UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil Action No. 11- 1971 (JEB)**
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
	)	
Defendants	)	
	)	

DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Defendants, United States Department of Homeland Security ("DHS") and the United States Citizenship and Immigration Services ("USCIS"), by and through undersigned counsel, respectfully move this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff's claims for declaratory and injunctive relief with respect to the documents released to Plaintiff as well as Plaintiff's claims based upon a violation of the Administrative Procedure Act ("APA") on the grounds that the Court lacks subject matter jurisdiction. Defendants also move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting Defendants' motion for summary judgment based upon a violation of the Freedom of Information Act ("FOIA") on the grounds that no genuine issue of material fact exists, and Defendants are entitled to judgment as a matter of law.

In support of this motion, the Court is respectfully referred to the accompanying Statement of Material Facts as to Which There is No Genuine Dispute, the Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment with exhibits attached thereto, and the Declaration of Jill A. Eggleston. A proposed Order consistent with the relief sought herein also is attached.

Respectfully Submitted,

RONALD C. MACHEN, JR., D.C. Bar No. 447889
United States Attorney

DANIEL F. VANHORN, D.C. Bar No. 924092
Acting Chief, Civil Division

BY: /s/ *Marian L. Borum*
MARIAN L. BORUM, D.C. Bar No. 435409
Assistant United States Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-6531 (telephone)
(202) 514-8780 (facsimile)
Marian.L.Borum@usdoj.gov

Of Counsel:

Alan D. Hughes, Esq.
Associate Counsel, Office of Chief Counsel
U.S. Citizenship & Immigration Services
U.S. Department of Homeland Security

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	**Civil Action No. 11- 1971 (JEB)**
	)	
Defendants	)	
	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES **PAGE(S)**

CASES

STATUTES/REGULATIONS

RULES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	**Civil Action No. 11- 1971 (JEB)**
	)	
Defendants	)	
	)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

1. As the agency that oversees lawful immigration to the United States, the United States Customs and Immigration Service ("USCIS") is charged with disseminating accurate and needful information regarding immigration issues, granting immigration and citizenship benefits, promoting awareness and understanding of citizenship, and ensuring the integrity of the United States immigration system. See United States Citizenship & Immigration Servs., "About Us" at http://www.uscis.gov/aboutus.

2. The USCIS's National Records Center ("NRC") routinely processes Freedom of Information Act ("FOIA") requests in compliance with DHS implementing regulations found at 6 C.F.R. Part 5 and DHS Management Directive No. 0460.1. Exhibit ("Ex.") A, Declaration of Jill A. Eggleston ("Eggleston Decl.") ¶¶ 32-64.

3. Upon receiving a FOIA request, the NRC sends the requestor an acknowledgement letter that includes the request's control number and describes the processing-fee arrangement, processing options, contact information, and addresses any collateral requests the requester raised.

Id.

4. After determining the nature and scope of the FOIA request, the NRC conducts a preliminary search to locate potentially responsive records. Id.

5. If the NRC determines that responsive records are in the possession of an office or agency other than the responding office, a request for the production of records is sent to that office or agency's appropriate custodian of records. Id.

6. In an effort to process FOIA requests in a fair and expeditious manner, the NRC maintains a "first-in-first-out" processing policy. Id. ¶¶ 66-76.

7. This process has been enhanced by the implementation of a regulation providing for expedited processing of requests under particular circumstances, and by the adoption of a multi-track processing system that not only allows the NRC to process requests on a first-in-first-out basis within each track, but also facilitates responses to relatively simple requests more quickly than complex or voluminous requests. Id.

8. The NRC's first-in-first-out and multi-track processing techniques comport with the guidelines set forth in Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) and Exner v. Fed. Bureau of Investigation, 612 F.2d 1202 (9th Cir. 1980).

9. By letter dated March 14, 2011, AIC submitted a FOIA request to the USCIS seeking the following:

> any and all records which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Citizenship and immigration Services (USCIS), whether issued or maintained by USCIS Headquarters offices, regional offices, district offices, field offices and/or any other organizational structure, and which relate or refer in any way to any of the following;
>
> - Attorneys ability to be present during their clients' interactions with USCIS;
> - What role attorneys may play during their clients' interactions with USCIS;

- Attorney conduct during interactions with USCIS on behalf of their clients;
- Attorney appearances at USCIS offices or other facilities.

