UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	*	
Plaintiff	*	
	*	
v.	*	**Case No. 11-1972 (JEB)**
	*	
UNITED STATES DEPARTMENT OF	*	
HOMELAND SECURITY, et al.,	*	
Defendants	*	
	*	

* * * * * * * * * * * * *

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, United States Department of Homeland Security, United States Customs and Border Protection ("CBP" or "Agency"), by and through undersigned counsel, respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of Defendants on the grounds that no genuine issue as to any material fact exists, and Defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

In support of this motion, the Court is respectfully referred to the attached Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment with exhibits attached thereto, a Statement of Material Facts Not in Genuine Dispute, as well as the Declaration of Shari Suzuki, Chief, Freedom of Information Act Appeals, Policy and Litigation Branch, Regulations and Rulings, Office of International Trade, CBP. A proposed Order consistent with the relief sought also is attached.

Respectfully submitted,

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United States Attorney

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* * * * * * * * * * * * *

STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 7(h), Defendants, United States Department of Homeland Security, United States Customs and Border Patrol ("CBP" or "Agency"), hereby submit the following Statement of Material Facts Not in Genuine Dispute. The attached Declaration of Shari Suzuki, Chief, Freedom of Information Act Appeals, Policy and Litigation Branch ("FAPL"), Regulations and Rulings, Office of International Trade, CBP, Attachment 1 ("Suzuki Dec."), supports this statement.

1. By letter dated March 14, 2011, Plaintiff made a Freedom of Information Act ("FOIA") Request to CBP asking for, inter alia, all records which relate or refer to the following:

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

Suzuki Dec. at ¶ 7 and Exhibit ("Ex.") B. Plaintiff also requested a fee waiver. See Ex. B at pp. 2-4.

2. By correspondence dated March 29, 2011, CBP acknowledged Plaintiff's FOIA request, and denied Plaintiff's request for a fee waiver. See Suzuki Dec. at ¶ 8 and Ex. C.

3. By correspondence dated May 12, 2011, after collecting and reviewing responsive records, CBP's FOIA Division informed Plaintiff that "much of the information [AIC was] seeking [was] already publicly available." See Suzuki Dec. at ¶ 9 and Ex. D. The correspondence stated that responsive information could be found in the Code of Federal Regulations, the Personal Search Handbook, and the Inspector's Field Manual ("IFM"). In addition, Plaintiff was informed that "once the IFM is approved for release," it will be available via the internet on the CBP Reading Library. Id.

4. By correspondence dated May 26, 2011, Plaintiff appealed the FOIA Division's May 12, 2011 response. See Suzuki Dec. at ¶ 10 and Ex. E. Plaintiff also questioned the adequacy of the FOIA Division's search for responsive records, and requested reconsideration of the denial of its request for a fee waiver. Id.

5. By correspondence dated June 10, 2011, Ms. Suzuki acknowledged receipt of the appeal by way of correspondence to the Plaintiff. See Suzuki Dec. at ¶ 11, Ex. F.

6. On June 23, 2011, an attorney on Ms. Suzuki's staff confirmed, in a telephone call with Plaintiff, that its request for information regarding CBP policies, directives and guidance relating to the accessibility of counsel was limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry. The FOIA request did not seek the policies, directives and guidance concerning the permissible roles of attorneys in the myriad trade matters within the purview of CBP. Suzuki Dec. at ¶ 12.

7. By correspondence dated September 28, 2011, Ms. Suzuki issued the final administrative appeal decision in the matter (FAPL Branch case number H170224), which granted Plaintiff's request for a fee waiver and provided Plaintiff with 2 pages of unredacted records as enclosures. Suzuki Dec. at ¶ 13 and Ex. G.

8. On November 29, 2011, Ms. Suzuki was notified that Plaintiff filed the instant lawsuit. Suzuki Dec. at ¶ 14.

9. On or about May 22, 2012, the parties to the lawsuit agreed that CBP would undertake additional searches within its component offices, in order to locate and produce, as appropriate, any additional records responsive to Plaintiff's FOIA request. Suzuki Dec. at ¶ 15; see ECF No. 18.

10. From October 2012 through September 2013, CBP worked collaboratively with Plaintiff and conducted the additional searches, answered follow-up questions, responded to requests for clarification, provided search detail spreadsheets, made discretionary disclosures and provided a limited Vaughn Index. Suzuki Dec. at ¶ 16.

11. On October 12, 2012, 60 pages of records were released to Plaintiff. Two documents were released in full, and 3 documents were withheld in full. The remaining 22 documents were released in part. CBP withheld information from the records pursuant to FOIA Exemptions 5, 6, (7)(C) and (7)(E). See ECF No. 24.

12. On October 17, 2012, CBP released 11 additional pages to Plaintiff. Two documents were released in full; 1 document was withheld in full; and 8 documents were released in part. Defendants withheld information from the records pursuant to FOIA Exemptions 5, 6, (7)(C) and (7)(E). Information deemed to be non-responsive to Plaintiff's FOIA request was withheld. Id.

13. On December 18, 2012, 60 pages of responsive records were released to Plaintiff. The 60 pages were comprised of responsive portions of 13 separate documents which were released in part. CBP withheld information from the records pursuant to FOIA Exemptions (b)(6), (b)(7)(C) and (b)(7)(E). Information deemed to be non-responsive to Plaintiff's FOIA request was withheld. See ECF No. 28.

14. On January 17, 2013, 68 pages of responsive records were released to Plaintiff. Forty-seven pages were released in part, and 21 pages were released in full. CBP withheld information from the records pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E). Information deemed to be non-responsive to Plaintiff's FOIA request was withheld. See ECF No. 29.

15. On February 22, 2013, 2 pages of responsive records were released to Plaintiff. Defendants withheld information from the records pursuant to FOIA Exemption (b)(7)(E). Information deemed to be non-responsive to Plaintiff's FOIA request was withheld. See ECF No. 31.

16. On June 21, 2013, in a telephone conference, Plaintiff stated that it had concluded that CBP had conducted an adequate search for records responsive to its FOIA request, and that the "adequacy of search" issue would no longer be in contention in the lawsuit. This conclusion was memorialized in the parties joint submission to the Court filed on July 11, 2013. Suzuki Dec. at ¶ 17; see ECF No. 36 at p. 1; see also ECF No. 37 at p. 1.

17. The parties continued their efforts to resolve the remaining issues regarding the redaction or withholding of documents, and resolved their issues regarding all but 9 documents. See Suzuki Dec. at ¶ 18; ECF No. 38.

18. On October 25, 2013, Plaintiff sent Defendants an email indicating that it was no longer challenging the redaction or withholding of 2 of the 9 documents. Suzuki Dec. at ¶ 19 and Ex. H. Each of the remaining 7 documents was released, in part, to Plaintiff. Therefore, the redactions from only 7 documents remain at issue in this litigation. See id., and Ex. I.

Respectfully submitted,

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* * * * * * * * * * * *

DEFENDANT U.S. CUSTOMS AND BORDER PROTECTION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action was commenced by Plaintiff, American Immigration Council ("AIC"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking disclosures of records from Defendants, United States Department of Homeland Security, United States Customs and Border Protection ("CBP" or "Agency"), which, inter alia, relate or refer to the following:

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

Attachment 1, Declaration of Shari Suzuki, Chief, Freedom of Information Act Appeals, Policy and Litigation Branch ("FAPL"), Regulations and Rulings, Office of International Trade, CBP, ("Suzuki Dec.") at ¶ 7; see Complaint ("Compl") at p. 4.

After the release of numerous records to Plaintiff, Plaintiff determined that the adequacy of Defendants' search was not at issue in this litigation. *See* ECF NO. 30 at p. 1; ECF No. 37 at p. 1. What is at issue in this litigation are the redactions from the following 7 documents:

1. Pages 7 and 8 of Chapter 5 of the Border Patrol Handbook without redactions: Production 4, at 8-9;

2. August 2010 Memorandum from the Chief Counsel on the Release of Detainee Information/Telephone Inquiries; Produced on September 18, 2013 without Bates numbers.

3. Miami Int'l Airport Memorandum from the Office of the Chief Counsel: "Outside Presence During Deferred Inspection;" Produced on September 18, 2013 without Bates numbers.

4. "Implementation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008" Border Patrol memo: Production 3, at 69-71;

5. "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo: Production 4, at 11;

6. Baltimore Field Office email: Production 1, at 58;

7. "Hold Rooms and Short Term Custody" Border Patrol memo: April 9 Production, at 4913042-491352.

