UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-cv-01972 (JEB)

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff American Immigration Council ("AIC") respectfully submits this memorandum of law in opposition to the summary judgment motion submitted by Defendants United States Department of Homeland Security ("DHS") and United States Custom and Border Protection ("CBP").

I. INTRODUCTION

Plaintiff AIC's suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeks records from DHS and its component, CBP, concerning individuals' access to legal counsel during their interactions with CBP. AIC submitted its FOIA request to Defendants on March 14, 2011. (Defs.' Mot. Ex. B.) Two months later, Defendants claimed that "much of the information" AIC sought was "already publicly available." (*Id.* Ex. D at 1.) AIC appealed, contending that Defendants' search was inadequate. (*Id.* Ex. E.) To assist Defendants, AIC confirmed that its FOIA request was not seeking information about the roles of attorneys related to various trade matters within CBP's purview. (*Id.* Ex. G at 1.) Three months later, Defendants produced only two pages of responsive records. (*Id.* at 13-14.) In an effort to compel Defendants to conduct a more comprehensive search, AIC filed the instant litigation in November 2011. (ECF No. 1.)

In January 2012, Defendants initially moved for summary judgment (which Defendants have conspicuously omitted from their current motion papers), contending their search was adequate. (ECF No. 9.) AIC opposed that motion, supplying six declarations with supporting exhibits to demonstrate the inadequacy of Defendants' search. (*See* ECF No. 12.) Upon review of AIC's motion, Defendants withdrew their summary judgment motion so that they could conduct

> "a nationwide search of CBP offices … involv[ing] over 300 Ports of Entry, approximately 130 Border Patrol Stations and 20 Border Patrol Sectors, CBP

> Field Operations Offices as well as the following additional offices at CBP headquarters: Office of Training and Development, Office of Diversity and Civil Rights, Office of Policy and Planning, and Office of Executive Secretariat."

(ECF No. 18 at 2-3.) Defendants further agreed to provide AIC with rolling productions of responsive documents and to provide monthly status reports to this Court. (*Id.* at 3.)

From October 2012 to July 2013, Defendants made ten productions of responsive records. (*See* ECF Nos. 20-25; 27-29; 31, 36.) Some of these records were released in full, some were released in part, and some were withheld in full based on various FOIA exemptions. (*See id.*) Between October 2012 and September 2013, AIC and Defendants repeatedly met and conferred about the adequacy of Defendants' searches and their asserted FOIA exemptions, including the scope of Defendants' redactions which in some cases resulted in Defendants producing less redacted versions of their records. (*See* ECF Nos. 20-25, 27-29, 31-38.) The parties' efforts to narrow and resolve issues have been well-documented through the filings in this matter, which include eleven[1] status reports and, in 2013, six motions to continue the status conference. (*See id.*)

After ten months, AIC determined that it would no longer challenge the adequacy of Defendants' search and informed Defendants that it intended to contest their asserted FOIA exemptions in only ten records. (ECF No. 36.) Through additional meet and confers, the records at issue were reduced to nine.[2] (ECF No. 38.) Despite AIC's best efforts, Defendants were unwilling to relent on or adequately explain the redactions in the remaining documents.

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[1] Defendants filed nine status reports regarding their productions but filed an amended fifth status report which resulted in ten status reports total by Defendants. (*See* ECF Nos. 20-25; 27-29; 31.) The parties filed a joint status report in September 2013. (*See* ECF No. 38.)

[2] While Defendants were drafting their summary judgment motion, AIC determined that it would forego its challenges to the redactions in two of the nine contested records, reducing the number of records at issue to seven. (Defs.' Mot. Ex. H.)

Defendants again move for summary judgment, relying on a declaration from Ms. Shari Suzuki, Chief, FOIA Appeals, Policy, and Litigation Branch, outlining what Defendants contend are properly asserted FOIA exemptions. Defendants also rely on their *Vaughn* index which generally describes the content of the information withheld from six of the seven records. However, many of Defendants' asserted exemptions under (b)(5) and (b)(7)(E) are unjustified, either because they exceed the scope of permissible exemptions under FOIA or because Defendants have waived the exemptions by releasing the information in other contexts. Given that Defendants have failed to meet their burden under Fed. R. Civ. P. 56(a), this Court should deny their motion and order them to produce these records without the contested redactions under (b)(5) and (b)(7)(E).[3]

II. ARGUMENT

A. Standard of Review.

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

FOIA requires agencies to release all records that are responsive to a proper request unless a listed exemption protects such records from disclosure. *See* 5 U.S.C. § 552(b); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980) ("The defending agency

[3] AIC is not challenging any of the (b)(6) or (b)(7)(C) exemptions asserted by Defendants in any of the seven records.

must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements.") (citation omitted) (quotation omitted). Agencies bear the burden of proving that they have fulfilled their FOIA obligations. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

B. Redactions Challenged by AIC.

AIC contests the applicability of the redactions in the following documents:

Record No.	Description	Exemptions at Issue	Pages/Redactions Challenged
Record No. 1	Border Patrol Handbook, Ch. 5	Nonresponsiveness – Not an exemption under FOIA	7-8 (up to "CONSEQUENCES OF IMRPOPER [sic] ACTION" on 8)
Record No. 2	Memorandum from Assistant Chief Counsel, Tucson, on "Release of Detainee Information/Telephone Inquiries" (August 2010)	(b)(5) Attorney-Client Privilege Attorney Work-Product Privilege Deliberative Process Privilege (b)(7)(E)	All, excluding file number redacted on page 1
Record No. 3	Miami International Airport Memorandum from the Associate Chief Counsel, Miami, FL, on "Outside Counsel Presence during Deferred Inspections" (April 2009)	(b)(5) Attorney-Client Privilege Attorney Work-Product Privilege Deliberative Process Privilege (b)(7)(E)	All, excluding file number redacted on page 1

Record No. 4	Border Patrol Memorandum, "Implementation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008" (March 2009)	(b)(7)(E)	Page 000069 Page 000071[4]
Record No. 5	Tucson Border Patrol Memorandum, "Phone Calls and Visitors to Aliens in Detention" (December 2004)	(b)(7)(E)	Page 000011[5]
Record No. 6	Baltimore Field Office Email (July 2012)	(b)(5) Deliberative Process Privilege	Page 000058 – first two redactions
Record No. 7[6]	Border Patrol Memorandum, "Hold Rooms and Short Term Custody" (January 2008)	(b)(7)(E)	See footnote 6

[4] Defendants' *Vaughn* index includes the redactions on pages 74 and 75. AIC only challenges the redactions pursuant to Exemption 7(E) on pages 69 and 71.

[5] Although Defendants' *Vaughn* index includes all redactions on pages 10 and 11, AIC only challenges the redactions under Exemption 7(E) on page 11. As discussed in Section II.D.2, *infra*, Defendants subsequently released the information redacted pursuant to Exemption 5.

[6] As discussed in Section II.D.1, *infra*, because Defendants have produced a less redacted version of this document without several claimed (b)(7)(E) redactions, the public domain doctrine bars Defendants from claiming that many of the contested redactions are exempt from disclosure. *See Watkins v. U.S Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196-98 (9th Cir. 2011) (CBP waived claims to Exemption 4 because it freely disclosed confidential, FOIA-exempt information without imposing limitations on third parties). AIC is not challenging Defendants' remaining redactions in Record No. 7.

C. Defendants' Conclusory Explanation For Withholding Information From Record No. 1 Does Not Justify Their Assertion of Non-Responsiveness.

Agencies are required to "construe a FOIA request liberally." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). To meet that requirement, agencies must "release any information, subject to the specified exemptions, which relates to the subject of the request or which in *any sense sheds light on, amplifies, or enlarges upon that material* which is found in the same documents." *Elec. Frontier Found. v. U.S. Dep't of Justice*, No. C 10-4892 RS, 2012 WL 5372103, at *2 (N.D. Cal. Oct. 30, 2012) (quoting *Dunaway v. Webster*, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981) (emphasis in original).

