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' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Defendants, United States Department of Homeland Security (DHS) and United States Customs and Border Protection (CBP or Agency), by and through undersigned counsel, respectfully file this reply memorandum in response to Plaintiff's Opposition to Defendants' Motion to Dismiss and for Summary Judgment (Opp.). Defendants should be granted summary judgment on each of Plaintiff's claims because Defendants properly applied Freedom of Information Act (FOIA) Exemptions (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E) to the withheld information, submitted a declaration and Vaughn Index as required, and complied with FOIA's segregability requirements.[1]

I. ARGUMENT

A. Record No. 1 Was Properly Withheld.

Plaintiff, American Immigration Council's FOIA request sought disclosures of records from Defendants, which, inter alia, relate or refer to the following:[2]

[1]Plaintiff now indicates that it "is not challenging any of the (b)(6) or (b)(7)(C) exemptions asserted by Defendants in any of the seven records." Opp. at 3, n.3.

[2]Plaintiff states that it "denies that its FOIA request to Defendants…was limited to the four bullet points…." Plaintiff's Response to Defendants' Statement of Material Facts (Pltf's SOMF) at ¶1. However, Defendants did not state that Plaintiff's FOIA request was limited to the four bullet points.

- 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.

Defendants' Motion, Attachment 1, Declaration of Shari Suzuki at ¶ 7; see Complaint (Cmplt) at 4. After the release of approximately 383 pages of responsive records to Plaintiff, seven records remain at issue. Record No. 1 consists of Pages 7 and 8 of Chapter 5 of the Border Patrol Handbook.[3] Ms. Suzuki, Chief, Freedom of Information Act Appeals, Policy and Litigation Branch, Regulations and Rulings, Office of International Trade, CBP, who was familiar with the records at issue in the litigation, determined that Pages 7 and 8 were non-responsive to Plaintiff's Complaint. See Suzuki Dec. at ¶¶ 4, 21. Plaintiff, however, claims that "page 6 of Record No. 1 indicates that portions of pages 7 and 8 are part of a section entitled, 'Advice of Rights.'" [4] Opp. at 8. Therefore, Plaintiff states that Pages 7 and 8 "*appear to* 'shed[] light on, amplif[y], or enlarge[]'" the released sections [of the record], and thus should have been released." *Id.* at 7 (emphasis added). Plaintiff also claims that Defendants did not provide a "sufficient explanation" for withholding Pages 7 and 8.

Ms. Suzuki explained that the withheld information described, "in general terms, constitutional law considerations and related considerations and actions in the context of the 4th, 5th

---

Rather, Defendants clearly state that the FOIA request "**inter alia**, relate[d] or refer[red] to" those issues. Defs' Motion at 1 (emphasis added). See http://www.merriam-webster.com/dictionary (indicating that the meaning of inter alia is "among other things.") Moreover, in Plaintiff's own Complaint, it uses only those four bullet points to describe its FOIA request. *See* Cmplt at ¶11. The FOIA request itself also uses these four bullet points. See id., Ex. A.

[3]A redacted version of the remainder of Chapter 5 was provided to Plaintiff.

[4]The Agency made a discretionary release of the preceding pages of the record as part of the then-ongoing attempts to bring this matter to closure. Plaintiff states that Defendants produced page 6 "but failed to submit [it] in support of their motion…." Opp. at 7. However, logically, the only documents submitted in support of its motion are the seven redacted records which remain at issue in the litigation. Moreover, if the Defendants had some nefarious reason to withhold information in pages 7 and 8, as Plaintiff appears to contend, they would not have made the *discretionary* disclosure of page 6 to Plaintiff in the first instance.

and 6th amendments and criminal procedure rather than in administrative detentions …." Suzuki Dec. at ¶7. Because Plaintiff's FOIA request clearly asked for information that did not concern criminal proceedings, see Cmplt, Ex. A, Ms. Suzuki concluded that the information on Pages 7 and 8 were non-responsive to the request. Plaintiff now states that the Fifth Amendment "can be invoked in administrative proceedings[,]" Opp. at 9, and Pages 7 and 8 should not have been withheld. However, whether or not the Fifth Amendment can be invoked does not mean that the information in Pages 7 and 8 were responsive to the request. Moreover, the sections withheld discuss specific considerations to be made, steps to be taken, and forms to be completed in order to create investigatory records. Hence, based on Plaintiff's specific request and Ms. Suzuki's knowledge of the complete contents of Pages 7 and 8, she made the determination that the pages were non-responsive.

Moreover, Plaintiff only states that Pages 7 and 8 "*appear to* 'shed[] light on, amplif[y], or enlarge[]" the released portions of the record. However, Plaintiff's supposition does not present a sufficient reason for the Court not to "adhere to the ordinary rule that affidavits submitted by an agency are 'accorded a presumption of good faith.'" Anderson v. CIA, 63 F.Supp.2d 28, 31 (D.D.C. 1999)(citing SafeCard Servs. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Therefore, Plaintiff's contention that these pages should be released should fail.