CBP determined that portions of Record No. 1, pages 7 and 8 of the Border Patrol Handbook, were non-responsive to Plaintiff's FOIA request.[1] A redacted version of the remainder of the record was provided on April 9, 2013. A redacted version of Record No. 2, the August 2010 Memorandum from the Chief Counsel on the Release of Detainee Information/Telephone Inquiries, was released to AIC on September 18, 2013. A redacted

[1] Ms. Suzuki was familiar with Plaintiff's FOIA request and subsequent appeal, see Suzuki Dec. at ¶ 4, and determined that information within this record was not responsive to Plaintiff's request. See Wilson v. DOT, 730 F.Supp.2d 140, 156 (D.D.C. 2010) ("an agency has 'no obligation to produce information that is not responsive to a FOIA request'"), aff'd, No. 10-5295, 2010 WL 5479580 (D.C. Cir. Dec 30, 2010), reh'g en banc denied, Mar 15, 2011 (citing Ctr. for Biological Diversity v. OMB, No. 07-04997 (MHP), 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009)(agency "not required to produce information that is not responsive to a FOIA request"); Cal. Ex rel. Brown v. NHTSA, No. 06-2654, 2007 WL 1342514 (SC), at *2 (N.D. Cal. May 8, 2007)(declining to order agency to disclose non-responsive information redacted from documents, and stating that "[a]n agency has no obligation to produce information that is not responsive to a FOIA request")(add'l citation omitted)). As the withheld information is non-responsive, this document is not addressed in the Vaughn Index.

version of Record No. 3, the Miami International Airport Memorandum, "Outside Counsel Presence during Deferred Inspections," was released to AIC on September 18, 2013. A redacted version of Record No. 4, the "Implementation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008" Border Patrol Memo, was released to AIC on December 18, 2012. A redacted version of Record No. 5, "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo, was released to AIC, on January 17, 2013**.** A redacted version of Record No. 6, the Baltimore Field Office email, was released to AIC October 12, 2012. A redacted version of Record No. 7, the Border Patrol document entitled "Hold Rooms and Short Term Custody," was released to AIC on April 9, 2013.

Defendants have fully and appropriately responded to Plaintiff's FOIA request, providing all reasonably segregable, non-exempt information through these releases. See Suzuki Dec. at ¶¶ 50-53. Defendants, therefore, have satisfied their obligations under the FOIA. Accordingly, based upon the Declaration of Shari Suzuki, see Attachment 1, the Vaughn Index, and the entire record herein, Defendants submit that they are entitled to judgment as a matter of law.

II. APPLICABLE LEGAL STANDARDS

A. Motions for Summary Judgment

Where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is required by Rule 56(a) of the Federal Rules of Civil Procedure. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(interpreting Rule 56(c), the prior version of Rule 56(a)); Gaujacq v. EDF, Inc., 601 F.3d 565, 575 (D.C. Cir. 2010). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson, 477 U.S. at 248. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported

motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-248 (emphasis in original).

The burden on the party moving for summary judgment "may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Burke v. Gould, 286 F.3d 513, 517-20 (D.C. Cir. 2002)(requiring a showing of specific, material facts). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. Thus, to avoid summary judgment, the plaintiff must present some objective evidence that would enable the court to find he is entitled to relief. See Celotex, 477 U.S. at 322-23. See also Laningham v. Navy, 813 F.2d 1236, 1241 (D.C. Cir. 1987)(non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor). In Celotex, the Supreme Court instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. FOIA Actions and Summary Judgment

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment. See Harrison v. EOUSA, 377 F.Supp.2d

141, 145 (D.D.C. 2005)(FOIA cases are typically and appropriately decided on motions for summary judgment.). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the plaintiff with affidavits or declarations and other evidence which show that the documents are exempt from disclosure. Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv , 608 F.2d 1381, 1386 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). The district court is required to accord substantial weight to declarations submitted by an agency in support of the claimed exemptions, 5 U.S.C. § 552(a)(4)(B), and such declarations are presumed to be submitted in good faith. SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Indeed, summary judgment may be awarded to an agency in a FOIA case solely on the basis of agency affidavits [or declarations] "when the affidavits describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" Trans Union LLC v. FTC, 141 F.Supp.2d 62, 67 (D.D.C. 2001)(quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)); see also McGhee v. CIA, 697 F.2d 1095, 1102 (D.C. Cir. 1983); Citizens Comm. on Human Rights v. FDA, 45 F.3d 1325, 1329 (9th Cir. 1995). Indeed, this Circuit established that if the affidavits or declarations are reasonably specific, rather than merely conclusory, and they are not called into doubt by contradictory evidence or evidence of agency bad faith, the court must grant summary judgment based upon them. See Gardels v. CIA, 689

F.2d 1100, 1105 (D.C. Cir. 1982); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 409 (D.D.C. 1983).

III. ARGUMENT

A. Plaintiff Conceded That Defendants Conducted a Search Reasonably Calculated to Recover Responsive Records.

In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. Oglesby v. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). An agency demonstrates that it conducted a reasonable search by showing "that it made a good faith effort to conduct a FOIA search for requested records by using methods that can reasonably be expected to produce the information requested." W. Ctr. for Journalism v. IRS, 116 F.Supp.2d 1, 9 (D.D.C. 2000), aff'd 22 Fed. Appx. 14 (D.C. Cir. 2001); Oglesby, 920 F.2d at 68 (a search is inadequate only if the agency cannot "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents.") Conducting a "reasonable" search is a process that requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise" and is "hardly an area in which the courts should attempt to micro-manage the executive branch." Schrecker v. DOJ, 349 F.3d 657, 662 (D.C. Cir. 2003).

Here, apparently based upon the information released by the Agency, Plaintiff has determined that there is no longer a dispute regarding the adequacy of Defendants' search. See ECF No. 36 at p. 1; ECF No. 37 at p. 1. Therefore, Defendants have met their burden that they conducted a reasonable search for records responsive to Plaintiff's request.

B. The Defendant Has Submitted Declarations and a Vaughn Index.

In moving for summary judgment in a FOIA case, an agency must establish a proper basis for its withholding of responsive documents. "In response to this special aspect of summary judgment in the FOIA context, agencies regularly submit affidavits . . . in support of their

motions for summary judgment. . . ." Judicial Watch v. HHS, 27 F.Supp.2d 240, 242 (D.D.C. 1998). The declaration or affidavit (singly or collectively) is often referred to as a Vaughn Index. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). There is no set formula for a Vaughn Index. The statute does not require "meticulous documentation [of] the details of an epic search." Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982). " [I]t is well established that the critical elements of the Vaughn Index lie in its function, and not in its form." Kay v. FCC, 976 F.Supp. 23, 35 (D.D.C. 1997), aff'd, 172 F.3d 919 (D.C. Cir. 1998). "The materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." Delaney, Midgail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987). See also Keys v. DOJ, 830 F.2d 337, 349 (D.C. Cir. 1987). "All that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." Judicial Watch v. Exp.-Imp. Bank, 108 F.Supp. 2d 19, 34 (D.D.C. 2000). As this Circuit has stated,

> the adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case. And we expressly cautioned that it would be inappropriate for the court to mandate a bright-line set of steps for an agency to take in this situation, because FOIA requires both systemic and case-specific exercises of discretion and administrative judgment and expertise.

Davis v. DOJ, 460 F.3d 92, 103 (D.C. Cir. 2006)(internal citations and quotations omitted). Hence, the specificity of itemization needed depends upon the nature of the document and the exemption asserted. Info. Acquisition Corp. v. DOJ, 444 F.Supp. 458, 462 (D.D.C. 1978).

The Vaughn Index serves a threefold purpose: (1) it identifies each document withheld; (2) it states the statutory exemption claimed; and (3) it explains how disclosure would damage the interests protected by the claimed exemption. See Citizens Comm. on Human Rights, 45

F.3d at 1326, n.1. "Of course the explanation of the exemption claimed and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). Once the Court determines that the declarations are sufficient, it need not inquire further. See Citizens Comm. on Human Rights, 45 F.3d at 1329. A court "may award summary judgment [in a FOIA case] solely on the basis of information provided by the department or agency affidavits or declarations." Burnes v. CIA, No. 05-242 (GK), --- F.Supp.2d ---, 2005 WL 3275895, at *2 (D.D.C. Sept. 14, 2005).

In the instant case, Defendants have submitted the Declaration of Shari Suzuki, Chief, Freedom of Information Act Appeals, Policy and Litigation Branch ("FAPL"), Regulations and Rulings, Office of International Trade, CBP. As a part of Ms. Suzuki's duties she is responsible for the overall supervision and management of the FAPL Branch, and serves as the official with the duties and responsibilities which include: 1) giving guidance and instructions to the personnel in CBP regarding the processing of FOIA requests; 2) adjudicating administrative appeals that concern FOIA requests; and 3) overseeing all CBP activities related to information disclosure. Suzuki Dec. at ¶ 2. As a result, Ms. Suzuki is familiar with the processing of Plaintiff's March 14, 2011 FOIA request. See id. at ¶ 4. The Suzuki Declaration as well as the Vaughn Index submitted in support of this motion, meet the requirements of Vaughn v. Rosen, 484 F.2d at 820. The declaration identifies the information withheld, states the statutory exemptions claimed, and explains how disclosure would damage the interests protected. See Citizens Comm. on Human Rights, 45 F.3d at 1326, n.1. Therefore, the declaration and Vaughn

Index provide the Court with the requisite basis to grant Defendants' motion for summary judgment.