See Ex. B, AIC FOIA Request Letter dated March 14, 2011; Ex. A, Eggleston Decl. at ¶¶ 81-97.

10. Plaintiff's March 14, 2011 correspondence requested a fee waiver. See id.

11. The AIC FOIA request was received at the NRC on March 31, 2011. Ex. A, Eggleston Decl. at ¶ 99.

12. In a letter to AIC counsel dated April 15, 2011, the NRC acknowledged receipt of the FOIA request in accordance with its normal operating procedures; advised that the FOIA request would be processed on a first-in, first out basis and on a multi-track system. AIC also was advised its FOIA request was placed in the complex track (Track 2) and assigned an NRC control number of COW2011000252. See Ex. C, USCIS's Acknowledgment Letter dated April 15, 2011.

13. On May 2, 2011, USCIS notified AIC by letter that its request for a fee waiver was granted. Ex. D, USCIS's Fee Waiver Letter dated May 2, 2011.

14. Because AIC's FOIA request sought access to USCIS records related to agency policies and procedures on the role of attorneys representing individuals during their "interactions with USCIS" and "attorney appearances at USCIS offices or other facilities," as opposed to records pertaining to a specifically identified individual, the FOIA request was assigned to the NRC's Significant Interest Group Team ("SIG") for processing. See Ex. A, Eggleston Decl. at ¶¶ 111-115.[1]

15. FOIA requests that are complex in nature and entail an expansive agency search for responsive records often must exceed the FOIA statutory response time of twenty business

[1] Complex FOIA requests such as the AIC FOIA request, are often referred to the SIG team for processing. Ex. A, Eggleston Dec. at ¶¶ 111-122, n. 1.

days. 5 U.S.C. § 552(a)(6)(A). See id. at ¶¶ 66-76.

16. USCIS provided a status letter to AIC on July 12, 2011, explaining it was continuing its search for responsive records, stating staff was "working on gathering and searching records pertaining to your request." See Ex. E, USCIS Status Letter dated July 12, 2011.

17. Nonetheless, on August 11, 2011, AIC submitted an administrative appeal to USCIS stating it considered USCIS's failure to provide responsive records as a constructive denial of its FOIA request. See Ex. A, Eggleston Decl. at ¶¶ 224-225.

18. USCIS responded by letter on August 16, 2011 acknowledging it had not completed the FOIA request and informing AIC that it may treat the August 16, 2011 letter as a denial of its appeal and bring an action in an appropriate federal court. See Ex. F, USCIS Appeal Determination Letter dated August 16, 2011; Ex. A, Eggleston Decl. at ¶¶ 227-229.

19. USCIS SIG team staff continued searching for and compiling responsive records. On November 8, 2011. AIC filed the instant complaint, seeking injunctive and declaratory relief directing USCIS to provide responsive records to its FOIA request. See Complaint; Ex. A, Eggleston Decl. at ¶¶ 229-232.

20. On February 6, 2012, after completing a thorough and FOIA-compliant search, USCIS mailed its FOIA response, recorded on a Compact Disc to AIC. See Ex. A, Eggleston Decl. at ¶¶ 216-217.

21. The response informed AIC that USCIS staff identified 2,042 pages of records that were responsive to the request. Four hundred fifty-five (455) pages were released to AIC in their entirety, 418 pages were released in part, and 1,169 pages were withheld in full. Id. at ¶¶ 217-219.

22. USCIS staff determined the withheld records contained no reasonably segregable portions of non-exempt information. USCIS reviewed and determined to release all information except those portions that are exempt pursuant to 5 U.S.C. § 552(b)(5) and (b)(6) of the FOIA. See Ex. G, USCIS FOIA Response Letter to AIC dated February 6, 2012.