B. Defendants Have Not Waived the Exemptions Asserted for Record Nos. 5 or 7.

A redacted version of Record No. 5, "Phone Calls and Visitors to Aliens in Detention," Tucson Border Patrol Memo, was released to Plaintiff. Portions of the document were withheld pursuant to Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Plaintiff claims that Defendants "produced Record No. 5 without Exemption 5 redactions[, so they] … have waived … attorney-client and attorney work product privilege[s] for Record No. 5." Opp. at 11. However, several

factors figure into the analysis of whether these privileges are waived including whether the disclosure was intentional or inadvertent. Williams & Connolly LLP v. U.S. SEC, 729 F.Supp.2d 202, 211 (D.D.C. 2010). Here, the disclosure was inadvertent as the Agency merely neglected to redact the information from the original document when it was sent to Plaintiff. However, it clearly raised these privileges in their motion for summary judgment. See Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1110 (D.C. Cir. 2007)(where U.S. Marshals Service explicitly referenced Exemptions 6 and 7(C) in its second motion for summary judgment, exemptions were not waived and court was required to consider those exemptions when ruling on the motion.). Notably, this Court has held that, "[i]n the FOIA context, an agency may waive the right to raise certain exemptions if it fails to raise them *prior to the district court ruling in favor of the other party*." Judicial Watch v. Dep't of Army, 466 F.Supp.2d 112, 123-24 (D.D.C. 2006)(emphasis added)). Here, not only has the Court not ruled on the propriety of the exemption, but Defendants clearly raised the Exemption (b)(5) argument in their motion for summary judgment. Hence, Defendants' Exemption 5 arguments have not been waived. Cf. Ctr For Public Integrity v. FCC, 505 F.Supp.2d 106, 113 (D.D.C. 2007)(rejecting argument as being without merit where plaintiff claimed Exemption 6 waived where not raised in Agency's Motion for Summary).

A redacted version of Record No. 7, the Border Patrol document entitled "Hold Rooms and Short Term Custody," was released to Plaintiff. Portions of the document were withheld pursuant to Exemption (b)(7)(E). Plaintiff states that it has located "an identical but significantly less redacted version of Record 7 which the Agency produced to another organization[,]" and "[m]uch of the information redacted [here] under Exemption (b)(7)(E)…is disclosed in the less redacted version." Opp. at 10. Therefore, Plaintiff claims that Defendants cannot assert (b)(7)(E) for those redactions already made public. Id. at 10 and n.8. Given that Plaintiff has received, from whatever source, the

information they seek, has been provided the redacted version of Record No. 7 information by CBP, and has access to the redacted document on CBP's FOIA reading room, the issue of release of the redactions already made public appears to be moot.

C. Other Assertions of Exemption (b)(5) and (b)(7) are Not Called into Question.

Plaintiff contends that because the (b)(5) information was not redacted in Record No. 5 and, because some of the (b)(7)(C) information had been released, **all** of the (b)(5) and (b)(7)(C) redactions in the records at issue are called into question. Plaintiff's contention fails.

With respect to Record No. 5, CBP provided Plaintiff with that document on January 17, 2013. When CBP provided the document, it inadvertently only redacted information pursuant to Exemptions (b)(6) and (b)(7)(C). However, CBP believed that Exemption (b)(5) also was an appropriate redaction and argued so in its motion. The fact that CBP argued for this redaction in the motion, but did not redact it from the document provided in January, does not mean that the decision to withhold the information was "mistaken" as Plaintiff claims. It simply means it was overlooked in the redaction process. Moreover, it says absolutely nothing about the redactions made at different times, to the different documents involved in this litigation now.

With respect to Record No. 7, Plaintiff apparently located another copy of the document with fewer redactions.[5] Plaintiff indicates that it was produced to another organization in July 2011. Certainly, over a two-year period, different decisions could have been made, by different individuals, regarding the scope of redactions in this document. However, even if the decisions made were "mistaken[,]" either in 2011 or now, the fact that a CBP employee may have released

[5]As "the parties worked together regarding issues pertaining to Defendants' searches and exemptions[,]" Pltf's SOMF at ¶ 11, the work could have been more productive if Plaintiff had shared its copy of Record No. 7 which appears to have already been in Plaintiff's possession.

more information in the past reveals nothing about the (b)(7)(E) redactions in any of the other documents at issue in this litigation as Plaintiff claims.

Plaintiff describes Defendants' use of Exemption (b)(7)(E) in Record No. 7 as "heavy." Opp. at 11. However, a comparison of the redactions in the document released here, with those released in 2011 reveals that much of the same information was redacted, and the redactions here can hardly be characterized as heavy. Indeed, the withholding decisions here and in 2011 were the same for significant portions of the document including the redactions in Sections 6.3.3, 6.3.4, 6.5.3, 6.7.1, 6.7.5, 6.20, 6.23[6], 6.24.12, and 10, Appendix 1. In addition, the redaction decisions were similar for portions of Sections 3.6, 6.3.1, 6.3.2, 6.7.3, 6.22, 6.24.3, and 6.24.4.