Information that may not be clearly responsive to a FOIA request but is "located on the same page, or in close proximity to undisputedly responsive material" often "'sheds light on, amplifies, or enlarges upon'" the responsive information found in that document. *Id.* at *3. Absent an applicable FOIA exemption, agencies should produce that information. *Id.*; *see Dunaway*, 519 F. Supp. at 1083-84 (ordering release of withheld material if "material might bear some relationship to the subject of the request, or if the information was necessary to understand the context in which the reference to the subject of the request arises in the document"); *see also ACLU v. FBI*, No. C 12-03728 SI, 2013 WL 3346845, at *11 (N.D. Cal. July 1, 2013) (reviewing non-responsive redactions *in camera* and stating that it "will only uphold redactions if [the court] is utterly convinced that they do not shed light on, amplify, or enlarge upon that responsive information").

Agencies cannot rely on mere conclusory explanations when withholding documents on grounds of non-responsiveness. *Nat'l Immigration Proj. of the Nat'l Lawyer's Guild v. Dep't Homeland Sec.*, No. 11 Civ. 3235 (JSR), 2012 WL 6809301, at *6 n.2 (S.D.N.Y. Dec. 27, 2012). Instead, agencies must provide "reasonably detailed explanations of why material was withheld."

Id. (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted)). Thus, agencies must show that they have fulfilled their FOIA obligations even though they have withheld documents on the basis of non-responsiveness. *Ray v. Fed. Bureau of Prisons*, 672 F. Supp. 2d 75, 80 (D.D.C. 2009).

AIC disputes Defendants' claim that pages 7 and 8 of Record No. 1 are non-responsive. AIC requested documents that "relate or refer *in any way*" to any of 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."

(Defs.' Mot. Ex. B, at 1 (emphasis added).) The redacted portions of Record No. 1, which are interspersed with other sections that describe CBP's access to counsel policies, appear to "shed[] light on, amplif[y], or enlarge[]" the released sections, and thus should have been released. *See Elec. Frontier Found.*, 2012 WL 5372103, at *2.

Defendants have embarked on a quixotic quest to establish that the redacted information falls outside the scope of AIC's request. (*See* Declaration of Shari Suzuki ("Suzuki Decl.") ¶ 21. ("Those released pages describe, in general terms, constitutional law considerations and related considerations and actions in the context of the 4th, 5th and 6th amendments [sic] and criminal procedure rather than in administrative detentions during border encounters. . .").) Yet, AIC's requests did not relate exclusively to "administrative detentions." In fact, the only limitation AIC confirmed to Defendants related to records on attorneys' roles in various trade matters within Defendants' purview. (Pl.'s Resp. to Defs.' Statement of Material Facts Not in Genuine Dispute and Pl.'s Statement of Material Facts as to Which There is a Genuine Dispute, ¶ 6.)

The previous page of Record No. 1 (which Defendants produced, but failed to submit in support of their motion) provides critical context to show how the redacted information "sheds

light on" responsive information. Specifically, page 6 of Record No. 1 indicates that the redacted portions of pages 7 and 8 are part of a section entitled, "Advice of Rights." (Declaration of Michelle Grant ("Grant Decl."), Ex. A at 4.) The unredacted portions of this section, which Defendants produced, describe CBP's policies on access to counsel. As in the *Electronic Frontier Foundation* case, Record No. 1 includes non-responsive information on the *exact same page* as undisputedly responsive material, meaning that there is a presumption that the redacted information would "'shed[] light on, amplif[y], or enlarge[] upon' the plainly responsive material, and that it should therefore be produced, absent an applicable exemption." 2012 WL 5372103, at *3. Just because CBP would prefer not to produce these portions does not mean that it should be allowed to do so. *See id.* at *2 ("Government should not be permitted to withhold materials not subject to any exemption merely because it would *prefer* not to disclose the information and can construct a technical argument that it is outside the scope of the request . . .").

Moreover, Defendants provided neither AIC nor this Court a "reasonably detailed explanation" of why they withheld the contested portions of Record No. 1. Instead, Defendants' brief includes the following two conclusory sentences: "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. A redacted version of the remainder of the record was provided on April 9, 2013." (Defs.' Br. at 2.) Although agencies "need not offer lengthy explanations so long as [their] explanations clearly demonstrate why a document is nonresponsive," *Nat'l Immigration Proj.*, 2012 WL 6809301, at *6 n.4, CBP's brief recitation provides insufficient detail to show, let alone clearly, why the document is nonresponsive. The accompanying footnote indicating that this version of the Border Patrol Handbook has been withdrawn does not remedy the deficiency

and simply repeats CBP's claim of non-responsiveness while providing no further detail.[7] (Defs.' Br. at 2 n.1.)

Although Ms. Suzuki's declaration offers some additional detail, it still fails to offer sufficient explanation to meet Defendants' burden, particularly in light of the context of the withheld portions and the breadth of AIC's FOIA request. Ms. Suzuki's unfounded assumption that AIC's request is limited to "administrative detentions during border encounters" undermines her conclusion that the redacted portions of Record No. 1 are non-responsive. (*Compare* Suzuki Decl. ¶ 21, *with* Defs.' Mot., Ex. B at 1.) Furthermore, even if AIC's request was so limited (which AIC denies), the Fifth Amendment, which, by the Defendants' own admission is implicated in the redacted passages, can be invoked in administrative proceedings. *See Kastigar v. United States*, 406 U.S. 441, 445 (1972) (Fifth Amendment's privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, *administrative* or judicial, investigatory or adjudicatory . . . ") (emphasis added). Because Defendants' have failed to substantiate their claim that the contested sections of Record No. 1 are non-responsive, these sections should be produced in full.

D. Defendants Have Waived Their Asserted Exemptions for Record Nos. 5 and 7 by Producing Less Redacted Versions of the Same Records.

1. The Public Domain Doctrine Compels Disclosure of Much of the Information Redacted from Record No. 7 under Exemption (b)(7)(E).

The public domain doctrine bars exempt FOIA information from being withheld "if it was previously 'disclosed and preserved in a permanent public record.'" *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs*, 722 F. Supp. 2d 66, 72 (D.D.C. 2010) (citation omitted). The party seeking to apply the public domain doctrine must point to "specific

[7] A footnote in Ms. Suzuki's declaration indicates further that the 1984 version of the handbook is still in place. (Suzuki Decl. ¶ 21 n.1.) Presumably, the 1984 version contains responsive sections, which Defendants also failed to release.

information in the public domain that appears to duplicate that being withheld." *Id.* (quotation and citation omitted).

Here, AIC has located an identical but significantly less redacted version of Record No. 7 that the agency produced to another organization. (*See* Declaration of Brittney Nystrom ("Nystrom Decl."), Ex. A.) This less redacted version is also posted online. *See* U.S. Border Patrol Policy, Hold Rooms and Short Term Custody, https://www.documentcloud.org/documents/818095-bp-policy-on-hold-rooms-and-short-term-custody.html (last visited December 4, 2013). Much of the information redacted under Exemption (b)(7)(E) from the version of Record No. 7 produced in the instant litigation is disclosed in the less redacted version. Given that CBP previously released this information, Defendants have no basis to assert claims under (b)(7)(E) with regard to many of the redactions.[8] *Watkins*, 643 F.3d at 1196-98 (CBP waived claims to Exemption 4 because it freely disclosed confidential, FOIA-exempt information without imposing limitations on third parties).

2. <u>Defendants Waived Claims under (b)(5) By Disclosing Information that Allegedly Otherwise Would Have Been Subject to the Attorney-Client or Attorney Work Product Privileges.</u>

One may waive both attorney-client privilege and work product privilege by disclosure. *See Williams & Connolly, LLP v. SEC*, 729 F. Supp. 2d 202, 211 (D.D.C. 2010) ("As with the attorney-client privilege, a party may waive the work product privilege through disclosure."); *In re United Mine Workers of Am. Employee Benefits Plan Litig.*, 159 F.R.D. 307, 310 (D.D.C. 1994) ("It seems . . . clear in this Circuit that the disclosure of documents protected by attorney work product privilege waives the protections . . . as to the documents disclosed."). With

[8] AIC is not challenging the additional redactions in Record No. 7 that were not already released in the less redacted version of the document.

attorney-client privilege, such disclosure waives the privilege to all communications of and "relat[ing] to the same subject matter." *Williams & Connolly, LLP*, 729 F. Supp. 2d at 211.