Respectfully Submitted,

RONALD C. MACHEN, JR., D.C. Bar No. 447889
United States Attorney

DANIEL F. VANHORN, D.C. Bar No. 924092
Acting Chief, Civil Division

BY: /s/ *Marian L. Borum*
MARIAN L. BORUM, D.C. Bar No. 435409
Assistant United States Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-6531 (telephone)
(202) 514-8780 (facsimile)
Marian.L.Borum@usdoj.gov

Of Counsel:

Alan D. Hughes, Esq.
Associate Counsel, Office of Chief Counsel
U.S. Citizenship & Immigration Services
U.S. Department of Homeland Security

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	**Civil Action No. 11- 1971 (JEB)**
	)	
Defendants	)	
	)	

I. SUMMARY OF ARGUMENT

American Immigration Council ("AIC" or "Plaintiff") brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 501 et seq., seeking records related to individuals' access to legal counsel during their interactions with USCIS. However, Plaintiffs claims should be dismissed or summary judgment should be granted in Defendants' favor.

Specifically, Plaintiffs claims for injunctive and declaratory relief based upon Defendants' failure to respond to AIC's FOIA request should be dismissed as USCIS has provided Plaintiff with all non-exempt, responsive records in accordance with the FOIA. In addition, Plaintiffs claims under the APA should fail because a Plaintiff cannot bring an APA action for withholding records where an adequate remedy is available under the FOIA. See Kenny v. Dep't of Justice, 603 F. Supp. 2d 184, 190 (D.D.C. 2009). Finally, because Plaintiff has searched for and released to Plaintiff, in full or in part, all segregable records except those properly withheld under FOIA Exemptions 5 U.S.C. § 552(b)(5) and (b)(6),[1] Defendants are entitled to summary judgment as a

[1] Pursuant to FOIA Exemptions (b)(5) and (b)(6), Defendants have properly withheld attorney-client, attorney work product and deliberative process privileged records as well as records that, if released, would pose an unwarranted invasion of personal privacy.

matter of law. [2]

II. APPLICABLE LEGAL STANDARDS

A. Motions to Dismiss

Federal Rule of Civil Procedure 12(b)(1) gives the plaintiff the burden of establishing that the Court has jurisdiction to review his claims. See Fed. R. Civ. P. 12(b)(1); Public Warehousing Co. KSC v. Defense Supply Ctr. Phila., 489 F. Supp. 2d 30, 35 (D.D.C. 2007). The plaintiff bears the burden of persuasion, and must establish jurisdiction "by a preponderance of the evidence." Thompson v. Capitol Police Bd., 120 F. Supp.2d 78, 81 (D.D.C. 2000) (citations omitted); see also Vanover v. Hantman, 77 F. Supp.2d 91, 98 (D.D.C. 1999), aff'd, 38 Fed. Appx. 4 (D.C. Cir. 2002). To determine the existence of jurisdiction, a court may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. See Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). Although a court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss for lack of jurisdiction, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Commun. Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). "At issue in a factual 12(b)(1) motion is the trial court's jurisdiction - - its very power to hear the case." Mortensen v. First Fed. Sav. and Loan Assn, 549 F.2d 884, 891 (3rd Cir. 1977).

A motion to dismiss is a proper procedural vehicle for adjudicating a plaintiff's failure to exhaust its administrative remedies. It is well settled in this Circuit that the exhaustion

[2] The USCIS describes responsive documents released in part and withheld in part and in full in a Vaughn index. See Ex. H, Vaughn Index; see also Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.1973), cert. denied, 415 U.S. 977 (1974).

requirement is a condition precedent to the bringing of a FOIA action. Jones v. Dep't of Justice, 576 F.Supp.2d 64, 66 (D.D.C. 2008). See Spannus v. Dep't of Justice, 824 F.2d 52 (D.C. Cir. 1987) ("It goes without saying that exhaustion of remedies is required in F[reedom of Information Act] cases."). When a FOIA defendant disputes that a FOIA plaintiff has fulfilled the exhaustion requirement, the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Hildalgo v. Fed. Bureau of Investigation, 344 F.3d 1256, 1260 (D.C. Cir. 2003).