Plaintiff also comes to its own conclusion that the release of some of the information which has been redacted here would not risk circumvention of the law. Id. at 12. However, the release of all of the information in Sections 3.6, 6.3.1, 6.3.2, 6.22, 6.24.3, 6.24.4, 6.24.5 of the document would risk the evasion of CBP enforcement actions related to the protection of minors. Allowing individuals to learn about the detention procedures, including the duration of detention, as listed in Sections 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.4.1, and 7.3.1, could risk circumvention of detention procedures used by CBP. The release of the information withheld in Section 6.6 would risk circumvention of detention procedures by disclosing certain characteristics displayed by detainees that require specific treatment or reactions from the detaining officers. In addition, the release of information which reveals under what circumstances an individual will be strip searched, as in Section 6.19, could risk circumvention of the law because, individuals who are "forearmed" with the knowledge of what contingencies are available to detaining officers, will be able to manipulate their behaviors in order to incur favorable treatment or avoid certain consequences that are prescribed in

[6]The previous redactor also asserted Exemption (b)(7)(F).

this document. Release could also enable smugglers of contraband to employ measures to neutralize those techniques. Finally, the release of the information in Section 6.7.3, which pertains generally to the detention of individuals who show signs of carrying an infectious disease, would risk circumvention of the law because the individuals could use their disease status to threaten CBP officers in charge of their detention.

Significantly, the D.C. Circuit has found that Exemption 7(E)

> looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.

Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011)(quoting Mayer Brown LLP v. IRS, 562 F.3d 1190, 1193 (D.C. Cir. 2009)). Moreover, while Plaintiff may believe that the release of certain techniques and procedures would not risk circumvention of the law, when a criminal law enforcement agency, such as CBP, invokes Exemption 7, it "warrants greater deference[.]" Keys v. DOJ, 830 F.2d 337, 340 (D.C. Cir. 1987). Certainly more deference than a not-for-profit educational organization which is seeking to obtain the documents. See Cmplt at ¶ 8. In any event, as the comparison of the 2011 and the present redactions reflects nothing about the (b)(5) and (b)(7) redactions in the remainder of the documents, Plaintiff's contention should fail.

D. Defendants' Withholdings Pursuant to Exemption (b)(5) Were Appropriate.

1. Attorney-Client Privilege

Plaintiff objects to the withholding of certain information from Record Nos. 2 and 3 pursuant to the Attorney-Client Privilege. Record No. 2 is a memorandum prepared by the Assistant Chief Counsel, Office of Chief Counsel of CBP, 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 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.

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 Officer 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 Associate Chief Counsel responded to the inquiries and provided his advice. The information redacted from this memorandum contained these responses. The purpose of these communications was to dissect and analyze the legal issues presented and identify/discuss the legal parameters of the relevant CBP's policies. The purpose of the memorandum also was to ensure that the offices complied with the relevant regulations and statutes so that CBP could effectively meet its law enforcement mandate. The responses were addressed to the SBPA and no individuals outside of the Agency were involved.

Plaintiff, nevertheless, claims that neither of these documents meets the requirements of the attorney-client privilege. Plaintiff states that "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." Opp. at p. 15 (citing Brinton v. Dep't of State, 636 F.2d 600, 603 (D.C. Cir. 1980)). In

support of its argument to release Record Nos. 2 and 3, Plaintiff cites to Brinton v. Dep't of State and appears to contend that the communications in these records were not based on confidential information provided by the client. However, the Brinton Court made clear that, "[w]hatever the precise formulation of this standard, [the application of the attorney-client privilege becomes improper] when an attorney conveys to his client *facts acquired from other persons or sources . . . .*" Id. at 604 (emphasis added).

Here, with respect to Record No. 2, the Assistant Chief Counsel did not obtain the information from an outside source. Rather, the information was obtained from the Assistant Chief Counsel's client, the Supervisory Border Patrol Agent, and the Assistant Chief Counsel provided his legal opinion based upon that information. Indeed, the Office of the Chief Counsel regularly provides legal advice to, and legal representation of, CBP officers in matters relating to the activities and functions of CBP. Defs' Motion at 13, n.4. This includes preparing formal legal opinions. Here, the specific questions asked by the agent were based upon information provided by the agent which he had observed "on the ground."

Similarly, with respect to Record No. 3, a Supervisory CBP Enforcement Officer contacted the office of the Associate Chief Counsel for advice regarding several issues concerning the presence of outside counsel during deferred inspections. The questions concerned existing policies and potential legal ramifications of situations that may arise in the administration of the deferred inspection process. In his capacity as an attorney, the Assistant Chief Counsel provided his legal opinion regarding those issues and potentialities. The information upon which the Assistant Chief Counsel provided his opinion were based upon information he received from his client, the Supervisory CBP Enforcement Officer, not an outside source.