C. The Defendant Complied With the FOIA's Segregability Requirement.

If a record contains information exempt from disclosure, the FOIA requires that any "reasonably segregable," non-exempt information be disclosed after redaction of the exempt information. 5 U.S.C. §552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with reasonable specificity" that the information withheld cannot be segregated. Armstrong v. Exec. Office of the President, 97 F.3d 575, 578-79 (D.C. Cir. 1996)(internal quotation marks omitted). See Johnson v. Exec. Office for U.S. Attorneys, 310 F.3d 771, 776 (D.C. Cir. 2002)("government's declaration and supporting material are sufficient to satisfy its burden to show with 'reasonable specificity' why the document cannot be further segregated," where declaration averred that agency had "'released to plaintiff all material that could be reasonably segregated'"); Loving v. DOD, 496 F.Supp.2d 101, 110 (D.D.C. 2007), aff'd, 550 F.3d 32 (D.C. Cir. 2008), cert. denied, 130 S.Ct. 394 (2009). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." Mead Data Ctr., Inc., 566 F.2d at 261, n.55.

As established by the Suzuki Declaration and Vaughn Index, Defendants provided Plaintiffs with approximately 383 pages of responsive records. Of these documents, Defendant released approximately 100 documents in full, approximately 283 documents in part, and

ultimately no documents were withheld in full. As a result of these releases, Plaintiff has determined that only 7 documents remain at issue in this case.[2] Of these 7 documents, Ms. Suzuki examined each one, "line-by-line, to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied." See Suzuki Dec. at ¶ 50. Where non-exempt information could be segregated from exempt information, CBP segregated and disclosed the non-exempt information. Ms. Suzuki determined that "any further release of the exempted materials could reasonably lead to the identification of the individuals or other information that is properly protected by the exemptions asserted." Id. In addition, as explained in the Suzuki Declaration, the redactions originally made in the documents were reviewed and reduced wherever possible. Id. The remaining redactions contain information that is either exempt from disclosure, has no surplus language, or the information redacted is inextricably intertwined with the remaining language in the redaction. Id.; see also id. at ¶¶ 50-53 (providing descriptions of excerpts deemed to be non-segregable with explanations). See AIC v. DHS, --- F.Supp. 2d ---, 2013 WL 3186061 (JEB), at *12 (D.D.C. June 24, 2013).[3]

Therefore, it is clear that the Defendants processed and released all reasonably segregable information from the documents provided to Plaintiff unless such release violated the attorney client, attorney work product or deliberative process privileges, 5 U.S.C. § 552(b)(5); would constitute a clearly unwarranted invasion of personal privacy, see 5 U.S.C. §552(b)(6), (b)(7)(C); or "would disclose techniques and procedures for law enforcement investigations or prosecutions, or disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." See U.S.C. §

[2] See ECF No. 36 at p. 1; ECF No. 37 at p. 1; Ex. G, Email dated October 25, 2013.
[3] Notably, this Circuit has found that "if a document is fully protected as attorney work-product, then segregability is not required." Judicial Watch v. DOJ, 432 F.3d 366, 371 (D.C. Cir. 2005).

552(b)(7)(E). Hence, Defendants have established with reasonable specificity that all reasonably segregable, non-exempt information has been released to Plaintiff.

D. The Withholdings Pursuant to Freedom of Information Act Exemption 5 Were Appropriate.

1. Exemption 5

An agency must release all records responsive to a properly submitted FOIA request unless the records are protected from disclosure by one or more of the FOIA's nine exemptions. See 5 U.S.C. § 552(b); see also DOJ v. Tax Analysts, 492 U.S. 136, 150-51 (1980). Exemption 5 of the FOIA protects "inter-agency or intra-agency memorand[a] 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 incorporates the privileges available to an agency in civil litigation, the three principal ones being: (1) the attorney-client privilege; (2) the attorney work-product doctrine; and (3) the deliberative process privilege. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Williams & Connolly v. SEC, 662 F.3d 1240, 1243 (D.C. Cir. 2011). In Stonehill v. IRS, 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 534, 539 (D.C. Cir. 2009). Indeed, the Circuit stated that "not all documents available in discovery are also available pursuant to FOIA." Id. Moreover, "the needs of a particular plaintiff are irrelevant to a court's determination of whether a particular communication is exempt from disclosure under (b)(5)." AIC v. DHS, 2013 WL 3186061 (JEB), at *12 (citing Martin v. Office of Special Counsel, MSPB, 819 F.2d 1181, 1184 (D.C. Cir. 1987); Sears, 421 U.S. at 149)).

2. Attorney-Client Privilege

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Cent., Inc., 566 F.2d at 252. The privilege encompasses not only facts communicated by the client to the attorney, but also opinions rendered by the attorney based on those facts. Schlefer v. U.S., 702 F.2d 233, 245 (D.C. Cir. 1983); Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir 1980), cert. denied, 452 U.S. 905 (1981). The Supreme Court has long recognized that the attorney-client privilege merits special protection "to encourage full and frank communication between attorneys and their clients . . . ." Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981), Thus, "if a party demonstrates that attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure." In re Allen, 106 F.3d 582, 600 (4th Cir. 1997). This privilege covers the specifics of a confidential attorney-client communication, even when the underlying subject matter is known to third parties. Upjohn Co., 449 U.S. at 395-96; see also In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388 (D.D.C. 1978)(holding that privilege applies even where information in question was not confidential, so long as client intended that information be conveyed confidentially). Unlike the attorney work-product doctrine, the attorney-client privilege of Exemption 5 is not limited to the context of litigation. Coastal States v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980)("The privilege is not limited to communications made in the context of litigation or even a specific dispute, but extends to all situations in which an attorney's counsel is sought on a legal matter."). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997)). Indeed, the attorney-client privilege applies when "the Government is dealing with its attorneys as would

any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors." Coastal States, 671 F.2d at 863; see Judicial Watch, Inc. v. DHS, 926 F. Supp. 2d 121, 144 (D.D.C. 2013).

Information in the following documents was withheld pursuant to the Attorney-Client Privilege of Exemption 5:

> Record No. 2, August 2010 Memorandum from the Chief Counsel on the "Release of Detainee Information/Telephone Inquiries;"
>
> Record No. 3, Miami International Airport Memorandum from the Office of the Chief Counsel entitled "Outside Counsel Presence during Deferred Inspection;" and
>
> Record No. 5, "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo.

Record No. 2 is a memorandum prepared by the Assistant Chief Counsel, Office of Chief Counsel of CBP,[4] for a Supervisory Border Patrol Agent ("SBPA") in the Tucson Sector Immigration Court Liaison Unit /Prosecutions Unit. The Tucson Sector ICLU/Prosecutions Unit is a client of the Office of Chief Counsel. The Supervisory Border Patrol Agent requested legal advice on three issues regarding the release of detainee information during telephone inquiries. Counsel was asked to assess the factual situation "on the ground" and explain the protocols and procedures for access to counsel during immigration encounters, interviews and detentions. In the capacity of attorney, the Assistant Chief Counsel expressed his or her legal opinion on the

[4] The Chief Counsel is the chief legal officer of CBP and is the principal legal advisor to the CBP commissioner and its officers. The Office of the Chief Counsel provides legal advice to, and legal representation of, CBP officers in matters relating to the activities and functions of CBP. The office is also responsible for reviewing proposed actions to ensure compliance with legal requirements, preparing formal legal opinions, preparing or reviewing responses in all court actions, civil or criminal, involving CBP, and developing, implementing, and evaluating nationwide programs, policies, and procedures within its functional areas. The office has both a headquarters and a field structure. The headquarters office is located in Washington, D.C. and its activities are divided broadly into three functional areas: Ethics, Labor and Employment, Enforcement, and Trade and Finance, under the supervision of Associate Chief Counsels. The field structure consists of Associate and Assistant Chief Counsels located in major cities across the U.S. who advise CBP field managers in their geographic areas.

issues presented. The information redacted from this record contained these responses. The responses were addressed directly to the SBPA and no individuals outside of the Agency were involved. The advice provided was confidential to the Agency, and remains so.

Record No. 3 is a Memorandum which was prepared by an Associate Chief Counsel of CBP for a Supervisory CBP Enforcement Officer, in the Office of Deferred Inspections. The Supervisory CBP Enforcement Office had contacted the office of the Associate Chief Counsel for advice regarding several issues concerning the presence of outside counsel during deferred inspections. In his capacity as an attorney, the Assistant Chief Counsel responded to the inquiries. The information redacted from this memorandum contained these responses. The purpose of these communications was to dissect the issues and identify CBP's policies governing the access to counsel. The purpose of the memorandum also was to ensure that the offices complied with the relevant regulations, statutes and constitutional provisions so that CBP could effectively meet its mission. The responses were addressed to the SBPA and no individuals outside of the Agency were involved. The advice provided was confidential to the Agency and remains so.