Defendants assert that disclosure of information redacted pursuant to Exemption 5 in Record No. 5 "would reveal legal recommendations made by a specific individual within OCC," (Defs.' Mot., Ex. A at 5), and that these redactions contain "the legal interpretation of issues" by a CBP attorney "regarding telephone calls and visits to aliens in custody." (Defs.' Br. at 14; *see also* Suzuki Decl. ¶ 25.) However, Defendants produced Record No. 5 without Exemption 5 redactions. (Grant Decl. Ex. B at 2-3.) Thus, Defendants have waived all Exemption 5 claims of attorney-client privilege and attorney work product privilege for Record No. 5.

3. Defendants' Mistaken Assertions Regarding the Exemptions in Record Nos. 5 and 7 Call into Question The Validity of Other Claimed Exemptions under (b)(5) and (b)(7)(E).

The foregoing arguments based on Defendants' improper redaction of information disclosed under other circumstances, combined with side-by-side analysis of the less redacted documents and Defendants' descriptions of why they withheld portions of records in this case, raise serious questions about their claimed exemptions for other contested redactions. For example, Defendants' brief and *Vaughn* index contend that the (b)(5) redactions in Record No. 5 related to legal recommendations and interpretations. However, an examination of the less-redacted version shows that the redacted text was merely the following two sentence fragments: (1) "legal interpretation, from Assistant Chief Counsel" and (2) "the CBP Assistant Counsel recommends continued." (*See* Grant Decl. Ex. B at 2-3.) The redacted text included the phrase "legal interpretation"—not an actual legal interpretation that would be properly withheld pursuant to Exemption 5.

Likewise, numerous redactions in Record No. 7 call into question Defendants' heavy reliance on Exemption (b)(7)(E). Although Defendants argue that they may withhold significant

portions of the record pursuant to Exemption 7(E), (*see* Defs.' Br. at 41-42; Suzuki Decl. at ¶ 49, Defs.' Mot. Ex. A at 7), the less redacted version of Record No. 7 demonstrates that many of these redactions simply do not meet the requirements of the exemption. Defendants argue that the release of the redacted information in Record No. 7 risks circumvention of "CBP attempts to separate human smugglers from their victims, threaten[s] officer safety, . . . circumvention of detention practices, and . . . evasion of CBP enforcement actions related to the protection of minors." (Defs.' Br. at 42.) Yet the additional portions of the record that CBP previously released and are available on the internet provide general guidelines governing the appropriate behavior of CBP officers, not detainees, and pose none of the risks alleged by Defendants. (*See* Nystrom Decl., Ex. A at 3 ("Whenever possible, a detainee should not be held for more than **12 hours**" (previously redacted text in bold)) and *id.* at 7 ("**Masks should be made available for the detainee and agents should encourage their use**") (previously redacted text in bold); *see also* Section II.E.2.)

Such misleading and conflicting assertions raise significant concern about the accuracy and validity of Defendants' claimed FOIA exemptions under (b)(7)(E) and (b)(5) in the remaining redactions at issue in this case. These assertions alone lead AIC to request that this Court review the challenged redactions *in camera* to ensure that Defendants have not inappropriately withheld other information.

E. Defendants Have Improperly Withheld Records Under FOIA Exemptions (b)(5) and (b)(7)(E).

FOIA requires agencies to disclose records responsive to a request "unless the documents fall within enumerated exemptions." *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water User Protective Ass'n*, 532 U.S. 1, 7 (2001) (citing 5 U.S.C. § 552(b)). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective

of the Act." *Id.* at 8 (quotation omitted). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Id.* at 8.

Agencies "withholding responsive documents from a FOIA release bear the burden of proving the applicability of claimed exemptions," *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). Where, as here, agencies seek to establish the applicability of FOIA exemptions through a declaration and *Vaughn* index, these materials must "describe … the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [not be] controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (internal quotation omitted); *see also Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995) (providing that purpose of declaration and *Vaughn* index is to "establish a detailed factual basis for application of the claimed FOIA exemptions to" each withheld document). Conclusory claims that reiterate the statutory standards for exemptions are insufficient to sustain a summary judgment motion. *See Defenders of Wildlife*, 623 F. Supp. 2d at 90-91.

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

1. Inter and Intra-Agency Exemption (b)(5): Record Nos. 2, 3 and 6.

Exemption 5 permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has construed this exemption to permit the withholding of "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 protects "materials which would be protected under the attorney-client privilege, attorney work-product privilege, or the executive 'deliberative process' privilege." *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (citations omitted).

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

(a) Attorney – Client Privilege

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

> (1) The holder of the privilege is, or sought to be, a client; (2) the person to whom the communication is made is a member of the bar or his subordinate and, in connection with the communication at issue, is acting in his or her capacity as a lawyer; (3) the

> communication relates to a fact of which the attorney was informed by his client, outside the presence of strangers, for the purpose of securing legal advice; and (4) the privilege has been claimed by the client. Additionally, (5) a fundamental prerequisite to the assertion of the privilege is confidentiality both at the time of the communication and maintained since.

AIC v. U.S. Dep't of Homeland Sec., No. 12-856 (JEB), 2013 WL 3186061, at *18 (D.D.C. June 24, 2013) (citing *Judicial Watch, Inc.*, 841 F. Supp. 2d at 153-54) (internal quotation marks omitted) (alterations omitted). Importantly, communications that originate with the attorney rather than the client are deemed privileged only if they are "based on confidential information provided by the client." *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (internal citation and quotation omitted).

Because agencies bear the burden of establishing the applicability of a FOIA exemption, they cannot withhold records based on attorney-client privilege unless they offer specific support establishing each element of the privilege. *See, e.g.*, *Senate of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). Courts construe the privilege narrowly, and recognize that it "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Coastal States*, 617 F.2d at 862-63 (quotation omitted).

Defendants assert attorney-client privilege for parts of Record Nos. 2 and 3. Yet, they have not established all the necessary elements. Defendants' *Vaughn* index, simply states that disclosure "would reveal legal recommendations" by an individual in the Office of Chief Counsel. (*See* Defs.' Mot., Ex. A at 1.)

Defendants' brief and declaration also fail to justify their assertion of attorney-client privilege. They have not alleged—let alone established—that these records, which appear to have originated from counsel, "rest on confidential information obtained from the client." *Tax Analysts*, 117 F.3d at 618. Ms. Suzuki's declaration merely asserts that these records involve

"legal advice . . . regarding access to attorneys" and describe considerations that could arise. (Suzuki Decl. ¶¶ 22-23; *see also id.* ¶ 33.) Defendants' brief is similarly devoid of any indication that a client sought advice based on confidential information, although they do assert that the advice provided by counsel was confidential. (*See* Defs.' Br. at 14.) Defendants' assertions that the advice of counsel was provided in response to questions from clients do not establish that the advice rested upon confidential information. (*See, e.g.*, Defs.' Br. at 13 (Record No. 2 included a response to request for legal advice from a supervisory agent that required "assess[ing] the factual situation 'on the ground'"); *id.* at 14 (Record No. 3 included response to request from a supervisory officer "regarding several issues concerning the presence of outside counsel during deferred inspections").)

Defendants also have not established "that the confidentiality of the communications at issue has been maintained." *Judicial Watch, Inc.*, 841 F. Supp. 2d at 154 (citation omitted). Defendants allege in their brief, although not their *Vaughn* index, that the redacted information "was confidential to the Agency, and remains so." (Defs.' Br. at 14.) However, at least with regard to Record No. 5, the assertion that the redacted information remains confidential is plainly inaccurate as it has already been released and is available on the internet. *See supra*, Section II.D.2. Although AIC no longer challenges the (b)(5) redactions in Record No. 5, Record No. 2 appears to involve the same subject matter—telephone inquiries and phone calls to CBP detainees. To the extent that Record No. 2 relates to the subject matter in the publicly available version of Record No. 5, Defendants' assertion of attorney-client privilege is waived. *See Williams & Connolly, LLP*, 729 F. Supp. 2d at 211 (holding that disclosure of privileged information waives privilege over all communications of and "relat[ing] to the same subject

matter"). Defendants' conclusory contentions that confidentiality has been maintained are insufficient to support that element of the privilege.