While Plaintiff attempts to claim that the withheld information is nothing "more than unprotected, general descriptions of Defendants' routine legal positions[,]" it is clear that both the Supervisory Border Patrol Agent and Supervisory CBP Enforcement Officer were seeking legal advice upon which they could rely in performing their law enforcement duties, and that is precisely what they received. While these records may have referenced policies and procedures, this does not lead to the conclusion that legal advice was not provided regarding those policies and procedures.[7]

Plaintiff also states that Defendants have not "established" that the confidentiality of the communications…has been maintained.'" Opp. at 16. However, the Agency has indicated that the advice provided in these records was confidential to the Agency and remains so.[8] See Defs' Motion at 13-14. The communications were between agency counsel and front line personnel as attorney and client. The fact that the communication was limited to that exchange ipso facto demonstrates the confidentiality of the advice. Moreover, confidentiality was expected in the handling of these communications and, as evidenced here, the Agency has made reasonable efforts to protect the information contained in the documents from general disclosure.[9]

---

[7]Despite what Plaintiff appears to contend, this case is distinguishable from Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997). Tax Analysts concerned the withholding of Field Service Advice Memoranda (FSA) which the Office of Chief Counsel provided to field personnel, because the legal conclusions in FSAs are based upon information obtained from taxpayers. Here, the legal advice provided was not based upon information obtained from any outside parties but, rather, from clients of the CBP attorneys.

[8]Given Plaintiff's demonstrated ability to obtain documents and information from what appears to be an extensive network of collaborative sources, it is reasonable to conclude that, because the Plaintiffs have not produced any version of the record, that the records of the communication remain confidential.

[9]Plaintiff states that the assertion that the redacted information in Record No. 5 remains confidential is inaccurate because portions of the document have been released. Opp. at 16. However, it is clear that the intention of the Agency was for the information to remain confidential. In any event, Plaintiff admits it is not challenging the assertion of the attorney-client privilege for Record No. 5.

Plaintiff also states that "[t]o the extent that Record No. 2 relates to the subject matter in the publicly

2. Attorney Work-Product Privilege

Plaintiff objects to the withholding of certain information from Record Nos. 2 and 3 pursuant to the Attorney Work-Product Privilege. However, with respect to Record No. 2, the Assistant Chief Counsel provided the SBPA with the written procedures and expressed his opinions on these issues. The legal opinions to the clients included the attorney's candid evaluation of the handling of information regarding detainees and their telephone access at posts around the country. It also included his personal beliefs and mental impressions regarding how the issues should be handled by the Agency on the ground. The attorney evaluated the relevant regulations statutes and constitutional principles and developed legal theories and strategies to be used by the Agency going forward.

After a Supervisory CBP Enforcement Officer asked for advice, Record No. 3 was prepared to address several issues concerning the presence of outside counsel during deferred inspections. The Associate Chief Counsel provided his opinions and guidance to ensure that CBP's employees were abiding by the laws and principles concerning access to counsel during border encounters. Despite Plaintiff's contentions, the withheld information is not like an "agency manual, fleshing out the meaning of the statute it was designed to enforce[.]" Opp. at 22. Rather, the information in Record No. 3 discussed a legal strategy to deal with an issue presented.

Both Record Nos. 2 and 3 were prepared in anticipation of litigation because Border Patrol Officers had begun receiving inquiries from advocacy groups, immigration bar associations and private immigration attorneys about their presence during deferred inspections, and the Agency had received FOIA requests from organizations regarding the access to counsel issue. Moreover, the temporal proximity within which these issues were raised by these groups, the urgent tone of the

---

available version of Record No. 5, Defendants' assertion of attorney-client privilege is waived." Id. However, the fact that documents are merely *related* is not cause for the attorney-client to be waived. Even if it did, Plaintiff has not provided anything besides its mere assertion to support its claim for waiver.

inquiries, coupled with the fact that several of the inquiries were made directly to the Commissioner of CBP, were reasonably and prudently construed as indicators that the issue would potentially be the subject of litigation. Plaintiff argues that the Agency's belief that Record Nos. 2 and 3 were prepared in anticipation of litigation was not objectively reasonable. However, the Associate and Assistant Chief Counsel, who are aware of the legal issues which are confronting the Agency, and regularly provide legal advice and legal representation to the Agency, had subjective beliefs that litigation on the issue was a real possibility and that belief was objectively reasonable. See In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998) ("the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable."). Notably, this Court has stated that the work-product privilege 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).