Record No. 5 is a memorandum prepared by the Chief Patrol Agent, in the Tucson Sector of the CBP, sent to the Patrol Agents in Charge and Program Managers in the Tucson Sector. The memorandum concerned telephone calls and visitors to aliens in detention. The information redacted from this memorandum contained the legal interpretation of issues, by an attorney within CBP, regarding telephone calls and visits to aliens in custody. The responses were sent directly to the SBPA and no individuals outside of the Agency were involved. The advice provided was confidential to the Agency and remains so.

Each of these records from which information was withheld pursuant to the attorney-client privilege reflects that the attorneys and their clients shared a common interest, and engaged in full and frank communication. The communication regarding that interest was conveyed confidentially. Hence, these attorney-client communications should be afforded complete protection, and were properly withheld pursuant to Exemption 5.

3. Attorney Work-Product Privilege

To be considered attorney work-product, a document must have been "prepared by an attorney in contemplation of litigation which sets forth the attorney's theory of the case and his litigation strategy." Sears, 421 U.S. at 154. The attorney work-product doctrine protects the files and the mental impressions, conclusions, opinions or legal theories of an attorney "reflected, of course, in interviews, statements, memoranda, correspondence, briefs, . . . personal beliefs, and countless other tangible and intangible ways." Hickman v. Taylor, 329 U.S. 495, 511 (1947); see FTC v. Golier, 462 U.S. 19, 25 (1983). The attorney work product privilege also protects factual material. See Grolier, 462 U.S. at 25-26; Martin, 819 F.2d at 1187. This Circuit has stated that "[t]he work-product privilege . . . simply does not distinguish between factual and deliberative material." Martin, 819 F.2d at 1187. The exemption serves to provide a "'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." Coastal States, 617 F.2d at 864.

Overall, the courts have taken a flexible approach with respect to the attorney work-product doctrine. A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 146 (2d Cir. 1994). Therefore, the document need not be created when litigation was a certainty, so long as it was created "with an eye towards litigation." Hickman, 329 U.S. at 511. See AIC v. DHS, 2013 WL 3186061, at *16 ("the work-product privilege is relatively broad, encompassing documents prepared for

litigation that is 'foreseeable' . . . .")(citation omitted). Hence, the work-product doctrine extends to documents "prepared in anticipation of [foreseeable] litigation . . . even if no specific claim is contemplated." AIC v. DHS, 905 F.Supp.2d 206, 221 (D.D.C. 2012)(citation omitted). "At a minimum, the government must demonstrate that the lawyer who prepared the document possessed the 'subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." Id. (citing In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998)(add'l citation omitted). "The litigation anticipated by the work product can 'include proceedings before administrative tribunals if they are of an adversarial nature." Id. (citing 8 Charles Alan Wright et al., Fed. Practice and Procedure § 2024, at 502–03 (3d ed. 2010)).

Information within the following documents was withheld pursuant to the attorney work product privilege:

- Record No. 2, August 2010 Memorandum from the Chief Counsel on the "Release of Detainee Information/ Telephone Inquiries;"
- Record No. 3, Miami International Airport memorandum from the Office of the Chief Counsel entitled "Outside Counsel Presence during Deferred Inspection;" and
- Record No. 5, "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo;

Record No. 2 is a memorandum which was prepared by the Assistant Chief Counsel, Office of Chief Counsel of CBP, for a Supervisory Border Patrol Agent in the Tucson Sector ICLU/Prosecutions Unit. The document was prepared because the SBPA requested guidance on issues regarding releasing information concerning detainees and detainee telephone access. The Assistant Chief Counsel provided the SBPA with the written procedures and expressed his opinions on these issues. Because the Agency had received several inquiries from attorneys outside of the organization regarding detainees' right to contact counsel, attorneys within CBP's Office of Chief Counsel discerned the potential for litigation. Hence, the attorneys provided legal

opinions to their clients which included their candid evaluation of the handling of the issues at posts around the country, and their personal beliefs and mental impressions regarding how the access to counsel issue should be handled by the Agency on the ground. The attorneys evaluated the relevant regulations statutes and constitutional principles and developed legal theories and strategies to be used by the Agency going forward.

Record No. 3 is a Memorandum which was prepared by an Associate Chief Counsel of CBP for a Supervisory CBP Enforcement Officer in the Office of Deferred Inspections. The Supervisory CBP Enforcement Office had contacted the office of the Associate Chief Counsel for advice regarding the several issues concerning the presence of outside counsel during deferred inspections. Border Patrol Officers had begun receiving inquiries from immigration lawyers and advocate organizations about their presence during deferred inspections, and the Agency had received FOIA requests from organizations regarding the access to counsel issue. Therefore, the advice of the OCC attorneys to its clients was made when litigation was foreseeable. Hence, it was necessary to provide guidance to ensure that CBP's employees were abiding by the laws and constitutional principles concerning access to counsel during border encounters.

Record No. 5 is a Memorandum prepared by the Chief Patrol Agent in the Tucson Sector of the CBP to the Patrol Agents in Charge and Program Managers in the Tucson Sector. While the document Memorandum was prepared by the Chief Patrol Agent, it was written in order to provide the recipients with a legal interpretation of an attorney within CBP, on issues concerning telephone calls and visitors to aliens in detention. Again, the Agency had begun receiving inquiries regarding phone calls and visitors to aliens in detention, which prompted this inquiry from the Tucson sector. It was necessary to provide this legal interpretation so that the

procedures during the 2-hour period discussed in the memorandum would be followed, and there was compliance with the law. As the Agency had been involved in litigation regarding this issue in the past, in a nationwide class action lawsuit, it was reasonable for the CBP attorney to have "the subjective belief that litigation was a real possibility, and that belief [was] . . . objectively reasonable." AIC v. DHS, 905 F.Supp. 2d at 221. Therefore, the work product of these attorneys, which included their mental impressions, conclusions, opinions and legal theories, was properly redacted from Record Nos. 2, 3, and 5, and Exemption 5was appropriately applied.

4. Deliberative Process Privilege

The deliberative process privilege "protects the decisionmaking processes of government agencies and encourages frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fishbowl." Mapother v. DOJ, 3 F.3d 1533, 1537 (D.C. Cir. 1993)(alterations, citations and quotation marks omitted). Three policy purposes consistently have been held to constitute the bases for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See, e.g., Jordan v. DOJ, 591 F.2d 753, 773 (D.C. Cir. 1978 (en banc); Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

Courts have acknowledged and enforced the privilege's protection of the "decision making processes of government agencies." Sears, 421 U.S. at 150. In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm. *See, e.g.*, Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect

the executive's deliberative processes – not to protect specific materials."); Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Schell v. HHS, 843 F.2d 933, 940 (6th Cir. 1988) ("Because Exemption 5 is concerned with protecting the deliberative process itself, courts now focus less on the material sought and more on the effect of the material's release.").

To successfully invoke the deliberative process privilege an agency must meet two fundamental requirements. First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." Jordan, 591 F.2d at 774. Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

In establishing that information being withheld is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States, 617 F.2d at 868. Indeed, the Supreme Court has opined:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, 421 U.S. at 151 n.18; see also Citizens for Responsibility and Ethics in Wash. v. Dep't of Labor, 478 F.Supp.2d 77, 82 (D.D.C. 2007)(rejecting plaintiff's argument that privilege did not apply because agency had not identified "precisely what policies were under consideration");

As this Court has stated, a court "must give considerable deference to the agency's explanation of its decisional process, due to the agency's expertise . . . ." Pfeiffer v. CIA, 721 F.Supp. 337, 340 (D.D.C. 1989).

Further, the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision, or has decided not to make a final decision. See Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) ("Contrary to plaintiff's assertion that materials lose their Exemption 5 protection once a final decision is taken, it is the document's role in the agency's decision-making process that controls."); Sears, 421 U.S. at 151 n.18 (extending protection to records that are part of decisionmaking process even where process does not produce actual decision by agency); Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *21 (D.D.C. Mar. 20, 2006) (rejecting plaintiff's claim that documents relating to action ultimately not taken did not qualify as predecisional). Moreover, the predecisional character of a document is not altered by the passage of time in general. See, *e.g.*, Bruscino v. BOP, No. 94-1955, 1995 WL 444406, at *5 (D.D.C. May 15, 1995) ("The predecisional character of a document is not lost simply. . . because of the passage of time."), aff'd in part, rev'd in part on other grounds & remanded, No. 95-5213, 1996 WL 393101 (D.C. Cir. June 24, 1996).

