable search." [ECF No. 26, ¶ 24.] Nowhere in Paragraph 24 do Defendants make such an implication. Further, Plaintiff's contention that the statement "it is therefore logical that HSILD would have responsive documents to Plaintiff's request related to access of counsel" based on HSILD's mission is a legal conclusion again demonstrates Plaintiff's irrational attack on the Agency's search. There can be no genuine dispute that the sub-component that among other things, provides legal advice to ERO offices involved in the detention and removal of aliens suspected of human rights violations or national security concerns, would be a proper component to search. Indeed, if the Agency had *not* searched HSILD, Plaintiff would have presumably attacked the Agency vigorously on this point (as it has at every point during this litigation).

[7] *See supra note* 3.

hour; another search was done of the Division Chief's e-mail using the same terms and of targeted other individuals' e-mails.[8] (*Id.* at 10-11, ¶¶ 39-40.)

Similarly the District Court Litigation Division had an Associate Legal Advisor take 2 hours to search the Litigation Database, his computer, and his e-mail database using targeted search terms including "Sixth and 6th Amendment" for the database and "Sixth or 6th Amendment", "Detainer", "Counsel", and "Worksite" for the computer and e-mail.[9] (*Id.* at 11, ¶ 42.) The Division tasked another Associate Legal Advisor who conducted a manual hand search of the office's paper files, including filing cabinets and book shelf. (*Id.* at 11, ¶ 43.) He also re-searched the Litigation Database using even more search terms, including "right to counsel," "6th amendment," "have counsel present," "seek counsel," and "right to representation." (*Id.*) Further, he searched the Division's compact discs using these same terms. (*Id.*) This search took 4 hours for the Associate Legal Advisor. (*Id.* at 11, ¶ 43.)

The District Court Litigation Division had a third Associate Legal Advisor spend another 2 hours to hand search the office's paper files, including the filing cabinets and search his computer and e-mail using the terms "attorney-client," "communications," "interactions," "right to counsel," "detention facility(ies)," and "representation." (*Id.* at 12, ¶ 44.)

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[8] Plaintiff argues that the fact that the HSILD Division Chief's e-mail was searched and then the Agency conducted a search "of targeted other individuals' emails" at HSILD calls for a legal conclusion. [ECF No. 26, ¶ 26.] There is nothing in the record that indicates that individuals' emails were searched at random (and presumably Plaintiff would object if that had been the case) and there is no legal conclusion anywhere in this statement of material fact.

[9] Plaintiff states throughout its opposition that it "denies any implication that Defendants' search . . . constituted an adequate and reasonable search." [*See, e.g.*, ECF No. 26, ¶¶ 28-32.] Nowhere in Defendants' statement of material facts do Defendants make such an implication and Plaintiff's failure to admit the material facts is simply unfounded.

Notably, Plaintiff does not deem the phrase "targeted search terms" to be a legal conclusion in the context of this specific material fact. (*See id.* ¶ 28.)

E. ODPP Completes Its Broad Search

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

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

After conferring, the parties agreed to a rolling production and, after five interim releases, ICE produced a total of 6,906 pages of records subject to FOIA and responsive to the Plaintiff's request. (1st Law Decl. [ECF No. 12-2] at 13, ¶ 33.) ICE informed Plaintiff through counsel that portions of the records were withheld pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). (*Id.* at 13, ¶ 34.) Upon further review of the produced records, after conferring in good faith, and to narrow the issues in dispute before the Court, Plaintiff and the Defendants jointly entered into a stipulation stating which documents remain in dispute for purposes of this litigation [ECF No. 12-11]. The Court denied Defendants' initial motion for summary judgment [ECF No. 19, 20], but noted that Plaintiff no longer contested Defendants' assertions of Exemption 6 and 7(C), *see id.* at 20, and the information withheld under those exemptions is no longer at issue in this case. After a status conference before the Court, the Court ordered an updated *Vaughn* index and supplemental declaration by Minute Order of July 9, 2013.