B. Motions for Summary Judgment

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

The burden on the party moving for summary judgment "may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Burke v. Gould, 286 F.3d 513, 517-20 (D.C. Cir. 2002) (requiring a showing of specific, material facts). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. Thus, to avoid summary judgment, the plaintiff must present some objective evidence that would enable the court to find he is entitled to relief. See Celotex, 477 U.S. at 322-23. See also Laningham v. Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor). In Celotex, the Supreme Court instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

C. FOIA Actions and Summary Judgment

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment. See Harrison v. Exec. Office for U.S. Attorneys, 377 F. Supp. 2d 141, 145 (D.D.C. 2005)(FOIA cases are typically and appropriately decided on motions for summary judgment.). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the plaintiff with affidavits or declarations and other evidence which show that the

documents are exempt from disclosure. Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv , 608 F.2d 1381, 1386 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). The district court is required to accord substantial weight to declarations submitted by an agency in support of the claimed exemptions, 5 U.S.C. § 552(a)(4)(B), and such declarations are presumed to be submitted in good faith. SafeCard Servs., Inc. v. Securities and Exchange Comm'n, 926 F.2d 1197, 1200 (D.C. Cir. 1991). If the affidavits or declarations are reasonably specific, rather than merely conclusory, and they are not called into doubt by contradictory evidence or evidence of agency bad faith, the court must grant summary judgment based upon them. See Gardels v. Cent. Intelligence Agency, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 409 (D.D.C. 1983).

III. ARGUMENT

A. THE USCIS PROPERLY RELEASED ALL RESPONSIVE, NON-EXEMPT RECORDS IN RESPONSE TO AIC'S FOIA REQUEST.

An agency must release all records responsive to a properly submitted FOIA request unless the records are protected from disclosure by one or more of the FOIA's nine Exemptions. See 5 U.S.C. § 552(b); see also Dep't of Justice v. Tax Analysts. 492 U.S. 136, 150-51 (1989). As shown below, the USCIS conducted an adequate search for records responsive to the AIC's FOIA request and properly withheld information pursuant to FOIA Exemptions (b)(5) and (b)(6). Therefore, it is entitled to summary judgment in its favor.

i. The USCIS's search was reasonably calculated to uncover all documents responsive to the AIC's FOIA request.

The FOIA requires an agency to undertake a search that is "reasonably calculated to uncover all relevant documents." Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Such searches are "adequate" as a matter of law. Valencia-Lucena v. U.S. Coast Guard,

180 F.3d 321, 325 (D.C. Cir. 1999); see also Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not rendered inadequate merely because it failed to "uncover every document extant." SafeCard Servs., Inc. v. Securities and Exchange Comm'n., 926 F.2d at 1201. Instead, a search is inadequate only if the agency cannot "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." Oglesbv, 920 F.2d at 68. Once the agency demonstrates the adequacy of its search, the FOIA requestor must show "that the agency's search was not made in good faith." Maynard v. Cent. Intelligence Agency, 986 F.2d 547, 560 (1st Cir. 1993). Unsupported assertions of bad faith are insufficient to raise a material question of fact with respect to the adequacy of an agency's search for purposes of summary judgment. See Oglesbv, 920 F.2d at 67 & n.13. Moreover, "[a]gency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents." Chamberlain v. Dep't of Justice, 957 F. Supp. 292, 294 (D.D.C. 1997), aff'd 124 F.3d 1309 (D.C. Cir. 1997).

The USCIS conducted an adequate search for records in response to the AIC's FOIA request. See Oglesby, 920 F.2d at 68 (holding that a search need only "us[e] methods which can be reasonably expected to produce the information requested"). USCIS properly construed Plaintiff's FOIA request as seeking any internal guidance, memoranda, operational field manuals and other instructions to staff that focused on USCIS policies and procedures related to the ability of attorneys to participate during their clients' interactions with USCIS during the agency adjudication process for immigration benefits. Ex. A, Eggleston Decl. at ¶¶ 138-142.

The Declaration of Jill Eggleston, Assistant Center Director, Freedom of Information and

Privacy Act Unit, National Records Center, USCIS, establishes that the USCIS's search method was reasonably calculated to uncover all records in its possession responsive to the AIC's FOIA request. Since AIC's FOIA request was not for an individual's immigration (alien or "A-file") records, which constitutes the overwhelming majority of FOIA requests received by USCIS, SIG staff had to search for responsive records from a wide variety of USCIS components. Unlike a FOIA request seeking A-file records, no single USCIS file was available that contained records responsive to the AIC FOIA request. Id. at ¶¶ 130-138.