The second requirement for the application of deliberative process privilege is that the withheld information be deliberative in nature, rather than purely factual. See, e.g., EPA v. Mink, 410 U.S. 73, 91 (1973). A document contains deliberative information when it makes recommendations or expresses opinions on matters facing the agency. Jordan, 591 F.2d at 1537; Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992); Paisley v.

CIA, 712 F.2d 686, 698 (D.C. Cir. 1983). Deliberative documents frequently consist of "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Sears, 421 U.S. at 150. Thus, the exemption covers recommendations, draft documents, proposals, analyses, suggestions, discussions, and other subjective documents that reflect the give-and-take of the consultative process. Coastal States, 617 F.2d at 866.[5] These categories of documents are protected because, by their very nature, their release would likely "stifle honest and frank communication within the agency." Id., 617 F.2d at 866; Lewis-Bey v. DOJ, 595 F.Supp.2d, 120, 133 (D.D.C. 2009)(protecting documents whose release "'would have the effect of inhibiting the free flow of recommendations and opinions'")(internal citation omitted). This Court has stated that "[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take - of the deliberative process - by which the decision itself is made."[6] Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 117 (D.D.C. 1984)(quoting Vaughn, 523 F.2d at 1144). The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'" Chemical Mfrs. Ass'n, 600 F.Supp. at 118 (quoting Sears, 421 U.S. at 151).

Information in the following documents was withheld pursuant to the deliberative process privilege of Exemption 5:

- Record No. 2, August 2010 Memorandum from the Chief Counsel on the "Release of Detainee Information/Telephone Inquiries;

[5] Even after a path has been cut by an agency, "it is the very process of debating, shaping, and changing a . . . policy that needs candor, vigorous to-and-fro, and freedom of expression." Sierra Club v. Dep't of Interior, 384 F. Supp. 2d 1, 16 (D.D.C. 2004).

[6] See Tarullo v. DOD, 170 F. Supp. 2d 271, 277 (D. Conn. 2001)(rejecting argument that document was not predecisional and finding that it was "a description of how the agency performed under its then-existing policy," and concluding that although memorandum "contains some objective description of the facts providing a basis for . . . opinions, it consists primarily of specific subjective recommendations about future agency conduct and policy")

- Record No. 3, Miami International Airport memorandum from the Office of the Chief Counsel entitled "Outside Counsel Presence during Deferred Inspection";
- Record No. 6, Baltimore Field Office Email.

Record No. 2 is a memorandum which was prepared by the Assistant Chief Counsel of the Office of Chief Counsel of CBP for a Supervisory Border Patrol Agent in the Tucson Sector ICLU/Prosecutions Unit. The Office of Chief Counsel is located in headquarters of the CBP. The SBPA worked at one of the many Border Patrol Sectors which are located throughout the country. The Border Patrol Sectors look to the Office of Chief Counsel for advice on legal issues. The document was prepared because the SBPA requested guidance on issues regarding releasing information about detainees in response to telephone calls, and on procedures on detained use of telephones. The Assistant Chief Counsel provided the SBPA with the written procedures and then expressed his thinking on how to resolve the issues when presented in the field. Because the response to the issues may vary based upon the circumstances, there has been no distinct, final policy issued by the Agency on the matters discussed in the memorandum. Hence, the record is predecisional. The record is deliberative as it remains part of the ongoing processes engaged in by CBP in formulating access to counsel policies, while adapting to divergent situations that arise in the exercise of CBP's border enforcement authority.

Record No. 3 is a Memorandum which was prepared by an Associate Chief Counsel of CBP for a Supervisory CBP Enforcement Officer in the Office of Deferred Inspections. The Office of Chief Counsel is located in headquarters of the CBP. The Supervisory CBP Enforcement Officer worked in the Office of Deferred Inspections located in one of the 70 Deferred Inspections Sites located throughout the United States. Members of Deferred Inspection Offices often contact the Office of Chief Counsel for guidance on legal matters. Among other issues, the Supervisory CBP Enforcement Officer requested that a policy be put in

place to deal with certain issues that may arise regarding outside counsel being present during a deferred inspection. The record is deliberative because it contained the Associate Chief Counsel's recommendations and opinion on actions that may be taken when these issues arise. The Associate Chief Counsel noted that the Inspector's Field Manual addressed the issue of the presence of an attorney at a deferred inspection. But, the memorandum made clear that another CBP office should be contacted in an attempt to further resolve policy issues presented by the particular issues. Therefore, the document did not reflect the Agency's final policy on all of the issues presented.

Record No. 6 is an email chain of individuals within the Baltimore Field Office, of the Field Operations Division, pertaining to the issue of access to counsel. The first email in the chain was written by an Operations Specialist and is a draft response to an inquiry from Field Operations. The Operations Specialist sent the draft to an Acting Director of Field Operations in Baltimore for review. After making edits, the Acting Director sent it back to the Operations Specialist who then made further edits. The information within these emails reflects the give and take of the consultative process between Agency officials and is deliberative. There is factual information, which was observed by CBP personnel, within the record. However, it is inextricably intertwined with the internal deliberations of the Operations Specialist and Acting Director. The email contains the draft of the response and reflects the parties' attempts to work out a final response.

The enforcement of the customs laws, particularly those regarding the interdiction, screening and entry of persons at and between CBP ports of entry, is an ongoing and dynamic enterprise. CBP personnel observe situations that occur during encounters and inspections at ports of entry. These observations are communicated to OCC and other CBP personnel. The

parties here have exchanged ideas, formed opinions and made recommendations in order to effectively deal with access to counsel issues when presented. The emails and memoranda exchanged are deliberative because they were developed in an attempt to develop uniform policy throughout the Agency. Information in these records was predecisional because the records were created prior to the formulation of final policies and protocols related to the access to counsel issue. Disclosure of information within these records would defeat the policy consideration that underlie the deliberative process privilege -- the encouragement of frank and direct communications and free exchange of ideas without fear of disclosure, and protection against premature disclosure of proposed or recommended policies before they are actually adopted. In addition, the information within the documents reveals that permutations in the administration of access to counsel policies existed at different points of entry. This is because access to counsel is one of many important factors a port considers while executing its duty to protect the borders. Therefore, CBP officials communicated through these documents in order to develop and refine consistent policies. Disclosure of the permutations and of the rationales which were not ultimately adopted could prove confusing to the public. Hence, because the three policy purposes which constitute the basis for the deliberative process privilege are met, it is clear that the withholding of certain information within these records, under the deliberative process privilege of Exemption 5, was appropriate.

E. The Withholdings Pursuant to Freedom of Information Act Exemption 6 Were Appropriate.

1. Exemption 6

Exemption 6 of the FOIA provides for the withholding of matters contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). The term "similar files" has been read

broadly by the Supreme Court to encompass any "information which applies to a particular individual." Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982); see N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc); Schwaner v. Dep't of Army, 696 F.Supp.2d 77, 81 (D.D.C. 2010). Thus, regardless of the heading under which a record is filed, Exemption 6 covers "detailed Government records of an individual which can be identified as applying to that individual." Washington Post Co., 456 U.S. at 602 (internal quotation marks omitted). The primary purpose of enacting Exemption 6 was "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Id., 456 U.S. at 599.

In evaluating an Exemption 6 withholding, a court must balance the subject individual's right to privacy against the public's interest in disclosure. See Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976); Consumers Checkbook Ctr. for Study of Servs. v. HHS, 554 F.3d 1046, 1050 (D.C. Cir. 2009). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." DOD v. FLRA, 510 U.S. 487, 495-96 (1994) (internal citation and quotation marks omitted). As this Circuit has stated:

> [s]ince this is a balancing test, any invasion of privacy can prevail, so long as the public interest balanced against it is sufficiently weaker. The threat to privacy thus need not be patent or obvious to be relevant. It need only outweigh the public interest.

Public Citizen Health Research Group v. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978). A plaintiff bears the burden of demonstrating that the release of the withheld documents would serve the public interest. See Carter v. Dep't of Commerce, 830 F.2d 388, 391-92 nn.8 & 13 (D.C. Cir. 1987). However, most frequently, information about private citizens in government

files "would reveal little or nothing about an agency's own conduct." Reed v. NLRB, 927 F.2d 1249, 1250-52 (D.C. Cir. 1991) ("We need not linger over the balance; something outweighs nothing every time.")(quotation omitted).

2. Application of Exemption 6

Information in the following documents was withheld pursuant to Exemption 6:

- Record No. 2, August 2010 Memorandum from the Chief Counsel on the "Release of Detainee Information/Telephone Inquiries;
- Record No. 3, Miami International Airport Memorandum from the Office of the Chief Counsel entitled "Outside Counsel Presence during Deferred Inspection";
- Record No. 5, "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo;
- Record No. 6, Baltimore Field Office Email; and
- Record No. 7, "Hold Rooms and Short Term Custody" Border Patrol Memo.