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

II. PLAINTIFF'S OPPOSITION, RELYING PRIMARILY ON SUPPOSITION AND SPECULATION, FAILS TO OVERCOME THE DETAILED EXPLANATIONS SET FORTH IN THE AGENCY'S DECLARATIONS AND DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

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

Despite detailed explanations from the Agency of each and every search conducted, the rationale behind the searches, the databases searched, the identity of the persons conducting the search, and certifications (under penalty of perjury) that the searches were reasonably calculated to locate all responsive records, Plaintiff still contests the adequacy and reasonableness of the Agency's search. Further, Plaintiff's opposition seeks to ignore the facts set forth in the Law Declarations while distorting the legal standard. (*See* Pl. Opp. [ECF No. 26] at 8-12.) Contrary to Plaintiff's unfounded speculation and as the Agency described in its renewed motion, the summary of facts above, and demonstrated in great detail by the Third Law Declaration, ICE has more than satisfied its obligations under the FOIA. As the D.C. Circuit has instructed (and

contrary to Plaintiff's suggestions in its opposition), "In general, the adequacy of a search is "determined not by the fruits of the search, but by the appropriateness of its methods." *Hodge v. F.B.I.*, 703 F.3d 575, 579 (D.C. Cir. 2013) (quotation and citation omitted). Here, as set forth in painstaking detail by the Law Declarations, the Agency spent dozens of hours searching *the only* offices reasonably calculated to maintain records responsive to Plaintiff's request and those searches were reasonably calculated to locate all responsive records. (3d Law Decl. at 5-6, ¶¶ 22-23; *id.* at 8, ¶ 32; *id.* at 12, ¶¶ 45-46; *id.* at 13, ¶ 51.) Thus, Plaintiff's suggestion that the Agency has not satisfied the standard set forth in *Oglesby* and *Hodge* is simply inaccurate as the Agency has set forth in great detail the locations and systems searched, the rationale for why the searches were conducted, the manner and method in which they were conducted, the identity of the persons conducting the searches, and the duration of the searches.

In fact, as this Court recently noted, "'The standard for determining whether a search was adequate depends on the adequacy of the search for documents, not whether additional potentially responsive documents exist.'" *Lardner v. F.B.I.*, 875 F. Supp. 2d 49, 55 (D.D.C. 2012) (quoting *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994)). Further, "[a]n adequate search consists of a good faith, reasonable search of those systems of records likely to possess the requested information." *Id.* (citing *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Here, the updated Law Declaration provides specific and precise detail about why each ICE office searched was targeted and affirmatively avers that these offices were the ones which possessed potentially responsive documents and that the searches conducted swept up all responsive documents as required. *Oglesby*, 920 F.2d at 68; *Hodge*, 703 F.3d at 579.

Most curiously, Plaintiff takes umbrage with the amount of detail provided related to the identity of the persons conducting the searches and the amount of time taken to conduct the

searches when it states that "Defendants suggest that fulfilling FOIA's legally required searches is not one of the agency's regular responsibilities." (Pl. Opp. at 5.) But Defendants suggest nothing of the sort; rather, Defendants highlighted in each instance that the persons tasked with conducting the searches were intimately familiar with both the substantive issues surrounding Plaintiff's FOIA request, as well as the systems of records most likely to contain responsive information. Additionally, Plaintiff's suggestion that the Agency's instruction to offices likely to contain responsive documents to "conduct 'a comprehensive search for records'" is inadequate guidance is unavailing. (Pl. Opp. at 7 (quoting 3d Law Decl. ¶ 22).)

In fact, the detailed description of the offices searched, the persons conducting the searches, the databases searched, the terms used during any electronic searches, the paper files searched, and the amount of time spent on the searches provide more than adequate detail to demonstrate satisfaction of the standard set forth in *Oglesby* and *Hodge* show that no genuine issue of material fact remains. The Agency properly expended considerable time and resources identifying the offices and components which contained potentially responsive documents, tailoring searches reasonably calculated to identify those documents, taking the time to execute the searches, and then processing the almost 7,000 pages of documents these searches identified as responsive to Plaintiff's request and subject to FOIA. In fact, the Agency searched *the only* offices reasonably calculated to maintain records responsive to Plaintiff's request, searches reasonably calculated to locate all responsive records. (3d Law Decl. at 5-6, ¶¶ 22-23; *id.* at 8, ¶ 32; *id.* at 12, ¶¶ 45-46; *id.* at 13, ¶ 51.) Defendants, whose detailed declarations demonstrate that their search in response to Plaintiff's request were more than adequate and reasonable are therefore entitled to judgment as a matter of law.