Further, FOIA does not exempt from disclosure records that are general communications between attorney and client—even those that offer legal analysis and opinions on agency policies and processes—because they do not contain private information about the agency. *See Coastal States*, 617 F.2d at 863 (attorney-client privilege did not apply to "neutral, objective analyses of agency regulations" that did not contain "private information concerning the agency"). For example, in *Tax Analysts v. IRS*, the D.C. Circuit concluded that the attorney-client privilege did not protect the OCC's "Field Service Advice Memoranda" to the IRS. 117 F.3d at 619. Even though field personnel requested those memoranda "for legal guidance, usually with reference to the situation of a specific taxpayer . . . ," the court concluded that they were intended to "ensur[e] that field personnel apply the law correctly and uniformly," created "a body of private law, applied routinely as the government's legal position in its dealings with taxpayers," and were not protected by the attorney-client privilege. *Id.* at 609, 619.

Finally, Defendants have not proven that these records are anything more than unprotected, general descriptions of Defendants' routine legal positions regarding access to counsel. Their descriptions of the records undercut their claims of attorney-client privilege because they do not appear to rely on or specifically respond to confidential information obtained from clients. Instead, these records appear to be general communications describing agency policies and procedures. Specifically, Defendants state that the redacted information in Record No. 2 includes explanations of "protocols and procedures for access to counsel during immigration encounters, interviews and detentions," (*see* Defs.' Br. at 13), and "techniques CBP personnel should use 'when responding to telephonic requests from citizens and attorneys to

obtain information about or contact detainees in CBP custody.'" (*Id.* at 37 (quoting Defs.' Mot. Ex A at 1).) Defendants describe Record No. 3 to include the identification of "CBP's policies governing access to counsel," to ensure that CBP offices "complied with the relevant regulations, statutes and constitutional provisions so that CBP could effectively meet its mission." (Defs.' Br. at 14.) None of these descriptions implicates "private information concerning the agency," *Coastal States*, 617 F.2d at 863, and more accurately concern agency policies and processes "applied routinely as the government's legal position." *Tax Analysts*, 117 F.3d at 619.

Ultimately, Defendants' descriptions of the contested redactions merely reveal communication among attorneys and agency personnel regarding the agency's routine positions and policies on access to counsel. Such descriptions fail to establish that the attorney-client privilege applies. Accordingly, this Court should reject Defendants' assertion of attorney-client privilege in Record Nos. 2 and 3.

(b) Attorney Work-Product Doctrine

The attorney work-product doctrine protects materials "prepared in anticipation of litigation or for trial by or for [a] party or its representative." Fed. R. Civ. P. 26(b)(3)(A). The essential inquiry in applying this doctrine is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Equal Emp't Opportunity Comm'n v. Lutheran Soc. Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999) (internal citation and quotation omitted). Thus, agencies must show that "there was 'a subjective belief that litigation was a real possibility' at the time the document was prepared," and that this belief "was 'objectively reasonable.'" *Judicial Watch, Inc.*, 841 F. Supp. 2d at 156 (quotations omitted). Furthermore, the doctrine requires that "the document be prepared or obtained *because of* the prospect of litigation." *Id.* Although agencies need not necessarily show that documents were prepared

because of a particular claim or proceeding, they must show a direct relationship to anticipated litigation. *Delaney, Migdail & Young, Chartered v. Internal Revenue Serv.*, 826 F.2d 124, 127 (D.C. Cir. 1987).

The work product privilege may apply if the documents are analyzing "types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Id*. at 127. However, records are not work product merely because they were prepared by agency attorneys. If documents contain "mere 'neutral, objective analyses of agency regulations,'" set forth the "agency's view of the law," or express agency policy, they are not subject to the work-product doctrine, even if they relate to litigation in a general way. *See id.* (quotation omitted).

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

Defendants assert that the work-product privilege permits withholding of portions of Record Nos. 2 and 3. As with attorney-client privilege, Defendants should not be permitted to withhold information pursuant to the attorney work product privilege because they have not met their burden of demonstrating that the exemption applies. Defendants have demonstrated neither

that their belief regarding the potential for litigation was objectively reasonable nor that the records were "prepared or obtained *because of* the prospect of litigation." *Id.* at 156. Here, Defendants admit that responses provided by its Office of Chief Counsel (OCC) in the redacted documents were "a direct response to separate inquiries to CBP's Commissioner from immigration lawyers and organizations as well as to FOIA requests from AIC and other organizations regarding the access to counsel issue," (Suzuki Decl. ¶ 33), and contend that such inquiries made litigation a real possibility. (*See* Defs.' Br. at 16-17; Suzuki Decl. ¶ 34.) They claim that such a "belief was objectively reasonable because zealous private attorneys do not quietly accept denial of access to their clients," and that "[i]t [was] reasonable if not foreseeable that private attorneys … would file suit based on such perceived injustices." (Suzuki Decl. ¶ 34.) Here, Defendants erroneously assume that such inquiries necessarily give rise to litigation and that Exemption 5 protects all subsequent internal communications from disclosure. Allowing this reasoning to justify withholding pursuant to the attorney work product doctrine would thwart FOIA's purposes of openness and accountability. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (FOIA's basic purpose ensures "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). If this Court affirmed Defendants' position, CBP attorneys could claim work-product privilege for all documents addressing issues that are the subject of attorney inquiries. *Judicial Watch, Inc.*, 841 F. Supp. 2d at 159 ("[T]he work product exemption, read over-broadly, could preclude almost all disclosure from an agency with responsibilities for law enforcement.").

Furthermore, the unredacted portions and Defendants' descriptions of the records suggest that the redacted information includes "mere 'neutral, objective analyses of agency regulations,'"

setting forth Defendants' view of the relevant law and policies, rather than analysis of the "types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Delaney, Migdail & Young, Chartered*, 826 F.2d at 127 (quotation omitted). Although Defendants assert that Record No. 2 includes "legal theories and strategies," they also describe the redacted text as including "written procedures" and a response to a request for "guidance on issues regarding releasing information concerning detainees and detainee telephone access." (Defs.' Br. at 16.) Elsewhere, Defendants assert that "[t]he language redacted from Record No. 2 describes techniques CBP personnel should use" regarding the release of detainee information and telephone inquiries. (*Id*. at 37.) Record No. 3 includes "guidance to ensure that CBP's employees were abiding by the laws and constitutional principles concerning access to counsel during border encounters." (*See id*. at 17.) Thus, at least some of the redacted information "express[es] the agency's view of the law" and thereby assists agency employees in complying with the requirements of the law. Such information cannot be withheld pursuant to the work product doctrine. *See Delaney, Migdail & Young, Chartered*, 826 F.2d at 127 (quotation omitted); *Coastal States*, 617 F.2d at 865. Defendants' contention that they have been involved in litigation in the past, (*see* Defs.' Br. at 18), is insufficient to transform neutral and objective analyses into analyses of legal challenges, potential defenses, and unlikely outcomes. *See Judicial Watch, Inc.*, 841 F. Supp. 2d at 159 (agency made insufficient showing to establish work-product privilege with respect to documents containing "discussions on litigation strategies").

The redactions at issue resemble the kinds of "neutral objective analyses of agency regulations" that the D.C. Circuit determined were inappropriately withheld in *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). In *Coastal States*, a gas

company sought "memoranda from regional counsel to auditors working in Department of Energy's field offices, issued in response to requests for interpretations of regulations within the context of particular facts encountered while conducting an audit of a firm." *Id.* at 858. In rejecting the DOE's argument that such interpretations were protected by the attorney work product privilege, the D.C. Circuit noted that even though these memoranda dealt with factual situations and the underlying audits were intended to ensure compliance with regulations, the memoranda were not prepared in anticipation of litigation. *Id.* at 865. Subsequently, the D.C. Circuit noted that this result is typically appropriate where the documents at issue are "like an agency manual, fleshing out the meaning of the statute it was designed to enforce," rather than an advisory memorandum discussing "the types of legal challenges likely to be mounted against a proposed program . . .." *Delaney, Migdail & Young, Chartered*, 826 F.2d at 127.