3. Deliberative Process Privilege

Plaintiff objects to the withholding of certain information from Record Nos. 2, 3 and 6 pursuant to the Deliberative Process Privilege. With respect to Record No. 2, the Border Patrol Sectors regularly look to the Office of Chief Counsel for advice on legal issues. Here, the SBPA requested guidance on issues regarding releasing information about detainees in response to telephone calls, and on procedures on detainee's use of telephones. The Assistant Chief Counsel provided the SBPA with the written procedures and then expressed his opinion on how to handle the issues when presented in the field. However, there was 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.

Regarding Record No. 3, 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 this issue arises. 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 issue. If there had been a final decision on the matter, the Associate Chief Counsel would not have directed the officer to request further guidance. Hence, 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 clearly deliberative. There is factual information 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.

Plaintiff claims that the Agency has not shown that the withheld information was antecedent to the adoption of agency policy, and contends that these records "*appear* to describe exiting policies and practices[.]"[10] Opp. at 24 (emphasis added). However, while Record No. 2 does provide written procedures, as the Agency explained, the document also reflected the Assistant Chief Counsel's thought processes on how to resolve the issues about which the agent requested guidance. As the Agency also explained, there has been no distinct, final policy issued by the Agency on the matters discussed in the memorandum.

Plaintiff appears to state that, because Record No. 3 relies in part of policies in the Inspectors Field Manual and provides guidance, it cannot be predecisional. See id. at 25. However, while the record may have discussed policies in the IFM, this does not mean that what was discussed in this particular document was the final policy issued by the Agency. On the contrary, this document expressed the opinions and recommendations of the Associate Chief Counsel, and did not reflect the Agency's final policy on the issues presented. As has been made clear by this Circuit, the deliberative process privilege "covers *recommendations*, draft documents, proposals, suggestions, and other subjective documents which reflect the personal *opinions* of the writer rather than the policy of the agency." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added).

Plaintiff states that it is only challenging the withholding of the portion of Record No. 6 which "looks like the final draft" of a policy relating to access to counsel. Opp. at 25 (emphasis omitted). Plaintiff contends that this portion of the record "was described as 'final' by a CBP employee[,]" id., and therefore could not be predecisional. However, in the same sentence, the same employee also clearly described the document as a "***draft***." In addition, the record makes clear that,

[10]Plaintiff has selected particular language which describes a portion of the record and then contends that the record is not deliberative.

after this language, there was another response to the email referenced by Plaintiff which supports the conclusion that the record was not the final document produced by the Agency on the issue. Despite Plaintiff's contention, the referenced text did contribute to the Agency decision-making process because it contained edits of the draft, in an attempt to develop the Agency's final position on the matter.

Plaintiff also claims that the information redacted from Record Nos. 2, 3 and 6 was not deliberative, and states that "existing policies are not considered deliberative." Id. Plaintiff selects only particular language from the entire documents and argues that the documents merely explain current policies and procedures. More specifically, Plaintiff states that Record No. 2 contains written procedures, responds to a request for explanation of protocols and procedures, and describes circumstances under which detainees can be afforded access to a telephone. Id. at 26. However, the fact that a portion of the record contains written procedures and descriptions does not mean that the import of the document was not to make recommendations or express opinions on legal or policy matters. In fact, from the face of the redacted document itself, it is clear that the redacted language discusses the procedures. The fact that the document was written in response to a request for advice lends to the fact that the record is expressing opinions or providing recommendations.

Plaintiff complains that Record No. 3 contains information from the Inspector's Field Manual, so it provides guidance. However, again, this would not prevent the document from being deliberative. On the contrary, this document contained the Associate Chief Counsel's recommendations and opinion on actions that may be taken and referenced the IFM in doing so. Finally, Record No. 6 clearly shows the "back and forth" nature of the document and demonstrates the give and take of the consultative process as the writers attempted to develop a final response

regarding restrictions on access to counsel. Therefore, Plaintiff's claim that the document was not deliberative is without merit.

Further, Plaintiff states that Record Nos. 2 and 3 were sent from superiors to subordinates and do not "end with an offer of availability for 'questions[.]'"[11] Id. at 26. Therefore, they cannot be deliberative. However, there is no requirement that every document which is deliberative end with an offer of availability of questions. Therefore, the fact that neither of these records ended with such an offer is not dispositive. Moreover, information which has been redacted from Record No. 2 expresses opinions on legal matters. In addition, the information played a role in the deliberative process because the exchange involved making recommendations and expressing opinions by agency counsel to field personnel on observed and legal and policy matters regarding the access to counsel issue.

Information which has been redacted from Record No. 3 is a direct part of the deliberative process in that it expresses opinions on legal matters. In addition, more than once, the recipient is directed to continue his consultation in order to attempt to receive a final response. Finally, Plaintiff states that nothing in Record No. 6 "forecloses the possibility that this [document] was the agency's final decision." Id. Plaintiff's statement is pure speculation and incorrect.