B. ICE's Withholdings Were Appropriate

1. Exemption (b)(5)[10]

Contrary to Plaintiff's groundless attacks on the Agency's declarations, the D.C. Circuit has recently reinforced the discretion granted to federal agencies when determining whether its deliberative process, legal opinions, and legal advice are exempt from public disclosure pursuant to FOIA Exemption 5. *See Electronic Frontier Foundation v. U.S. Dep't of Justice*, -- F.3d --, No. 12-5363, 2014 WL 25916, at *5-*6 (D.C. Cir. Jan. 3, 2014). Exemption (b)(5) protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption applies to materials that would be privileged in the civil discovery context, including materials that would be protected by the deliberative process privilege, the attorney work product privilege and the attorney-client privilege. *NLRB v. Sears, Roebuck Bd.*, 421 U.S. 132, 149 (1975); *see also Stonehill v. I.R.S.*, 558 F.3d 534, 538-39 (D.C. Cir. 2009). In *Stonehill*, the D.C. Circuit analyzed the interaction between Exemption 5 and the civil litigation discovery process and found Exemption 5 to be more expansive than civil discovery privileges. 558 F.3d at 539. The D.C. Circuit explained that "not all documents available in discovery are also available pursuant to FOIA." *Id.* Thus, Exemption 5 protects all information that would "not normally be discoverable in civil litigation against an agency," regardless of whether – if this were an ordinary civil suit – a litigant might be able to establish special circumstances justifying disclosure of the information in discovery.

Here, contrary to Plaintiff's arguments in its opposition, the Agency properly invoked exemption (b)(5) to withhold and redact inter-agency and intra-agency draft documents,

[10] At various points in its opposition, Plaintiff repeatedly attacks the assertion of Exemption 5 to Document #10 (pages 990-1002). The inclusion of Exemption 5 on the *Vaughn* index was a scrivener's error as no information on any of those pages was withheld under Exemption 5, but rather solely under Exemptions 6, 7(C), or 7(E).

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

i. Deliberative Process

The deliberative process privilege naturally protects the "decision making processes of government agencies", *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), and "protects agencies from being 'forced to operate in a fishbowl.'" *Electronic Frontier*, 2014 WL 25916, at *5 (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). Further, as the Supreme Court stated in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, "deliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" 532 U.S. 1, 8-9 (2001) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted)).

Plaintiff's opposition, particularly in light of *Electronic Frontier*, fails to disturb the Agency's well-reasoned and detailed explanation for why it withheld limited information withheld under the deliberative process privilege. Specifically, Plaintiff claims that Document #7, as a request for "guidance" on how to process arrested individuals in the future, as well as Document #9 which contains a "draft legal opinion as to the right to remain silent and the right to counsel" were improperly withheld. (Pl. Opp. at 22 (quoting 3d Law Decl., Ex. C at 6).) But Plaintiff's contention is directly contradicted by binding precedent. The request to a lawyer for

guidance on what existing policy applied to a worksite enforcement action and the attorney's response, as well as a *draft* legal opinion are precisely the types of information the D.C. Circuit has held are properly exempt from disclosure. *See, e.g.*, *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) ("There can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5.").

Plaintiff's weak attack on the information properly withheld from Documents 1-3, 4, and 7-8 fares no better. (Pl. Opp. at 22-23.) Each of the documents is described in great detail in the *Vaughn* index as seeking specific kinds of advice on how the ICE decisionmakers should act regarding discrete issues. (*See* 3d Law Decl., Ex. C.) As the D.C. Circuit recently instructed in *Electronic Frontier*, this type of information is exempt from public disclosure. Specifically, none of the information withheld under the deliberative process privilege states official policy as none of it comes from final decisionmakers, rather, it states what ICE may be "*permitted* to do, [but] does not state or determine [ICE's] policy." *Electronic Frontier*, 2014 WL 25916, at *8 (emphasis in original). Thus, the information withheld pursuant to the deliberative process privilege is exempt from public disclosure and Defendants are entitled to judgment as a matter of law.

ii. Attorney-Client and Attorney Work-Product Privileges

Next, Plaintiff attacks the Agency's proper withholdings under either the attorney-client privilege or attorney work-product doctrine. Plaintiff's attack is surprising in light of the pains taken by the Agency to provide as much information as it possibly could without actually waiving the applicable privileges. (*See* 3d Law Decl., Ex. C.). Plaintiff seems to disregard the fact that in each instance that either privilege is asserted, the *Vaughn* index provides the identity

of the attorney or attorneys involved, the identity of the federal employee requesting legal advice, and the nature of issue on which the advice was sought. (*Id.* at 3-5.) Additionally, the *Vaughn* index provides the context in which the advice was either sought or given, that is to say, clearly demonstrates that the advice was either within the context of active litigation or in contemplation of future litigation. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *see also Cities Serv. Co. v. FTC*, 627 F. Supp. 827, 832 (D.D.C. 1984). Contrary to Plaintiff's argument, the Agency has, in each instance: "1) provide[d] the nature and contents of the withheld document, 2) identif[ied] the document's author or origin (by job title or otherwise), 3) describe[d] the factual circumstances that surround the document's creation, and 4) provide[d] some indication of the type of litigation for which the document's use is at least foreseeable." (Pl. Opp. at 25 (quoting *Am. Immigration Council*, No. 12-856, 2013 WL 3186061, at *16 (D.D.C. June 24, 2013)).) Plaintiff's argument is simply inaccurate in light of the information actually contained in the *Vaughn* index.