The Agency has withheld a telephone number of the Commissioner of CBP and/or the Office of Chief Counsel, a telephone number of a CBP employee, as well as the names of several CBP employees from Record No.2. From Record No. 3, the Agency has withheld 3 names of CBP employees and a telephone number of a CBP employee. The names of 3 CBP employees and a telephone number of a CBP employee were withheld from Record No. 5. Several names and telephone numbers of CBP employees were withheld from Record No. 6, and one name was withheld from Record No. 7.[7]

In determining to withhold this information, Defendant conducted a two-step analysis. The first step in the analysis was to determine whether the information sought to be protected was within the scope of Exemption 6. This step was easily satisfied as "[t]he Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular

[7] Defendants also have asserted exemption b(7)(C) to protect this information. See infra.

individual." Lepellitier v. FDIC, 164 F.3d 37, 46 (D.C. Cir. 1999)(quoting Dep't of State v. Washington Post Co., 456 U.S. at 602). The CBP employees' names and telephone numbers clearly applied to those individuals.

The second step in the analysis was to determine whether release of the information requested would result in a "clearly unwarranted invasion of personal privacy." This step in the analysis was satisfied as well because the release of this information could result in these individuals being subjected to harassment and potential danger by persons upset by the detention of certain individuals or who oppose CBP practices or the immigration laws. See Judicial Watch v. Dep't of the Army, 402 F.Supp.2d 241, 250-51 (D.D.C. 2005)("[t]he privacy interest of civilian federal employees includes the right to control information related to themselves and to avoid disclosures that 'could conceivably subject them to annoyance or harassment in either their official or private lives.'")(citing Lesar v. DOJ, 636 F.2d 472, 487 (D.C. Cir. 1980)).

In conducting the balancing test, there can be no dispute that there is a substantial privacy interest on one side of the balancing equation. In addition, there is no public interest in disclosure. The release of these individuals' names and telephone numbers would not shed light on how the Defendants performed their duties. Indeed, as the Supreme Court has stated, information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989). See id. at 773 (the core purpose of FOIA "is not fostered by disclosure of information about private citizens . . . that reveals little or nothing about an agency's own conduct"); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 87 (D.D.C. 2003)(The "only public interest" to be considered under FOIA is the extent to which disclosure "advances 'the citizens' right to be informed about what their government is up

to."). "[T]he public interest sought to be advanced must be a significant one[,]" NARA v. Favish, 541 U.S. 158, 172 (2004), and here it is not. Hence, the Court need not linger over the balance of the public and private interests because "something, even a modest privacy interest, outweighs nothing every time." Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d at 879. See DOD v. FLRA, 510 U.S. at 500 ("a very slight privacy interest would suffice to outweigh" a "virtually nonexistent FOIA related public interest in disclosure"). Therefore, it is clear that the withholding of these individuals' names and telephone numbers, pursuant to Exemption (b)(6), was appropriate.

F. The Withholdings Pursuant to Freedom of Information Act Exemption (b)(7)(C) Were Appropriate.

1. Exemption 7 - Threshold Issue

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes," but only to the extent that the production of such records satisfies the requirements of one of the subparts (A)-(F) of the exemption. See Pratt v. Webster, 673 F.2d 408, 413 (D.C. Cir. 1982); FBI v. Abramson, 456 U.S. 615, 622 (1982). Application of any of the subparts of Exemption 7 requires the agency to satisfy the threshold issues of, first, whether the agency has the requisite law enforcement purpose in compiling the records at issue and, second, whether the information gathered has a sufficient nexus to the law enforcement purpose. See, e.g., Tax Analysts v. IRS, 294 F.3d 71, 76-79 (D.C. Cir. 2002); Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2002). The term "law enforcement purpose" includes enforcement of civil and criminal statutes, as well as those statutes authorizing administrative (i.e., regulatory) proceedings. Ctr for Nat'l Policy Review v. Weinberger, 502 F.2d 373 (D.C. Cir. 1974). Many types of agency activities have been upheld as having law enforcement purpose, even several that arguably go beyond the core law enforcement mission of investigating crimes that have been

committed. See, e.g., Mittleman v. OPM, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996)(OPM background investigation), cert. denied, 519 U.S. 1123 (1997); Heggestad v. DOJ, 182 F.Supp.2d 1, 13 (D.D.C. 2000)(IRS has law enforcement purpose); Ctr to Prevent Handgun Violence v. Dep't of Treasury, 981 F.Supp. 20, 24 (D.D.C. 1997)(collecting information on all repeat handgun sales). In addition, the case law in this Circuit is unambiguous that the agency need not tie its collection of information to any specific or ongoing investigation. See Tax Analysts v. IRS, 294 F.3d at 78; Keys 830 F.2d at 342.

2. Exemption 7(C)

Exemption 7(C) protects from disclosure records compiled for law enforcement purposes where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 5(b)(7)(C). Under subpart C of Exemption 7, the next step is to determine if there is a privacy interest. A privacy interest sufficient to justify application of Exemption 7(C) has been found to exist in a wide variety of circumstances. See Computer Prof'ls for Social Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C. Cir. 1996)(the identities of suspects and witnesses who are identified in agency records in connection with law enforcement investigations withheld); Lesar, 636 F.2d at 487-488 (names of law enforcement officers who work on criminal investigations). Once a privacy interest has been established, it must be balanced against the public interest, if there is any, which would be served by disclosure. Albuquerque Publishing Co. v. DOJ, 726 F. Supp. 851, 855 (D.D.C. 1989). As with Exemption 6, the public interest in disclosure is limited to the FOIA's core purpose of "shed[ing] light on an agency's performance of its statutory duties." Reporters Comm., 489 U.S. at 773 (the public interest is "not fostered by disclosure of information about private citizens that is accumulated in

various government files but that reveals little or nothing about an agency's own conduct.").[8] Information that does not directly reveal the operations or activities of the Agency falls outside the ambit of the public interest that FOIA was enacted to serve. Id. at 775.

The FOIA requester's burden is made even heavier by the requirement that the public interest be both significant and compelling in order to overcome legitimate privacy interests. See Senate of Puerto Rico v. DOJ, 823 F.2d 574, 588 (D.C. Cir. 1987); Stone v. FBI, 727 F.Supp. 662, 667-69 (D.D.C. 1990). Consequently, in order to trigger the balancing of public interests against private interests, a FOIA requester must (1) "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "show the information is likely to advance that interest." Boyd v. Criminal Div. of DOJ, 475 F.3d 381, 387 (D.C. Cir. 2007)(citing Favish, 541 U.S. at 172). It is the "interest of the general public, and not that of the private litigant" that the Court considers in this analysis. Ditlow v. Schultz, 517 F.2d 166, 171-72 (D.C. Cir. 1975). Finally, only where the requester can produce meaningful evidence – "more than a bare suspicion" -- which would cause a reasonable person to believe that the government had engaged in impropriety should the Court even consider balancing the privacy interests against the public interest in disclosure. Favish, 541 U.S. at 174.

3. Application of Exemption

Information in the following documents was withheld pursuant to Exemption 7(C):

- Record No. 2, August 2010 Memorandum from the Chief Counsel on the "Release of Detainee Information/Telephone Inquiries;

[8] Exemption 7(C) is much broader than Exemption 6. The reasons surrounding the more expansive nature of privacy information exempt from disclosure under Exemption 7(C) is found in the history and language of the statute. See Favish, 541 U.S. at 165-66.

- Record No. 3, Miami International Airport Memorandum from the Office of the Chief Counsel entitled "Outside Counsel Presence during Deferred Inspection";

- Record No. 5, "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo;

- Record No. 6, Baltimore Field Office Email; and

- Record No. 7, "Hold Rooms and Short Term Custody" Border Patrol Memo.

The Agency has withheld a telephone number of the Commissioner of CBP and/or the Office of Chief Counsel, a telephone number of a CBP employee, as well as the names of several CBP employees from Record No. 2. From Record No. 3, the Agency has withheld 3 names of CBP employees and a telephone number of a CBP employee. The names of 3 CBP employees and a telephone number of a CBP employee were withheld from Record No. 5. Several names and telephone numbers of CBP employees were withheld from Record No. 6, and one name was withheld from Record No. 7.

"Customs and Border Protection is the unified border agency within the Department of Homeland Security charged with the management, control and protection of our nation's borders, at and between the official ports of entry." Suzuki Dec. at ¶ 3. CBP "is a federal law enforcement agency responsible for keeping terrorists and terrorist weapons out of the country while enforcing hundreds of U.S. laws. CBP has enforcement responsibilities for over 400 Federal statutes on behalf of over 40 different federal agencies." Id. CBP's mission includes "protect[ing] the borders of the United States against terrorists and the instruments of terror, and . . . enforc[ing] the customs and immigration laws of the United States . . . ." Id. CBP controls the "borders via the inspection and processing of passengers, conveyances, and merchandise entering, transiting and departing the United States." Id. "Paramount to achieving this mission" is "the creation and implementation of effective law enforcement policies and procedures . . . ."