E. Defendants' Withholdings Pursuant to Exemption (b)(7)(E) Were Appropriate.

1. Threshold Issue

Plaintiff claims that "Defendants have not satisfied Exemption (b)(7)'s threshold requirements…for Record Nos. 2 through 5[,]" id. at 27, and argues that the records were not compiled for law enforcement purposes. In support of its argument, Plaintiff discusses Record Nos. 2, 3, 5 and 7. See id. at 27-31. However, Plaintiff has provided nothing to support an argument that

[11]It should be noted that individuals in the Office of Chief Counsel are not superiors to the individuals who have asked for the legal advice.

Record No. 4 was not compiled for law enforcement purposes and has, therefore, conceded that this record meets the threshold requirement of Exemption (b)(7).

With respect to the remaining records, Plaintiff claims that Defendants "argue that the[] records were compiled for law enforcement purposes simply because they describe CBP's procedures for detaining or processing individuals." Id. at 28. Plaintiff is incorrect. "To show that the [records] were compiled for law enforcement purposes, the [agency] need only establish a rational nexus between the investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law." Blackwell, 646 F.3d at 40 (internal quotation marks and citations omitted).

Record No. 2 concerns the considerations agency personnel should make when responding to telephonic inquiries regarding individuals who have been detained because they are suspected to have violated the immigration laws of the United States. There is a rational nexus between the information withheld and the Agency's purpose to enforce the immigration laws of the United States because if, through certain telephone inquiries, individuals are able to gain information about how, why or where certain persons are detained, these individuals could use this information to circumvent the immigration laws or train others to do so. In addition, there is a connection between an incident and a possible security risk or violation of federal law because if specific information is learned about how, why or where an individual detainee is held, certain individuals can attempt to thwart or manipulate the detention process and help or have a detainee interfere with his detention.

The withheld information in Record No. 3 concerns procedures to be used when an individual is interviewed during a deferred inspection. A deferred inspection is a law enforcement proceeding because it is 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. There is a

rational nexus between the withheld information and the Agency's purpose to enforce the immigration laws of the United States because, if an individual were to learn of the guidelines contemplated within the document, they could attempt to obstruct the guidelines or manipulate them in ways that avoid compliance with immigration laws and the procedures used by CBP personnel to enforce those laws and procedures. In addition, there is a connection between an incident and a possible security risk or violation of federal law because, if these guidelines are manipulated or obstructed, a terrorist or other individual could be allowed to enter or remain in the country and pose a significant threat to the country.

The withheld information in Record No. 5 concerns a potential situation regarding telephone calls and visits to aliens who are being detained for immigration enforcement. The redacted sentence gives a specific instruction to officers in the event the potential situation arises. There is a rational nexus between the withheld information and the Agency's purpose to enforce the immigration laws of the United States because it relates to detained aliens who are being processed for enforcement proceedings. There is a connection between an incident and a possible security risk or violation of law because the release of information would reasonably lead to circumvention of the investigatory process that is accomplished during detentions.

Plaintiff claims that a less redacted version of Record No. 7 shows that some of the redactions Defendants have made "have no nexus to CBP's duties to protect the nation's borders." Opp. at 30. Plaintiff cites to the redactions they deem objectionable. See id., 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…").[12] However, there is a rational nexus between the length of time a detainee is held, the treatment of family units and the treatment of unaccompanied alien children, and the Agency's purpose to enforce the U.S. immigration laws because enforcement of the immigration laws includes not only preventing the unlawful entry of undocumented aliens into the country, but also protecting the rights of detainees when they are in the United States. Disclosure of the "rules" regarding the segregation of certain groups and the specific criteria that trigger different treatment could enable one to manipulate the system and circumvent these protections, causing potential harm to those in the system and frustrating the efforts of those who administer it. There is a connection between the requirement that masks be available for detainees and agents and CBP's role in protecting the nation's borders because, by using the masks, the Agency can help prevent the spread of illnesses into the country. In addition, it may protect the safety of CBP officers from illness and liquid projectiles while they are performing their duties. If CBP officers are not adequately protected, detainees have the ability to create dangerous conditions in the detention facilities. Finally, the redacted information regarding unaccompanied alien children has a nexus to CBP's obligations under the anti-human trafficking statute to protect immigrant children as they enter the country. See Suzuki Dec. at ¶48.[13]

[12]Plaintiff states that these "examples give rise to serious doubts about Defendants' claims of a nexus between other Exemption 7 redactions and CBP's law enforcement duties." Opp. at 31. However, Plaintiff has pointed to no specific examples in the other Exemption 7 redactions, and its blanket assertion that other exemptions ***may be*** incorrect is insufficient.

[13]Assuming arguendo that some of this information should not have been withheld pursuant to Exemption (b)(7), given that Plaintiff already is in possession of this redacted information it cites from Record No. 7, Plaintiff's request that these redacted statements be released is moot.