First, documents 782-83, 788-89, and 794-95 all discuss requests for legal advice from a senior ICE official related to questions about a specific visa interview, a specific regulation, and proposals on various ways to respond to questions surrounding when an alien is entitled to an attorney during a specific type of interview. The information withheld is either the seeking of legal advice by the senior official, Dan Ragsdale, the responses to that request, or the attorney's work product discussing the advice to be given – all information exempt from disclosure under the FOIA. *Mead Data*, 566 F.2d at 252; *Cities Serv. Co.*, 627 F. Supp. at 832.

Next, documents 798-802 contain discussions between ICE attorneys and an assistant U.S. attorney of the Department of Justice representing the Agency's interests in litigation. (*See Vaughn* Index at 4.) These documents were prepared in contemplation of litigation and are

among attorneys in an attorney-client relationship discussing the preparation of a declaration. Thus, this information is protected by both the attorney-client and attorney work product privileges and is exempt from disclosure. The information withheld on documents 876-79 consists of edits to a draft response to the public made by ICE attorneys for circulation among other ICE attorneys. The issue discussed is a legal one, namely, the rights of aliens when interviewed at a detention facility, and this information is therefore properly withheld under both the attorney-client and attorney work product privileges contemplated by Exemption 5. Similarly, the information withheld under Exemption 5 on documents 913-15 consists of e-mails where an ICE employee sought specific legal guidance from ICE attorneys related to the processing of aliens during a worksite enforcement and a direct response from an ICE attorney providing a legal opinion about the processing of aliens. Further, the information withheld on documents 932-33 consists of Dan Ragsdale requesting and ICE supervisory attorneys providing their client, Dan Ragsdale, with draft comments and recommendations based on their legal experience on a draft operation plan – information protected by the attorney-client privilege. Document 946 contains exempt information stemming from the request by Dan Ragsdale tasking OPLA with providing him legal advice regarding interrogations and transfers for alien detainees.

Next, documents 965-66 contain drafts of legal opinions on the issue of detainees' right to remain silent and the right to counsel, including "red-lined" edits and commentary discussing a court holding and its implication. This information is exempt under the attorney work product doctrine and the attorney-client privilege. Finally, documents 1020-22 contain handwritten notes by an ICE attorney analyzing specific cases involving aliens and the attorney's legal conclusions.

These documents are the textbook examples of attorney work product and information protected from disclosure by the attorney-client privilege. Indeed, the information withheld was

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

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

As set forth in its motion, all information withheld pursuant to Exemption 7 was compiled for a law enforcement purpose. (3d Law Decl. at 17, ¶ 66.); *see also Abdelfattah v. U.S. Imm. & Customs Enforcement*, 851 F. Supp. 2d 141, 145 (D.D.C. 2012) ("[W]here an agency [ICE] specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.") (first alteration in original, additional quotation and citation omitted). Plaintiff weakly attempts to attack ICE's invocation of Exemption 7 to information related to the administrative processing of individuals detained and in ICE custody at a specific facility. (Pl. Opp. at 32.) Contrary to Plaintiff's argument, however, activities related to the movement and control of detained persons in federal custody is law enforcement activity. *See, e.g., Anderson v. Fed. Bureau of Prisons*, 806 F. Supp. 2d 121, 127 (D.D.C. 2011) (finding information withheld by Federal Bureau of Prisons regarding decisions on inmate transfers to be subject to Exemption 7 as it related to BOP's law enforcement mission). Thus, all information at issue in this case withheld pursuant to Exemption 7 was related to ICE's law enforcement mission and is therefore exempt from public disclosure.