As a result, when processing a FOIA request of this nature, a member of the SIG team will determine the precise nature and scope of the request upon receipt, and identify all USCIS program offices potentially possessing records responsive to the request. SIG staff sends search requests ("staffing requests") via email to all USCIS agency components they deem may have responsive records. The staffing request details the scope of the FOIA request accompanied by the actual request for documents, and asks the recipient to provide responsive records to the appropriate members of the SIG team. Id. Each USCIS component tentatively affected by the FOIA request is tasked to forward all documents responsive to the request, if any, to the NRC for processing pursuant to the FOIA and, to the extent known, identify any other USCIS components that might possess records responsive to the subject request so that they can be similarly tasked. Ex. A, Eggleston Decl. at ¶¶ 109-120.

Accordingly, USCIS SIG staff sent staffing requests to multiple USCIS program offices.[3]

[3] The SIG team reasoned that program documents responsive to the request might be located within the (a) USCIS's Service Center Operations (SCOPS); (b) Office of Policy and Strategy (OP&S); (c) Field Operations Directorate (FOD); (d) Refugee, Asylum, International Operations (RAIO); and (e) the Office of Chief Counsel (OCC).

(a) SCOPS is responsible for the direct oversight and support of USCIS service centers located within the United States that adjudicate, manage and deliver immigration decisions and benefits.

(b) The OP&S mission includes: (a) recommending and developing national immigration policy; (b)

Id. at ¶¶ 151-160. Each agency subdivision then conducted a meticulous search for responsive documents and dispatched referrals to other agency subdivisions as necessary in order to ensure that all responsive information would be uncovered. Id. at ¶¶ 130-160. Further, as explained in the FOIA response letter sent to AIC, dated February 6, 2012, pursuant to DHS regulation 6 C.F.R. § 5.4(a), USCIS uses a "cut off" date to delineate the scope of a FOIA request by treating records created after that date as not responsive to the FOIA request. See id. at ¶¶ 143-146, Ex. G, USCIS FOIA Response Letter dated February 6, 2012. Therefore, in determining which records were responsive to the FOIA request, USCIS searched for records in possession of USCIS on or before April 8, 2011, the date SIG staff initiated the search for records. See Ex. G, USCIS FOIA Response Letter dated February 6, 2012).

In searching the records of the SCOPS, OP&S, FOD, RAIO and OCC program offices, USCIS searched all locations where information responsive to the FOIA request would reasonably be expected to be found and repeatedly conferred with individuals who were reasonably expected to possess information responsive to the request. See Ex. A, Eggleston Decl. at ¶¶ 130-206. In light

---

developing and coordinating immigration regulation initiatives; (c) performing research, evaluation and analysis on immigration services issues; (d) developing and coordinating strategic plans; and (e) serving as liaison with DHS and sister agencies on immigration policy issues.

(c) FOD manages the day to day operations of the various USCIS field offices and oversees the adjudication of all applications and petitions for immigration benefits requiring face-to-face interviews, timely action on related ancillary applications and other assigned product lines, provision of direct customer service, immigration information, ensuing the integrity of the immigration system and assistance to applicants, petitioners and beneficiaries.

(d) RAIO is responsible for overseeing, planning, and implementing policies and activities related to asylum and refugee issues as well as immigration services overseas. RAIO's offices are involved in extending citizenship and immigration benefits to eligible individuals, exercising vigilance in matters involving fraud detection and national security, sustaining effective intergovernmental liaisons, and advancing USCIS strategic priorities in the international arena.

(e) OCC is the legal arm of the USCIS and, among other things, renders legal advice and opinions on a myriad of immigration as well as administrative and legislative matters. OCC helps develop legal policies, guidance and training for USCIS.

of the expansive and thorough search, the USCIS undertook an adequate search for records responsive to the AIC FOIA request.

ii. USCIS has submitted a Declaration and a Vaughn Index.