2. Exemption 7(E)

Plaintiff also claims that the information should not have been withheld from Record Nos. 2, 3, 4, and 5 pursuant to Exemption 7(E).[14] Plaintiff states that these records "appear to relate to the administrative processing of individuals in the agency's custody - not investigations or prosecutions." Opp. at 35. This is a misapprehension or mischaracterization of the activities described in these records because the "processing" of undocumented aliens at the border is a subpart of the investigatory and law enforcement processes that CBP is mandated to perform. Indeed, Record No. 2 concerns certain procedures used when an alien is detained at a border and subjected to questioning. When an alien is detained, it is as a part of a limited investigation regarding whether he has violated the immigration laws of the country. The information which has been redacted from the document 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 Defs' Motion, Ex. A, Vaughn Index at 1. The telephone protocols described include analysis to assist CBP employees in deciding how to respond to these inquiries. Plaintiff states that Defendants have offered no details of why the techniques or procedures are not generally known to the public. Opp. at 35. However, these techniques are specifically used in the context of detaining aliens who have

[14]Plaintiff incorrectly states that 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,' … and therefore that they need only show a risk of 'circumvention of the law' for withholdings of 'guidelines for law enforcement investigations or prosecutions.'" Opp. at 31-32, n.13. However, Defendants indicated that the "first clause of Exemption 7(E) affords 'categorical' protection for 'techniques and procedures' used in law enforcement investigations or prosecutions." Defs' Motion at 34 (citing Smith v. ATF, 977 F.Supp. 496, 501 (D.D.C. 1997); 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 "[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)(emphasis added).

attempted to cross the border. As the general public is not involved in processing aliens entering the country, there would be no reason for the general public to know of these techniques.

Plaintiff also claims that Defendants have not offered enough detail to assess how the release of this information to the public could risk circumvention of the law. However, this Court has noted that "it is sometimes impossible to describe secret law enforcement techniques without disclosing the information sought to be withheld." Butler v. Dep't of Treasury, No. 95-1931 (GK), 1997 WL 138720, at *4 (D.D.C. January 14, 1997)(additional citation omitted). Nevertheless, it is reasonable to conclude that if certain individuals were aware of the information that has been withheld, those individuals could use the information to circumvent telephone screening protocols, interfere with the detention of persons, inform the detainee how to thwart his or her detention, or train others on how to do so. Moreover, if those screening protocols are violated, a terrorist or other dangerous individual could thwart enforcement efforts in order to enter or remain in the country.[15]

Plaintiff notes that Record No. 3 "includes guidelines for responding to attorney requests to be present during deferred inspections" and claims that the record relates to "administrative processing of individuals in the agency's custody – not investigations or prosecutions." Opp. at 35. However, the withheld information includes the analysis to be used by CBP personnel in responding to different inquiries from attorneys about their clients whose particular circumstances have been determined sufficient to have them return to the border office for inspection. The withheld information relates to investigations of the immigration status of particular individuals and, if the analysis and guidelines contained in the document were released, individuals could use the information to circumvent procedures used during deferred inspections. This could allow them to avoid those border enforcement strategies and procedures and make it more difficult for CBP officers

[15]Plaintiff has not objected to the withholding of the file number on Record No. 2.

to protect the nation's borders. In addition, Plaintiff's contention that deferred inspections are not investigatory in nature ignores the fact that the deferred inspection is designed to allow both CBP and the immigrant to compile and provide documentation in order to determine admissibility. CBP investigates the alien in order to determine whether or not the alien is admissible. The disclosure of this information would reveal the advice that the CBP attorney rendered in response to the inquiries from the field officer, and would divulge deliberations about enforcement tactics. Because these guidelines are specifically used in the context of the detention of aliens, they are not generally known to the public and should be protected.

Plaintiff also states that Record No. 4 appears to relate only to administrative processing of individuals. See Opp. at 35, 36-37. However, the information withheld from this document pertains to law enforcement criteria and legal considerations that must be made when minors are interdicted at the border. Specifically, 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. It clearly relates to enforcement proceedings because it concerns the processing of UAC who have been detained for suspected immigration violations and involves CBP's role 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." Suzuki Dec. at ¶48. Information withheld from Record No. 4 also describes the observations, step-by-step guidelines, and process that must be considered by CBP personnel when deciding how to process alien children. The withheld techniques 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. Because they are not used in other contexts, they are generally unknown to the public.

Plaintiff contends that the Defendants' explanation of how the release of this information would risk circumvention of the law lacks sufficient detail. However, if UAC are placed with human traffickers, they could fall prey to traffickers and be violated emotionally or physically. Moreover, the human traffickers could use the UAC to trick unsuspecting or sympathetic CBP employees and help the traffickers and others circumvent the immigration laws.