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

Plaintiff's challenges to the information properly withheld pursuant to Exemption 7(E) suffer from the same deficiencies as their facial challenge to ICE's invocation of Exemption 7, namely, Plaintiff overlooks both the context of the information as well as the detailed explanation provided in the *Vaughn* index. First, the information withheld relates to either ICE enforcement actions against employers violating federal law by employing unauthorized workers or the manner and method in which those detained for allegedly violating federal immigration law are housed, when they are searched for contraband and weapons, and how specific enforcement actions are carried out by ICE special agents. This information is vital to the effectiveness of ICE in carrying out its mission of enforcing federal immigration law – a mission that is of critical importance. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2498-99 (2012) (noting well-settled importance of enforcement of federal immigration law); *see also Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) (same) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (additional citation omitted)). Next, as described above, the disclosure of search techniques of persons already detained by ICE (and contrary to Plaintiff's opposition) is still a law enforcement technique and procedure exempt from disclosure for two reasons. First, generally, the maintaining of law and order within a detention facility is a law enforcement activity. *Anderson*, 806 F. Supp. 2d at 127. Second, more specifically (and, again, contrary to Plaintiff's argument), the suspected possession of contraband or other attempts to violate prison regulation trigger law enforcement investigations. *See, e.g.*, *Shores v. F.B.I.*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) ("By learning details of the surveillance operations at a prison, Plaintiff . . . could circumvent the effectiveness of law enforcement operations"); *Maydak v. U.S.*

Dep't of Justice, 362 F. Supp. 2d 316, 320 (D.D.C. 2005) (information related to investigation of inmate for violation of prison regulations properly withheld).

Again, contrary to Plaintiff's opposition, the disclosure of the withheld information related to the timing of searches of persons already in custody and the techniques and procedures utilized in enforcement operations clearly "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions.'" *Blackwell v. F.B.I.*, 646 F.3d 37, 40 (D.C. Cir. 2011) (quoting 5 U.S.C. § 552(b)(7)(E)). Additionally, disclosure of these types of information would almost certainly lead to circumvention of the law, but without question presents a risk of circumvention of the law. *Id.* at 42 ("'[T]he exemption looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.'") (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)).

Additionally, Plaintiff's opposition overlooks the specificity with which the Agency has described the information withheld in its *Vaughn* index. First, documents 90, 171-74, 176-77, 179-202, 204-09, and 211-12 are Detention Management Division Facility Reviews. The only information withheld is the timing and under what circumstances ICE conducts searches for contraband in detention facilities. This information is withheld from the public and describes a law enforcement technique that, if disclosed, would endanger the safety of both ICE personnel and detainees as it would allow detainees to anticipate searches which would "endanger the lives and safety of agents, inmates, other agency employees, and visitors." (*Vaughn* Index at 1.) Next, the Agency properly withheld information from an ICE affidavit that describes the factors

that ICE special agents use in identifying individuals believed to be unauthorized to be present in the United States, techniques kept from the public to prevent those seeking to violate federal immigration laws to avoid apprehension and detection. (*Id.*)

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

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

4. All Reasonably Segregable Information Was Released

Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Although the agency "must provide a 'detailed justification' for its non-segregability," it "is not required to provide so much

detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting *Mead Data*, 566 F.2d at 261). Here, the Agency has declared that it reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied to ensure that all non-exempt information was released, and with respect to the records that were released in part, all information not exempted from disclosure pursuant to FOIA exemptions specified above was correctly segregated and non-exempt portions were released. (*See* Law Decl. at 23, ¶¶ 77-80.) Further, as demonstrated by the *Vaughn* index and the Law Declarations, ICE went to great lengths to describe in detail the exact material which was withheld (including time stamps of e-mails) to indicate what was withheld and the reasons the information was statutorily exempt.

In fact, Plaintiff's opposition focuses almost exclusively on the segregability of material withheld pursuant to Exemption 6 or 7(C). But Plaintiff has already conceded that all information withheld pursuant to those Exemptions was proper. Plaintiff's argument is inherently contradictory therefore as Plaintiff has conceded that *all* of the information is exempt from public disclosure, but that a separate segregability inquiry must be made. Plaintiff's argument fails in light of its prior concession and the segregability analysis memorialized in the Law Declarations. Therefore, all segregable information has been released and Defendants are entitled to judgment as a matter of law.

5. In an Abundance of Caution, the Agency Has Re-Processed and Made a Discretionary Release of Two Documents

Finally, Plaintiff's opposition points to two documents that were labeled as "non-responsive" or "refer to DOJ." (Pl. Opp. at 17-18.) In an abundance of caution, the Agency has re-processed these documents and released any responsive information subject to FOIA. The re-processed documents are attached hereto as Exhibit "1," along with a supplemental *Vaughn*

index explaining any remaining withheld information. This re-processing should moot any remaining argument that Plaintiff makes in its opposition regarding those records. Therefore Defendants are entitled to judgment as a matter of law.

III. CONCLUSION

For the foregoing reasons and for those expressed in their motion for summary judgment, Defendants respectfully requests that the Court enter judgment in their favor.

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Washington, DC

Respectfully submitted,

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