For all of these reasons, this Court should reject Defendants' assertions that information in Record Nos. 2 and 3 was properly withheld pursuant to the work-product doctrine.

(c) Deliberative Process Privilege

Deliberative process privilege protects the integrity of the "decisionmaking processes of government agencies" by exempting certain internal communications directly related to agency decision-making from disclosure. *Sears, Roebuck & Co.*, 421 U.S. at 150. To justify the privilege, agencies must show that their communications are both (1) predecisional and (2) deliberative. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011), *cert. denied* 132 S. Ct. 1026 (Jan. 9, 2012). "Predecisional" means that a communication is "antecedent to the adoption of an agency policy." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259 (D.D.C. 2004) (quotation omitted). To "approve exemption of a document as predecisional, a court must be able to pinpoint an agency decision or policy to which the document contributed," *Senate of P.R.*, 823 F.2d at 585 (internal citation and quotation

omitted), or, at the least, "identify a decision-making process to which a document contributed." *Judicial Watch, Inc.*, 297 F. Supp. 2d at 259 (citation omitted). By contrast, post-decisional documents that embody statements of policy, implement the agency's established policy, or explain actions the agency has already taken, do not merit protection under the deliberative process privilege. *See, e.g.*, *Sears, Roebuck & Co.*, 421 U.S. at 153-54; *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 677-78 (D.C. Cir. 1981); *Judicial Watch, Inc. v. HHS*, 27 F. Supp. 2d 240, 245 (D.D.C. 1998) ("deliberative process privilege does not protect documents that merely state or explain agency decisions").

"[D]eliberative" means that the communication "is one that is 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Judicial Watch, Inc.*, 297 F. Supp. 2d at 259 (quotation omitted). Crucially, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Agencies must "identify the role of a contested document in a specific deliberative process" to fulfill this requirement. *Judicial Watch, Inc.*, 297 F. Supp. 2d at 259 (citation omitted).

To carry their burden, agencies must provide specific information to establish each element of the privilege. "[W]here no factual support is provided for an *essential* element of the claimed privilege or shield, the label 'conclusory' is surely apt," and in these cases, courts have found that agencies have not carried their burden. *See, e.g.*, *Senate of P.R.*, 823 F.2d at 585. Like other FOIA exemptions, this privilege "must be construed as narrowly as consistent with efficient Government operation." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (internal citation and quotation omitted). At a minimum, Defendants must "establish

'what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Senate of P.R.*, 823 F.2d at 585-86 (quotation omitted). Further, Defendants must show that each withheld document constitutes "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters" or "provide[s] candid or evaluative commentary." *Public Citizen, Inc.*, 598 F.3d at 876 (citation omitted).

Defendants have failed to carry their burden of establishing that the deliberative process privilege applies in this case. First, Defendants have failed to establish how Record Nos. 2, 3, and 6[9] are predecisional because they have not shown that the records were "antecedent to the adoption of an agency policy." *AIC v. USCIS*, 905 F. Supp. 2d 206, 217-18 (D.D.C. 2012) (quoting from *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) *overruled in part on other grounds*, *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc)). Defendants generally assert that the records are predecisional because they "were created prior to the formulation of final policies and protocols related to the access to counsel issue." (Defs.' Br. at 24.) More specifically, Defendants assert that Record No. 2 is predecisional because it sets forth procedures in which "the response to the issues may vary based upon the circumstances . . .." (*Id*. at 22.)

Yet, further examination of these records shows that they appear to describe existing policies and practices, not decision-making on new practices, and thus are not predecisional. *See*

[9] On Record No. 6, Defendants failed to disclose that AIC challenges only the first two redactions on page 58. Based on the limited information available within the record, AIC concedes that Defendants' exchanges in the prior portions of the email chain found in Record No. 6 appear to be deliberative and predecisional. *See AIC*, 905 F. Supp. 2d at 218 (citing *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979)) ("Even when an agency subsequently makes a final decision on the issue discussed in the record, the record remains predecisional if it was produced before that final decision.").

Public Citizen, Inc., 598 F.3d at 876. Record No. 2 provides "*written procedures*" and then discusses those established, written procedures. (*See* Defs.' Br. at 22 (emphasis added).) Merely because an agency's actions may "vary based upon the circumstances," (*see id*.), does not mean that, *ipso facto*, there has been no final agency decision. Record No. 3 relies in part on established final policies in the Inspector's Field Manual, (*id.* at 23), and provides "guidance" to ensure that CBP officers were "abiding by the laws and constitutional principles . . . during border encounters." (*Id*. at 17). The only portion of Record No. 6 that AIC is challenging involves "what looks like the *final* draft" of a policy relating to restrictions on access to counsel. (Defs.' Mot. Ex. I, at 33) (emphasis added).) While this could leave open the possibility of further alterations, Defendants have nevertheless failed to "identify the role of [the challenged portion of the] contested document in a specific deliberative process." *Judicial Watch, Inc.*, 297 F. Supp. 2d at 259 (citation omitted). Defendants briefly describe the challenged sections of the document in their *Vaughn* index as including the "personal opinion" of a CBP employee regarding the conduct of specific attorneys and "the 'climate' at Dulles Airport." (*See* Defs.' Mot. Ex. A at 5.) However, they do not explain how the redacted text, rather than the text of Record No. 6 in general, contributed to an agency decision-making process, beyond asserting that "the thoughts related to the access to counsel issue." (*See id.*) In their brief, Defendants merely argue that the entire email chain is predecisional, (*see, e.g.*, Defs.' Br. at 23), without acknowledging that the portion of the record AIC is challenging was described as "final" by a CBP employee.

Second, Defendants have not established that the redacted sections of these records are deliberative. Documents that explain existing policies are not considered deliberative. *Public Citizen, Inc.*, 598 F.3d at 876. Here, the information provided by Defendants suggests that these

documents, at least in part, explain current policies and procedures, as opposed to developing new or revised policies or procedures. Record No. 2 provides "written procedures" and responds to a request for explanation of "the protocols and procedures for access to counsel during immigration encounters, interviews and detentions." (*See* Defs.' Br. at 13.) Further, Defendants assert that the document describes "the circumstances under which detainees *can* be afforded access to a telephone" and what "information . . . *can* be released," suggesting the presence of an existing policy. (Suzuki Decl. ¶ 52 (emphasis added).) Record No. 3 includes information from the Inspector's Field Manual and provides guidance to "ensure that [CBP offices] complied with the relevant regulations, statutes, and constitutional principles." (*Id.* at 14.)

Additionally, messages sent from superiors to subordinates that contain "no hint that the superior is still weighing her options or wants feedback from the employees" and that ask if employees have any questions, *not* suggestions, are more likely to be non-deliberative, postdecisional policy directives. *See AIC*, 905 F. Supp. 2d at 220. This is true here. Record Nos. 2 and 3 were sent from superiors in the Office of Chief Counsel to either supervisory or line level CBP officers, in response to requests for "written procedures" or "that a policy be put in place." (Defs.' Br. at 22-23.) These records offer no hint that their authors are seeking comment from those employees, and end with an offer of availability for "questions," not suggestions.[10] (*See* Defs.' Mot. Ex. I at 10, 13.) Likewise, the author of the challenged portion of Record No. 6 does not appear to be seeking comments. Rather, the response was described as the "final draft of our response," and nothing in the document forecloses the possibility that this was the agency's final version. (Defs.' Mot. Ex. I at 33.). The record was not part of the

[10] While Defendants assert that the author of Record No. 3 advised its recipient to contact another CBP office "in an attempt to further resolve policy issues presented," (*see* Defs.' Br. at 23), nothing in that general statement forecloses the possibility that the redacted information reflects at least some portions of the Agency's final policy.

"decisionmaking process to which [this] document contributed," but rather the unprotected culmination of a decision-making process. *See Judicial Watch, Inc.*, 297 F. Supp. 2d at 259 (quotation omitted). Thus, Defendants have failed to show that the redacted information may be withheld pursuant to the deliberative process privilege.