Id. In creating and implementing effective law enforcement policies and procedures, CBP officials, through memoranda, emails and other methods, perform analysis of, and exchange ideas, form opinions, and make recommendations concerning its practices. Each of the records from which information was withheld has a nexus to CBP's law enforcement purpose because the records were exchanged as part of CBP's analysis of its policies and practices concerning access to counsel. More, specifically, Record No. 2 has a nexus to a law enforcement purpose because it concerns aliens who have been detained after suspicion of violation immigration laws as well as the release of information about, and telephone inquiries by, the detainees. Record No. 3 concerns the deferred inspection process which occurs after someone has been detained as a suspected violator of immigration laws. Therefore, it has a nexus to the laws which CBP enforces.

Record No. 5 has a nexus to a law enforcement purpose because involves the guidelines regarding telephone calls and visits to aliens after they have been detained, pursuant to the rules, regulations and laws, by the Border Patrol, which is tasked with protecting the nation's borders. Record No. 6 concerns the law on applicants for admission to the United States in accordance with federal immigration laws. Record No. 7 concerns the policy for the short-term custody of persons arrested or detained, pursuant to immigration laws, and detained in hold rooms at Border Patrol station, checkpoints, and other facilities by Border Patrol Agents. Both Records 6 and 7 clearly have a nexus to law enforcement.

Defendants have asserted Exemption 7(C) to withhold the names and telephone numbers of employees working for the CBP. Each of these individuals referenced in these records has privacy interests in his or her name and telephone numbers not being disclosed because the disclosure could subject him or her to harassing inquiries for access to information regarding the

enforcement of CBP policies. In addition, the disclosure of this information could cause in individuals who oppose CBP policies or its mission to interfere with the performance of this government official's duties. Hence, the release of this information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Moreover, there is no public interest to be served by releasing these names and telephone numbers because such disclosures would not shed light upon how the Agency performs its duty to control and protect the nation's borders against terrorism, and to enforce the nation's customs and immigration laws. See Suzuki Ex. at ¶ 3. As "the only public interest relevant for purposes of Exemption 7(C) is one that focuses on the citizens' right to be informed about what their government is up to[,]" Davis, 968 F.2d at 1282, and the disclosure of this information would not do so, this information was properly withheld. In fact, even if there was a public interest in this information, in conducting the balancing test, the privacy interest in the identities and telephone numbers of these government officials clearly outweighs any minimal public interest in the disclosure of the information, Therefore, the assertion of Exemption 7(C)was proper.

F. The Withholdings Pursuant to Freedom of Information Act Exemption 7(E) Were Appropriate.

1. Exemption 7(E)

Exemption 7(E)of the FOIA provides protection for all information compiled for law enforcement purposes when release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). As in other subparts of Exemption 7, an agency must first satisfy the threshold requirements of establishing that the agency has the requisite law enforcement purpose in compiling the records at issue and, that the information

gathered has a sufficient nexus to the law enforcement purpose. See, e.g., Tax Analysts v. IRS, 294 F.3d at 76-79.

The first clause of Exemption 7(E) affords "categorical" protection for "techniques and procedures" used in law enforcement investigations or prosecutions. Smith v. ATF, 977 F. Supp. 496, 501 (D.D.C. 1997)(citing Fisher v. DOJ, 772 F. Supp. 7, 12, n.9 (D.D.C. 1991), aff'd, 968 F.2d 92 (D.C. Cir. 1992)). In addition, the "term 'law enforcement purpose' is not limited to criminal investigations but can also include civil investigations and proceedings in its scope." Mittleman, 76 F.3d at 1243 (citing Pratt, 673 F.2d at 420, n.32). "Thus, '[e]nforcement' of the law fairly includes not merely the detection and punishment of violations of law but their prevention.'" Mittleman, 76 F.3d at 1243 (citing Miller v. U.S., 630 F.Supp. 347, 349 (E.D.N.Y. 1986). When, however, a criminal law enforcement agency invokes Exemption 7, it "warrants greater deference than do like claims by other agencies." Keys, 830 F.2d at 340 (citing Pratt, 673 F.2d at 418). A criminal law enforcement agency must simply show that "the nexus between the agency's activity . . . and its law enforcement duties" is "'based on information sufficient to support at least 'a colorable claim of its rationality.'" Keys, 830 F.2d at 340 (quoting Pratt, 673 F.2d at 421). See Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 WL 3273974, at *5 (D.D.C. Sept. 1, 2005) (finding that "administrative and operational guidelines and procedures" were properly withheld, as contents "would provide assistance to persons threatening individuals and property protected by the USMS and allow fugitives to avoid apprehension").

In addition, "[b]ecause the Exemption grants categorical protection to these materials, it 'requir[es] no demonstration of harm or balancing of interests.'" Keys v. DHS, 510 F.Supp.2d 121, 129 (D.D.C. 2007)(citation and quotation marks omitted). Moreover, while Exemption 7(E)'s protection is generally limited to techniques or procedures that are not well known to the

public, even commonly known procedures "may be protected from disclosure if the disclosure could reduce or nullify their effectiveness." Id. (citing Peter S. Herrick's Customs & Int'l Trade Newsletter v. CBP, No. 04-0377 (JDB), 2006 WL 1826185, at *7 (D.D.C. June 30, 2006)). See, e.g., Coleman v. FBI, 13 F.Supp.2d. 75, 83 (D.D.C. 1998)(applying 7(E) to behavioral science analysis and details of polygraph examination.) In addition, courts have construed Exemption (b)(7)(E) to encompass the withholding of a wide range of techniques and procedures, including "immigration enforcement operation" techniques. Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 365 (D.Conn. 2009)(stating that disclosure of "criteria used to rank the cases" by priority level "would disclose law enforcement techniques and could be of assistance to those who wish to evade future immigration enforcement operations"); Tran v. DOJ, No. 01-0238 (ESH), 2001 WL 1692570, at *3 (D.D.C. Nov. 20, 2001) (concluding that agency form -- used when agencies share information from immigration records -- was properly withheld because it would reveal law enforcement techniques). In justifying the application of Exemption 7(E) the agency may describe the general nature of the technique while withholding the full details. See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991). The agency is not, however, required to describe secret law enforcement techniques, even in general terms, if the description would disclose the very information sought to be withheld. Coleman, 13 F.Supp. 2d at 83; Smith, 977 F.Supp. at 501.

Exemption 7(E)'s second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). See, e.g., PHE, Inc. v. DOJ, 983 F.2d 248, 251 (D.C. Cir. 1993)("release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus

inhibit investigative efforts"); Jimenez v. FBI, 938 F.Supp. 21, 30 (D.D.C. 1996)(applying Exemption 7(E) to gang-validation criteria used by Bureau of Prisons to determine whether individual is gang member); Butler v. Dep't of Treasury, No. 95-1931 (GK), 1997 WL 138720, at *4 (D.D.C. Jan. 14, 1997) (permitting the withholding of "the type of equipment used in . . . surveillance"). This Circuit has held that "an agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation." See Tax Analysts, 294 F.3d at 79. Notably, "the importance of deterrence explains why the exemption is written in broad and general terms" and further explains why the exemption looks "not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk" circumvention of the law. Mayer Brown LLP v. IRS, 562 F.3d 1190, 1193 (D.C. Cir. 2009).

2. Application of Exemption

CBP is an agency specializing in law enforcement, see supra at p. 35, and, consequently, its decision to invoke Exemption 7(E) is entitled to a measure of deference. See Abdelfattah v. ICE, 851 F. Supp. 2d 141, 145 (D.D.C. 2012)); accord Campbell v. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998). CBP has asserted Exemption 7(E) to withhold the information in the following records:

- Record No. 2, August 2010 Memorandum from the Chief Counsel on the Release of Detainee Information/Telephone Inquiries;
- Record No. 3, Miami Int'l Airport Memorandum from the Office of the Chief Counsel;
- Record No. 4, "Implementation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008" Border Patrol Memo;

- Record No. 5, "Phone Calls and Visitors to Aliens in Detention" Tucson Border Patrol Memo; and

- Record No. 7, "Hold Rooms and Short Term Custody" Border Patrol Memo.