In moving for summary judgment in a FOIA case, an agency must establish a proper basis for its withholding of responsive documents. "In response to this special aspect of summary judgment in the FOIA context, agencies regularly submit affidavits . . . in support of their motions for summary judgment against FOIA plaintiffs." Judicial Watch v. Dep't of Health and Human Servs., 27 F. Supp. 2d 240, 242 (D.D.C. 1998). The declaration or affidavit (singly or collectively) is often referred to as a Vaughn Index. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). There is no set formula for a Vaughn Index. "[I]t is well established that the critical elements of the Vaughn Index lie in its function, and not in its form." Kay v. Fed. Commc'ns Comm., 976 F.Supp. 23, 35 (D.D.C. 1997), aff'd, 172 F.3d 919 (D.C. Cir. 1998). "The materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." Delaney, Midgail & Young, Chartered v. Internal Revenue Serv., 826 F.2d 124, 128 (D.C. Cir. 1987). See also Keys v. Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987); Hinton v. Dep't of Justice, 844 F.2d 126, 129 (3d Cir. 1988). "All that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." Id. at 128. The specificity of itemization needed depends upon the nature of the document and the exemption asserted. Info. Acquisition Corp. v. Dep't of Justice, 444 F.Supp. 458, 462 (D.D.C. 1978).

The Vaughn Index serves a threefold purpose: (1) it identifies each document withheld; (2) it states the statutory exemption claimed; and (3) it explains how disclosure would damage the interests protected by the claimed exemption. See Citizens Comm. on Human Rights v. Food and Drug Admin, 45 F.3d at 1325 (9th Cir. 1995). "Of course the explanation of the exemption claim and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979).

In the instant case, USCIS has submitted the declaration of Jill A. Eggleston, Assistant Center Director, Freedom of Information and Privacy Act Unit, National Records Center, United States Citizenship and Immigration Services, United States Department of Homeland Security. See Ex. H, Vaughn Index. In her position, Ms. Eggleston supervises over 100 information access professionals who are responsible for the orderly processing of all public, congressional, judicial, and inter-/intra-agency requests or demands for access to USCIS records and information pursuant to the FOIA, Privacy Act, Executive Orders, departmental directives, regulations and compulsory legal process. Ex. A, Eggleston Decl. at ¶¶ 13-17. The declaration of Ms. Eggleston as well as the attached Vaughn Index submitted in support of this motion, meet the requirements of Vaughn v. Rosen, 484 F.2d at 820. The declaration identifies the information withheld, states the statutory exemption claimed, and explains how disclosure would damage the interests protected. See Citizens Comm. on Human Rights, 45 F.3d at 1325. Therefore, the Eggleston Declaration and Vaughn Index provide the Court with the requisite basis to grant Defendants' motion for summary judgment.

iii. The USCIS complied with the FOIA's segregability requirement.

If a record contains information exempt from disclosure, the FOIA requires that any "reasonably segregable," non-exempt information be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with reasonable specificity" that the information withheld cannot be segregated. Armstrong v. Exec. Office of the President ,97 F.3d 575, 578-79 (D.C. Cir. 1996) (internal quotation marks omitted); Canning v. Dep't of Justice, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). See Johnson v. Exec. Office for U.S. Attorneys, 310 F.3d 771, 776 (D.C. Cir. 2002) ("government's declaration and supporting material are sufficient to satisfy its burden to show with 'reasonable specificity' why the document cannot be further segregated," where declaration averred that agency had "'released to plaintiff all material that could be reasonably segregated'"); Loving v. Dep't of Defense, 496 F. Supp. 2d 101, 110 (D.D.C. 2007), aff'd, 550 F.3d 32 (2008), cert. denied, 130 S.Ct. 394 (2009). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." Mead Data Ctr., Inc., 566 F.2d at 261, n.55.