2. Law Enforcement Exemption (b)(7)[11]

Exemption 7 permits agencies to withhold "records or information compiled for law enforcement purposes," provided they satisfy the requirements of one of the exemption's subparts, (A) to (F). 5 U.S.C. § 552(b)(7). "[T]o prevail on an Exemption 7 claim, the government must bear its burden of demonstrating for every record that: (1) the information [the agency] seeks to conceal was 'compiled for law enforcement purposes,' and (2) disclosure would produce one of the specified harms enumerated in the statute." *Davin*, 60 F.3d at 1054 (citing *U.S. Dep't of Justice v. Landano*, 508 U.S. 165 (1993); *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 622 (1982)).

(a) Defendants have not satisfied Exemption (b)(7)'s threshold requirements and incorrectly assert that their redactions for Record Nos. 2 through 5[12] are proper.

The D.C. Circuit has adopted threshold requirements to determine if records were truly "compiled for law enforcement purposes." *See Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982). Agencies must specifically identify "the connection" between the redacted information at issue "and a possible security risk or violation of federal law." *Id.* at 420. Agencies must also show that "the nexus between the [withholding] and one of the agency's law enforcement duties [is] based on information sufficient to support at least 'a colorable claim' of its rationality." *Id.* at

[11] AIC is challenging only the Defendants' redactions under Exemption (b)(7)(E), not (b)(7)(C).
[12] AIC is not challenging Defendants' remaining redactions on Record No. 7, as noted on pages 4-5 *supra*. As discussed *supra* in Section II.D.1, because Defendants have produced a less redacted version without numerous claimed (b)(7)(E) redactions, the public domain doctrine bars Defendants from claiming the information is exempt from disclosure.

421. Thus, agencies must provide information as to "how and under what circumstances the requested files were compiled, . . . and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. U.S. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (internal quotation marks omitted) (citations omitted).

Records cannot be considered prepared for law enforcement purposes simply by virtue of the function the agency serves. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 229 (D.C. Cir. 1987) (quoting from *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986)); *see also AIC*, 2013 WL 3186061, at *20 (noting that while agencies specializing in law enforcement are entitled to deference under Exemption 7, that deference is not "vacuous," and law enforcement agencies must still satisfy both prongs of the standard set forth in *Pratt*). Yet Defendants have attempted to tie their use of Exemption 7 to CBP's general law enforcement mandate. (*See* Suzuki Decl. ¶ 46 ("All of the records remaining at issue in this case constitute law enforcement records because they were created while CBP, in accordance with its law enforcement mandate, developed and employed policies for the screening and processing of international travelers and the enforcement of the U.S. immigration laws").)

Defendants have failed to satisfy the threshold requirements for Exemption 7(E). Specifically, Defendants argue that these records were compiled for law enforcement purposes simply because they describe CBP's procedures for detaining or processing individuals. (*See, e.g.*, Defs.' Br. at 40 ("The information in [Record No. 5] 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."); *see also id.* at 37-42.) Yet this Court has noted that "[a]t a

minimum," Defendants who invoke Exemption 7 need to provide "a description of the circumstances in which the records were compiled, the relevant law-enforcement activity for each, the nature of the incident or individual involved, and the perceived security risk or likely violation of the law." *AIC*, 2013 WL 3186061, at *21 (internal citations omitted); *see also Pratt*, 673 F.2d at 420. Defendants have failed to provide the necessary information regarding the documents withheld pursuant to Exemption 7.

For example, Defendants assert that the redactions in Record No. 2 "can be characterized as relating to an enforcement proceeding because it concerns certain *procedures* used when an alien is detained at a border and subject to questioning." (Defs.' Br. at 37.) Yet this claim is insufficient to establish that this information "relate[s] to anything that can fairly be characterized as an enforcement proceeding," merely because CBP *may*, at some future time, place the individuals subject to these procedures into enforcement proceedings. *Jefferson*, 284 F.3d at 177. Furthermore, Defendants offer only conclusory allegations regarding hypothetical security risks that they argue might result from disclosure of these records. (*See, e.g.*, Defs.' Br. at 37 ("If certain individuals were aware of the information which was withheld from this document, they could use the information to circumvent telephone screening protocols . . .").)

Additionally, Defendants must also offer sufficient evidence to show the requisite nexus between the activities of the agency and the agency's law enforcement duties. *See Pratt*, 673 F.2d at 421. Yet Defendants' allegations that the requisite nexus exists are too conclusory to support a grant of summary judgment in their favor. Defendants seemingly assert that they satisfy the nexus requirement simply by virtue of their status as a law enforcement agency. (*See* Defs.' Br. at 37 ("There is a nexus between the information withheld from [Record No. 2] and the Agency's law enforcement duty to protect the nation's borders against terrorists and enforce

the nation's immigration laws."); *id.* at 38 ("There is a nexus between the information withheld [from Record No. 3] and the Agency's law enforcement duty to detain individuals, protect the nation's borders against terrorists, and enforce the nation's immigration laws."); *id.* at 40 ("There is a nexus between the information withheld from [Record No. 5] 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."); *see also* Suzuki Decl. ¶ 44 ("The rational nexus CBP has between enforcement of federal law and the information withheld pertains to the screening of travelers, the interdiction and apprehension of individuals attempting to enter the United States, and access to counsel during such interactions").) Should the Court accept Defendants' broad statements regarding the nexus between the withheld records and the agency's law enforcement purposes, the agency could conceivably shield any of its immigration-related records from FOIA requests, as all of them presumably have some nexus to the agency's "duty to enforce immigration laws." For good reason, such claims of blanket protection under (b)(7) for law enforcement agencies have been rejected as insufficient. *See, e.g.*, *King*, 830 F.2d at 229 (rejecting claim of *per se* protection for FBI simply because it serves predominantly law enforcement function).

A side-by-side comparison of the redacted Record No. 7 produced by Defendants in this case and a less redacted version that CBP previously released further demonstrates that Defendants' interpretation of the nexus requirement is impermissibly broad. In their brief, Defendants argue that "[t]here is a nexus between [Record No. 7] and the Agency's duties to protect the nation's borders and enforce the nation's immigrations laws." (Defs.' Br. at 41.) However, the less redacted version of the document shows that some of the redactions currently claimed by Defendants have no nexus to CBP's duties to protect the nation's borders. (*See, e.g.*,

Nystrom Decl., Ex. A at 3 ("Whenever possible, a detainee should not be held for more than 12 hours."); *id.* at 7 ("Masks should be made available for the detainee and agents should encourage their use."); *id.* at 10 ("Unaccompanied alien children must be separated from unrelated adults and must not be detained with unrelated adults in the same holding room"); *id.* at 11 ("Unaccompanied alien children arrested or taken into custody should not be transported in vehicles with detained adults when separate transportation is practical and available. When separate transportation is impractical, all necessary precautions should be taken for the juvenile's protection and well-being.").) Indeed, it is not clear that the redacted portions of the text were compiled for law enforcement purposes, rather than to facilitate administrative processing of detainees.

The above examples give rise to serious doubts about Defendants' claims of a nexus between other Exemption 7 redactions and CBP's law enforcement duties. Because Defendants have failed to establish the threshold requirements for redaction under Exemption 7, this Court should deny their request for summary judgment.

(b) Defendants also fail to demonstrate the applicability of the (b)(7)(E) exemption.

Even if this Court concludes that Defendants have satisfied the threshold requirements for (b)(7), Defendants still bear the burden of demonstrating that disclosure will reveal law enforcement guidelines, techniques and procedures "generally unknown to the public," *Albuquerque Pub. Co. v. United States Dep't of Justice*, 726 F. Supp. 851, 857 (D.D.C. 1989), and that disclosure of these techniques could "reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).[13] Defendants must provide "a relatively detailed justification

[13] Defendants argue that "[t]he first clause of Exemption 7(E) affords 'categorical' protection for 'techniques and procedures' used in law enforcement investigations or prosecutions," (Defs.' Br. at 34 (citing *Smith v. ATF*, 977 F. Supp. 496, 501 (D.D.C. 1997))), and therefore that they need

for each record that permits the reviewing court to make a meaningful assessment of the redactions and to understand how disclosure would create a reasonably expected risk of circumvention of the law." *AIC*, 2013 WL 3186061, at *22 (quoting from *Strunk v. Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012)) (internal quotation marks omitted).