Finally, Plaintiff appears to claim that Record No. 5 contains guidelines for "processing and fielding calls regarding detained individuals[,]" and, therefore, does not relate to investigations or prosecutions. See Opp. at 35 (citation omitted). However, the withheld information relates to detained aliens who are being processed for enforcement proceedings. So, there is a sufficient nexus between the withheld information and CBP's law enforcement duties to enforce the nation's immigration laws. The guidelines are to be followed by CBP personnel when processing and fielding calls regarding detained individuals, so they necessarily are not generally known to the public. The release of this information could risk circumvention of the law because, if the detained aliens were aware of the guidelines, they could reasonably be expected to use them to circumvent the procedures put in place regarding communication with outside parties. In addition, release of this information would nullify its effectiveness.[16]

[16]While Plaintiff did argue that Record No. 7 was not compiled for a law enforcement purpose,

F. Defendants Have Complied with FOIA's Segregability Requirements.

Plaintiff claims that Defendants have not sufficiently addressed the issue of segregability.[17] In making its argument, notably, Plaintiff failed to mention that, in attempting to work collaboratively with Plaintiff, Defendants "reconsidered, at AIC's request, the redactions made in the…documents at issue and reduced the number of redactions whenever possible." Suzuki Dec. at ¶50. In addition, as explained in the Suzuki Declaration, "[t]he remaining redactions contain[ed] information that [wa]s either exempt from disclosure, ha[d] no surplus language, or the information redacted [wa]s inextricably intertwined with the remaining language in the redaction and the only language that would be releasable would be an incomprehensible smattering of conjunctions and articles."[18] Id.

Plaintiff admits that the Suzuki Declaration contains descriptions of non-segregable portions of Record Nos. 2 and 3. Opp. at 38. However, Plaintiff states that "the description of non-segregability of Record No. 2 does not include all redacted portions of the documents." Id. The additional redacted portions of Record No. 2 could not be further described because any further description of the redacted portions of the document would reveal the information that is being withheld.

With respect to Record No. 4, as Ms. Suzuki explained, "only the most essential law enforcement criteria [wa]s redacted from that document - and the lion's share of the document was

---

Plaintiff has failed to offer any argument that the disclosure of the information withheld from Record No. 7 could reasonably be expected to risk circumvention of the law, and has thereby waived such an argument.

[17]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). See supra at 11-13 (application of attorney work-product privilege to Record Nos. 2 and 3).

[18]Again, Plaintiff is not challenging the redactions made pursuant to Exemptions (b)(6) and (b)(7)(C).

released and what was released conveys the gist and main provisions of the record." Suzuki Dec. at ¶50. In addition, the redactions in Record No. 5 were limited to only the law enforcement technique, criteria or policy priority. CBP was circumspect in making these redactions and limited them to only the most crucial information. Indeed, a review of the document as released confirms that the majority of the salient information was disclosed. The withheld information from Record No. 6 included "only those deliberations that reflected the 'back and forth' exchange of ideas between the Operations Specialist and the Acting Port Director." Id. Moreover, no additional information from the document could be released without revealing that information the Agency is seeking to protect. Given its law enforcement mandate and the necessity of maintaining its ability to enforce the border laws without disclosing information that could lead to circumvention of those enforcement efforts, CBP appropriately segregated the redacted information in this record.

Finally, the information redacted from Record No. 7 was limited to the law enforcement technique, criteria or policy priority. CBP described the information redacted and the justifications for the redactions. Any further description of or lesser redaction of the information withheld would reveal the information withheld.[19] Therefore, it is clear that Defendants have complied with FOIA's segregability requirements.

II. CONCLUSION

For the reasons explained herein, and in Defendants' Motion to Dismiss and for Summary Judgment, Defendants respectfully request that the Court grant the Government's motion.

[19]Moreover, given that Plaintiff is in possession of a lesser redacted version of the document at issue, several of Plaintiff's contentions regarding this document appear to be moot.

Respectfully submitted,

RONALD C. MACHEN JR.
D.C. Bar # 447889
United States Attorney

DANIEL F. VAN HORN
D.C. Bar # 924092
Chief, Civil Division

By: */s/ Marian L. Borum*
MARIAN L. BORUM
D.C. Bar # 435409
Assistant United States Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2510 (telephone)
(202) 252-2599 (facsimile)
Marian.L.Borum@usdoj.gov

Of Counsel:

Andrew Langreich
Attorney-Advisor
FOIA Appeals, Policy & Litigation Branch
U.S. Customs and Border Protection
Washington, D.C. 20229-1179

CERTIFICATE OF SERVICE

I certify that, on this 20th day of December, 2013, the foregoing was sent via the Court's Electronic Mail System to Plaintiff's counsel:

Creighton R. Magid
Dorsey & Whitney LLP
1801 K Street, N.W., Suite 750
Washington, D.C. 20006

Melissa Crow
American Immigration Council
1331 G Street, N.W., Suite 200
Washington, D.C. 20005

Michelle Grant
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402

Marian L. Borum
MARIAN L. BORUM
Assistant United States Attorney