Record No. 2 is a memorandum which was prepared by the Assistant Chief Counsel of the Tucson Office of Chief Counsel of CBP, for a Supervisory Border Patrol Agent in the Tucson Sector ICLU/Prosecutions Unit. The Office of Chief Counsel is located in headquarters of the CBP. The SBPA worked at one of the many Border Patrol Sectors which are located throughout the country. The record can be characterized as relating to an enforcement proceeding because it concerns certain procedures used when an alien is detained at a border and subjected to questioning. There is a nexus between the information withheld from this document and the Agency's law enforcement duty to protect the nation's borders against terrorists and enforce the nation's immigration laws. See Suzuki Dec. at ¶ 3. The language redacted from Record No. 2 describes techniques CBP personnel should use "when responding to telephonic requests from citizens and attorneys to obtain information about or contact detainees in CBP custody." See Ex. A, Vaughn Index at p. 1. The telephone protocols described include analysis to assist CBP employees in deciding how to respond to different types of inquiries. The information presents situational responses. For instance, if action A occurs, then the response required is action B because of considerations X, Y and Z. These techniques are used by border patrol employees and are not generally known to the general public. If certain individuals were aware of the information which was withheld from this document, they could use the information to circumvent telephone screening protocols and violate laws which prevent illegal immigration or induce others to do so.

The file number of this document also has been withheld because the release of this information would reveal CBP's document naming protocols which are designed to be

compatible with CBP's computer systems. Release of such information would risk infiltration, circumvention and disruption of CBP's electronic systems. Because Exemption 7 grants categorical protection to law enforcement techniques, no balancing of harm or interests is required, and the information in Record No. 2 was properly withheld pursuant to this exemption.

Record No. 3 is a Memorandum which was prepared by an Associate Chief Counsel of CBP for a Supervisory CBP Enforcement Officer in the Office of Deferred Inspections. The Office of Chief Counsel is located in headquarters of the CBP. The Supervisory CBP Enforcement Officer worked in the Office of Deferred Inspections located in one of the 70 Deferred Inspections Sites located throughout the United States. The record relates to an enforcement proceeding because it concerns procedures to be used when an individual is detained during a deferred inspection.[9] It describes guidelines for the actions CBP personnel should take when responding to requests from attorneys to be present during deferred inspections in Miami. There is a nexus between the information withheld and the Agency's law enforcement duty to detain individuals, protect the nation's borders against terrorists, and enforce the nation's immigration laws. See Suzuki Dec. at ¶ 3. The law enforcement considerations and procedures mentioned in the withheld information are used by border patrol employees and are not generally known to the general public. They include deliberations and analysis used in deciding how to respond to different inquiries from attorneys. The withheld information also presents situational responses for CBP personnel. Id. If certain individuals were aware of the guidelines which were withheld from this document, they could use the information to circumvent procedures used

[9] Deferred inspections are used when an immediate decision concerning the immigration status of an arriving traveler cannot be made at the port of entry due to a lack of documentation. On a case-by-case basis, the port of entry may schedule the traveler to report to a Deferred Inspection Site at a future date in order to present the necessary documentation and/or information. The traveler will be given an Order to Appear-Deferred Inspection, Form I-546, explaining what information and/or documentation is required to resolve the discrepancy. See http://www.cbp.gov/xp/cgov/toolbox/contacts/deferred_inspection /overview _deferred_inspection.xml.

during deferred inspections and violate laws which prevent illegal immigration. This could result in harm to the interest of CBP, in particular, and the United States, in general. Therefore, this information was properly withheld pursuant to Exemption 7(E).

Record No. 4 is a memorandum prepared by the Chief of U.S. Border Patrol for all Chief Patrol Agents and all Division Chiefs. The subject of the memorandum is the Implementation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. It was prepared to inform the recipients that the Act was approved. The memorandum contains interim guidance for processing unaccompanied Alien Children ("UAC"). It describes criteria and guidelines used by CBP to determine whether a minor is capable of making an independent decision with regard to whether to withdraw an application for admission into the United States or voluntarily return to his country of nationality or residence. The information withheld from the record can be characterized as relating to enforcement proceedings because it concerns the processing of UAC who have been detained for suspected immigration violations. The information concerns the Agency's law enforcement activities and duties in enforcing the nation's immigration laws. In addition, the memorandum was "created in furtherance of CBP's obligations under the anti-human trafficking statute and was created for the law enforcement purpose of protecting immigrant children and enforcing immigration and border security laws." Id. at ¶48. Information also was withheld from Record No. 4 because it described the observations, step-by-step guidelines and process that must be considered by CBP personnel when deciding how to process alien children. The techniques described in the withheld information concern information used when processing UAC including: the documentation which is considered appropriate for acceptance, information concerning a proposed guardian, guidelines used regarding UAC's making independent decisions whether or not to remain in the

United States, removal of UAC from the United States, records regarding deportable/inadmissible aliens, guidelines concerning notices to appear, screening for credible fear determinations, and human trafficking indicators and suggested questions. These various guidelines are used by border patrol officials when encountering UAC and are generally unknown to the public. If these guidelines were disclosed, they could be used by UAC, human traffickers and others to subvert U.S. immigration laws or facilitate the entry of terrorists into the United States. In addition, release of this information would allow human smugglers to learn how to train victims to respond in order to avoid being identified as a victim of human smuggling. Hence, it "could be used to avoid the protections established for unaccompanied minors or could be used to falsely invoke the protections established by the statute." Id. With respect to the law enforcement techniques used, Exemption 7 grants categorical protection to law enforcement techniques. Therefore, no balancing of harm or interests is required, and the information in Record No. 3 was properly withheld pursuant to this exemption.

Record No. 5 is a Memorandum prepared by the Chief Patrol Agent in the Tucson Sector of the CBP to the Patrol Agents in Charge and Program Managers in the Tucson Sector. The information in the document relates to telephone calls and visits to aliens who are being processed for administrative/ immigration purposes such as Notice To Appear or Voluntary Return. Hence, it relates to detained aliens who are being processed for enforcement proceedings. There is a nexus between the information withheld from this document and the CBP's law enforcement duty to enforce the immigration laws of the United States because the individuals being processed are suspected to have violated the law. The information withheld describes guidelines to be followed when processing and fielding phone calls regarding detained individuals. As the guidelines are used in the specific circumstance of when aliens are held, it is

not generally known to the public. The release of the withheld information could result in considerable harm because, if the detained aliens were to be aware of the guidelines, they could use them to circumvent the immigration laws regarding the 2-hour period described in the document. The information also could be used to facilitate circumvention of the procedures related to when outside parties can communicate with individuals who have been apprehended or detained. Hence, this information was properly protected under Exemption 7(E).

The subject of Record No. 7 is the Detention Standards regarding Hold Rooms and Short Term Custody. The document was prepared because it "establishes national policy for the short-term custody of persons arrested or detained by Border Patrol Agents and detained in hold rooms at Border Patrol stations, checkpoints, processing facilities, and other facilities that are under the control of . . . CBP." See Ex. I, Hold Rooms and Short Term Custody Border Patrol Memo. The document also contains procedures to be used to ensure that juveniles are not detained with human smugglers. This record relates to enforcement proceedings as it concerns individuals who have been arrested or detained by CBP. There is a nexus between the document and the Agency's duties to protect the nation's borders and enforce the nation's immigrations laws because these detainees are suspected of violating those laws.

The withheld information is used when individuals are detained and describes guidelines and procedures for detaining individuals in short term hold rooms, guidelines on the detention of family groups and when family groups may be held together, techniques for handling high risk detainees and detainees which require special handling or have medical issues, techniques for strip searches and restraint of violent detainees, guidelines related to segregation and privacy of detainees, and techniques related to the detention of juveniles to ensure that they are not detained

with human smugglers. These techniques and guidelines are used by Border Patrol Agents when detaining aliens, and are generally not known to the public.

Because Exemption 7 grants categorical protection to law enforcement techniques, no balancing of harm or interests is required, to properly withhold the described techniques. If the guidelines were disclosed, they would provide information on how to avoid being held in a hold room, could be used to circumvent CBP attempts to separate human smugglers from their victims, could result in threatened officer safety, could cause circumvention of detention practices, and could facilitate evasion of CBP enforcement actions related to the protection of minors. Finally, the release of the guidelines could allow individuals to thwart U.S. immigration laws. Therefore, they were properly withheld pursuant to Exemption 7(E).

Finally, the reference number of this document also has been withheld because the release of this information would reveal CBP's document naming protocols which are designed to be compatible with CBP's computer systems. Release of such information would risk infiltration, circumvention and disruption of CBP's electronic systems.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion for Summary Judgment be granted because there are no genuine issues of material fact, and Defendants are entitled to judgment as a matter of law. See Fed. R. Civ. Proc. 56(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 5th day of November, 2013, the foregoing was sent via the Court's Electronic Mail System to Plaintiff's counsel:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	*	
Plaintiff	*	
	*	
v.	*	**Case No. 11-1972 (JEB)**
	*	
UNITED STATES DEPARTMENT OF	*	
HOMELAND SECURITY, et al.,	*	
Defendants.	*	
	*	

* * * * * * * * * * * * *

ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment. Upon consideration of this Motion and the entire record of this case, it is this _____ day of _____, 2013,

ORDERED that Defendants' Motion for Summary Judgment should be and hereby is GRANTED.

_____
UNITED STATES DISTRICT JUDGE