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

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

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

Again, Defendants have failed to carry their burden, and instead have offered only conclusory allegations and insufficient descriptions and explanations of the redacted materials. First, Defendants' descriptions of the technique or procedure at issue are deficient and at times contradictory. For example, Defendants describe redacted information as providing "procedures to be used when an individual is detained during a deferred inspection," including "guidelines for the actions CBP personnel should take when responding to requests from attorneys to be present

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only show a risk of "circumvention of the law" for withholdings of "guidelines for law enforcement investigations or prosecutions." (*Id.* at 35 (citing *PHE Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993)).) Nonetheless, the D.C. Circuit and this Court have both required a showing of risk of circumvention of the law for withholdings of guidelines for law enforcement, *and* techniques and procedures used in investigations or prosecutions. *See, e.g.*, *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (requiring a showing of risk of circumvention of the law for "techniques or procedures used for law enforcement investigations") (internal quotation marks omitted); *AIC*, 2013 WL 3186061, at *20 (stating that "[i]n order for the government to invoke the 'techniques and procedures' prong of 7(E), it must demonstrate that its withholdings . . . 'could reasonably expect to risk circumvention of the law.'" (citations omitted)).

during deferred inspections in Miami." (*See* Defs.' Br. at 38.) This description is vague and reveals nothing about the "technique" or "procedure" at issue. Elsewhere, Defendants indicate that this redacted information consists of "deliberations," "recommendation[s]," and "responses to hypothetical/potential situations." (*See* Suzuki Decl. at ¶ 53.) If the latter description is accurate, it is not clear that the redacted information actually includes procedures or techniques for law enforcement investigation or prosecution.

Further, Exemption 7(E) justifies redaction of materials that pass the threshold requirements "only to the extent that [their] production . . . would disclose" guidelines, techniques, or procedures "for law enforcement *investigations or prosecutions*." 5 U.S.C. § 552(b)(7)(E) (emphasis added). Even if an agency is not required to show that materials relate to a specific investigation to meet Exemption 7's threshold requirement, agencies must still demonstrate that the materials are "agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions." *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002); *see also Families for Freedom v. CBP*, 797 F. Supp. 2d 375, 394 (S.D.N.Y. 2011) ("[W]hile [certain CBP forms] constitute 'records or information compiled for law enforcement purposes,' the release of the charge codes contained therein would not 'disclose techniques or procedures for law enforcement investigations or prosecutions, or . . . guidelines for law enforcement investigations or prosecutions . . ..'").

Courts have allowed agencies to withhold records constituting law enforcement guidelines, techniques, or procedures where those records relate to investigations or prosecutions. *See, e.g.*, *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d at 251 (holding that records which included "documents, records and sources of information available to Agents investigating obscenity violations, as well as the type of patterns of criminal activity to look for when

investigating certain violations" were properly withheld); *Nat'l Whistleblower Ctr. v. HHS*, 849 F. Supp. 2d 13, 36 (D.D.C. 2012) (finding that records with procedures for gathering and analyzing evidence were properly withheld). But where records with a law enforcement purpose do not encompass *investigatory* or *prosecutorial* techniques, procedures, or guidelines, courts have not permit agencies to withhold those records pursuant to Exemption 7(E). *See Cowsen-El v. U.S. Dept. of Justice*, 826 F. Supp. 532, 534 (D.D.C. 1992) (denying summary judgment for Exemption 7(E) claims to Bureau of Prisons program statement because "[b]y its express terms, [Exemption 7(E)] authorizes the withholding of information consisting of, or reflecting, a law enforcement 'technique' or a law enforcement 'procedure' *if* it is 'for law enforcement investigations and prosecutions,' not internal agency policies wholly unrelated to investigations or prosecutions");[14] *see, e.g.*, *Raher v. Fed. Bureau of Prisons*, CV-09-526-ST, 2011 U.S. Dist. LEXIS 56211, *24-25 (D. Or. May 24, 2011) (holding that Bureau of Prisons' Exemption 7(E) withholdings lacked adequate justification where, "[a]lthough BOP has shown that disclosure . . . raises security concerns with respect to its custodial functions," agency had not shown (1) that "the withheld documents pertain[ed] to law enforcement functions" and (2) that assuming Bureau of Prisons qualified to be a law enforcement agency, it had to show "the withheld records are techniques, procedures or guidelines for 'law enforcement investigations or prosecutions' under Exemption (7)(E).").

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

Here, much of the material withheld by Defendants pursuant to Exemption 7(E) appears to relate to the administrative processing of individuals in the agency's custody—not investigations or prosecutions. (*See* Defs.' Br. at 37 (stating that Record No. 2 contains techniques for responding to inquiries about CBP detainees); *id*. at 38 (stating that Record No. 3 includes guidelines for responding to attorney requests to be present during deferred inspections); *id.* at 39 (stating that Record No. 4 "concerns the processing of UAC who have been detained for suspected immigration violations"); *id.* at 40 (stating that Record No. 5 contains "guidelines to be followed when processing and fielding phone calls regarding detained individuals").) Thus, even if these records were compiled for a law enforcement function and include agency procedures, techniques, or guidelines, they should not be withheld unless Defendants also show that the procedures relate to investigations or prosecutions.

Second, Defendants offer no details, let alone "an exploration," of why the techniques or procedures contained in these documents are not generally known to the public. (*See id.* at 37-40.) For example, in their argument that information in Record No. 2 was appropriately redacted, Defendants simply state, "These techniques are used by border patrol employees and are not generally known to the general public." (Defs.' Br. at 37.) Defendants rely on similar assertions to support their redactions of the remaining records under this exemption. (*See id.* at 38-42; Defs.' Mot., Ex. A at 2-4, 6.) Without such an exploration, neither AIC nor the Court can adequately evaluate Defendants' claims that the techniques are not publicly known.

Third, while Defendants seemingly offer greater detail when describing how disclosure could risk circumvention of the law, their claims on this point are also unavailing.[15] For instance, Defendants describe their withholdings from Record No. 3 as "guidelines for the

[15] *See* footnote 13, *supra.*

actions CBP personnel should take when responding to requests from attorneys to be present during deferred inspections in Miami." (Defs.' Br. at 38.) Even though this record addresses CBP's responses to *attorney* requests and not those of individuals subject to deferred inspections, Defendants contend that awareness of these guidelines involving access to counsel will result in use of "the information to circumvent procedures used during deferred inspections and violate laws which prevent illegal immigration." (*Id.* at 39.) It strains credulity to argue that access to counsel or public knowledge of how CBP responds to requests from counsel to accompany their clients during deferred inspections could result in the circumvention of the law. Relatedly, Defendants simply do not offer enough detail to assess how, for instance, detainee access to phone calls, which are at the center of Defendants' claims regarding Record Nos. 2, 3, and 5, would permit detainees, their counsel, or members of the public to circumvent the law.

Likewise, Defendants have failed to establish that the release of information redacted from Record No. 4 would risk circumvention of the law. Defendants describe their withholdings as "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" and "observations, step-by-step guidelines and process that must be considered by CBP personnel when deciding how to process alien children." (*Id.* at 38-39.) Even though this record addresses CBP's processing of minors, Defendants contend that awareness of these guidelines will result in use of the information "by UACs, human traffickers and others to subvert U.S. immigration laws or facilitate the entry of terrorists into the United States." (*Id.* at 40.) Defendants' assertions, however, go too far. The exemptions that AIC is challenging on pages 69 and 71 appear to relate to whether UACs can make independent decisions, (*see* Record No. 4 at 69 ("UAC [redacted]

able to make an independent decision [redacted]")); when rights must be read aloud, (*see id.* ("If the UAC is [redacted] or unable to understand his or her rights, the apprehending officer or agent must be sure to read and explain all documents in a language that the UAC can understand"); *id.* at 71 ("If the UAC is [redacted] or unable to understand Form I-770, the apprehending officer or agent must be sure to read and explain all documents in a language that the UAC can understand.")); and when serving NTAs can be delayed, (*see id.* at 71 ("When CBP issues an NTA to a UAC [redacted] it may be necessary to delay service of the NTA until custody can be transferred to ORR.")). Defendants appear to have released at least some of this information in other documents produced in response to the FOIA request at issue in this case. (*See, e.g.*, Record No. 7 at 10, ¶ 6.24.1 ("If a juvenile is *under 14* or is unable to understand the form, the I-770 must be read and explained in a language that the juvenile understands.") (emphasis added).) In any case, the explanation provided does not include sufficient detail to assess how disclosing the circumstances under which officers must read rights aloud or serve NTAs on government custodians of children, or determine that UACs are able to make independent decisions would permit circumvention of the law. Accordingly, Defendants' reliance on Exemption 7 in this document is overly broad.

F. Defendants Did Not Release All Reasonably Segregable Information.

Even if portions of the information redacted from the documents in question are subject to the FOIA exemptions claimed by Defendants, an agency must release "[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see also Public Citizen*, 598 F. 3d at 876 (noting that documents under Exemption (b)(5) "that contain factual information that does not inevitably reveal the government's deliberations" must be released (internal citation and quotation omitted)). In the D.C. Circuit, a document's non-exempt portions must be

disclosed unless those portions "are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

Defendants have not sufficiently addressed the issue of segregability. While Defendants' declaration includes some description of portions of Record Nos. 2 and 3 asserted to be non-segregable from information that is allegedly exempt from disclosure, Defendants have not provided similar justifications for the alleged non-segregability of redacted portions of the remaining documents. (*Compare* Suzuki Decl. ¶¶ 52-53 (describing non-released portions of Record Nos. 2 and 3); *id*. ¶ 50 (similarly asserting that all reasonably segregable portions of Record Nos. 4, 5, 6 and 7 were released).) Even the description of non-segregability of Record No. 2 does not include all redacted portions of the document. (*See id*. ¶ 52 (not including a description of third paragraph with redactions on page 2 or redactions on page 3).)

Indeed, the agency's "line-by-line" examination of the documents, (*see id*. ¶ 50), resulted in withholding of information that CBP itself released either in this litigation or under other circumstances. (*See supra* Section II.D.) Thus, Defendants themselves have called into question whether they identified and produced all reasonably segregable information in these, and other, responsive documents. Further, even Defendants' provided descriptions do not clearly show that the withheld information is exempt from disclosure. (*See, e.g.*, Suzuki Decl. ¶ 52c-d (withheld information includes description of "circumstances under which detainees can be afforded access to a telephone" and "what personally identifiable information (PII) pertaining to detainees can be released to whom").) This Court should hold that Defendants have not complied with FOIA's segregability requirement and have asserted FOIA Exemptions (b)(5) and (b)(7)(E) too broadly.

III. CONCLUSION

Defendants have failed to carry their burden of establishing that the redacted sections of the records identified in their *Vaughn* index are exempt from disclosure and that the record

classified as non-responsive is outside the scope of AIC's FOIA request. Accordingly, AIC respectfully requests that the Court deny Defendants' motion for summary judgment and order that the documents at issue be produced without the contested redactions.

Respectfully submitted,

Dated: December 5, 2013

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Immigration Council, **Plaintiff,** **v.** **U.S. Department of Homeland Security, et al.,** **Defendants.**	**Civil Action No. 11-1972 (JEB)**

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

Plaintiff American Immigration Council ("AIC") responds as follows to the numbered paragraphs of Defendants' Statement of Material Facts Not In Genuine Dispute ("Defendants' Statement"):

1. AIC denies that its FOIA request to Defendants U.S. Department of Homeland Security ("DHS") and U.S. Customs and Border Protection ("CBP") was limited to the four bullet points listed in paragraph 1 of Defendants' Statement. The four bullet points are the topic areas of AIC's FOIA request, but AIC describes ten different, non-exclusive categories in its March 14, 2011 request that may be found within those four topic areas. (*See* Defs.' Mot. Ex. B at 1-2 (listing 10 different, non-exclusive categories).)

2. Undisputed that Defendants acknowledged AIC's request and denied AIC's request for a fee waiver in its March 29, 2011 letter. (*See* Defs. Mot. Ex. C at 1-2.)

3. Undisputed that Defendants' May 12, 2011 letter stated that "much of the information [AIC was] seeking [was] already publicly available"; that information could be

found in the Code of Federal Regulations, the Personal Search Handbook, and the Inspector's Field Manual; and that "once [the Inspector's Field Manual was] approved for release," it would be available online. (*See* Defs. Mot. Ex. D at 1.) However, AIC denies any implication by Defendants that by May 2011, a thorough search had been conducted in response to AIC's request or that much of the information sought was publicly available, given that Defendants withdrew their original summary judgment motion and, from October 2012 to July 2013, made ten productions of documents that were not publicly available. (*See* ECF Nos. 19-25; 27-29; 31.)

4. Undisputed.

5. Undisputed.

6. AIC denies that its FOIA request sought only "information regarding CBP policies, directives and guidance" as alleged in Defendants' Statement. Instead, AIC's request explicitly defined "records," to include "all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies." (Defs.' Mot. Ex. B at n.1.) Furthermore, AIC denies that the records sought related to the "accessibility of counsel"; rather, they relate to individuals' access to counsel during their interactions with CBP. (*See* Defs.' Mot. Ex. B.) AIC admits that it confirmed to CBP in a June 23, 2011 telephone call, that its request did not concern the permissible roles of attorneys in trade matters, but AIC did not otherwise limit its request.

7. Undisputed that Ms. Suzuki sent correspondence to AIC in September 2011, that this correspondence granted AIC a fee waiver, that Defendants produced two pages of records as

enclosures. AIC denies any implication that the two pages of records amount to a thorough search given that Defendants withdrew their original summary judgment motion and, from October 2012 to July 2013, made ten productions of documents that were not publicly available. (*See* ECF Nos. 19-25; 27-29; 31.) AIC notes further that Ms. Suzuki's letter is stamped with the date September 29, 2011. (Defs.' Mot. Ex. G.)

8. AIC lacks sufficient information to determine whether the date Ms. Suzuki was notified about AIC's filing of the lawsuit is accurate.

9. Undisputed that, on May 22, 2013, Defendants requested to withdraw their summary judgment motion (which this Court granted) and, with AIC's consent, agreed to undertake additional searches to locate and produce additional responsive records. (*See* ECF Nos. 18-19.

10. Undisputed that the parties worked together regarding issues pertaining to Defendants' searches and exemptions. AIC asserts that the status reports filed by Defendants reflect Defendants' efforts regarding production in this matter and that the parties' joint motions to continue the status conference and joint status reports reflect the scope of their collaboration in this matter. (*See* ECF Nos. 20-25, 27-29, 31-38.)

11. Undisputed.

12. AIC disputes that this paragraph's information is in ECF No. 24 because ECF No. 24 makes no reference to a production on October 17, 2012. (*See* ECF No. 24.) Rather, information regarding an October 17, 2012 production is contained in ECF No. 25, which Defendants filed as an amended fifth status report. (*See* ECF No. 25.) AIC does not dispute that the information contained in ECF No. 25 is the same as that in this paragraph. (*Id.*)

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. AIC denies that it concluded that CBP had conducted an adequate search for responsive records. AIC admits that it informed CBP in a telephone conference on June 21, 2013, that it would no longer dispute the adequacy of CBP's search for records and that this understanding was memorialized in the parties' joint submission to the Court filed on July 11, 2013. (*See* ECF No. 36 at 1; *see also* ECF No. 37 at 1.)

17. Undisputed that the parties sought to resolve issues regarding Defendants' redaction or withholding of documents. AIC further asserts that, as it informed the Court on August 27, 2013, if Defendants had released unredacted versions of four of the nine remaining contested documents, AIC would have agreed to forego challenges to the exemptions in the remaining five documents. (*See* ECF No. 38.)

18. Undisputed.

This record presents the following genuine issues of material fact:

1. Whether Defendants have carried their evidentiary burden of establishing that their withholdings from Record 1, Pages 7 and 8 of Chapter 5 of the Border Patrol Handbook, are nonresponsive to Plaintiff's request.

2. Whether Defendants have carried their evidentiary burden of establishing that the remaining contested redactions are properly exempt from disclosure.

3. Whether Defendants have carried their evidentiary burden of demonstrating that they have released all reasonably segregable portions of the remaining contested redactions.

Respectfully submitted,

Dated: December 5, 2013

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