As established by the Eggleston Declaration and Vaughn Index, USCIS identified 2,042 pages of records responsive to Plaintiff's FOIA request. USCIS released to Plaintiffs 455 pages in full, released 418 pages in part and withheld 1,169 pages in full. See Ex. A, Eggleston Decl. at ¶¶ 217-219. Where non-exempt information could be segregated from exempt information, the USCIS segregated and disclosed the non-exempt information. The USCIS established, with

reasonable specificity, that responsive documents were only redacted after a line-by-line review and after a determination that there were no reasonably segregable portions of documents appropriate for release.[4] Id. at ¶¶ 237-246; see Ex. H, Vaughn Index. Therefore, it is clear that USCIS processed and released all reasonably segregable information from the documents provided to Plaintiff unless such release would constitute an unwarranted invasion of personal privacy or would violate the agency's attorney-client, attorney work-product or deliberative process privileges. Hence, USCIS has established with reasonable specificity, that all reasonably segregable, non-exempt information has been released to Plaintiff.

B. AIC's CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF SHOULD BE DISMISSED WITH RESEPCT TO THE DOCUMENTS RELEASED TO PLAINTIFF.

AIC's complaint seeks injunctive and declaratory relief for USCIS's failure to provide its FOIA response within the FOIA statutory timeframe. Complaint ¶¶ 21-27. However, on February 6, 2012, USCIS provided AIC with a comprehensive FOIA response that contained all segregable, non-exempt, responsive records. Because USCIS has released these documents to AIC, the claims for declaratory and injunctive relief with respect to these documents are now moot.[5]

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. Spencer v. Kemna, 523 U.S. 1, 7 (1998). Thus, where intervening events after the filing of a lawsuit prevent a court from ordering any relief, the case is moot. In a FOIA

[4] An agency may rely upon declarations and Vaughn indexes to describe, in reasonable detail, the nature of its search and the withheld material, and to explain why such material falls within the claimed FOIA exemptions. Kidd v. Dep't of Justice, 362 F.Supp.2d 291, 294 (D.D.C. 2005).

[5] Challenges to an action, such as mootness, are properly asserted in a Fed. R. Civ. P. 12 (b)(1) motion to dismiss. See D.H.L. Assocs., Inc. v. O'Gorman, 199 F.3d 50, 54 (1st Cir. 1999).

complaint, once the Court determines an agency has, "however belatedly, released all nonexempt material, [it has] no further judicial function to perform under the FOIA." Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982). "Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made." Saldana v. Bureau of Prisons, 715 F. Supp. 24, 26-27 (D.D.C. 2010). Accordingly, Plaintiff's claims for injunctive and declaratory relief with respect to the released documents are moot because USCIS has complied with AIC's FOIA request. The Court now lacks subject matter jurisdiction over these claims and they should be dismissed. See Fed. R. Civ. P. 12(b)(1).

C. AIC'S APA CLAIMS CHALLENGING AGENCY ACTION AS A VIOLATION OF THE FOIA SHOULD BE DISMISSED.

In Plaintiff's second cause of action, it alleges that USCIS's failure to timely respond to its FOIA request violated the APA, and that the failure to timely respond was arbitrary, capricious and an abuse of discretion. Complaint ¶¶ 26-27. However, because the FOIA offers a remedy for AIC's alleged injuries, AIC fails to state a viable claim under the APA.

More specifically, AIC brings suit under the APA, 5 U.S.C. §§ 701-06, which provides for judicial review and a waiver of sovereign immunity for "a person adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Review under the APA, however, is expressly limited to "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. The Supreme Court has explained that this provision precludes judicial review of conduct that is subject to an alternative "special and adequate review procedure." See Bowen v. Massachusetts, 487 U.S. 879, 904 (1988). An alternative review procedure, according to the D.C. Circuit, will be deemed adequate, even where it does "not provide relief identical to relief under the APA, so long as it offers relief of the same genre." See Garcia v. Vilsack, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal citations omitted); see also Women's Equity Action League v.

Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990) (holding that APA review is unavailable where another statute provides an adequate remedy); Council of and for the Blind of Del. Cty. Valley, Inc. v. Regan, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (denying APA review because individual suits against a third party were possible, even where suit against a Federal agency would afford more systemic relief).

In accordance with these principles, this Court has foreclosed APA review where an alternative avenue of relief is available under the FOIA. See Kenney, 603 F. Supp. 2d at 190 (holding that plaintiff could not bring an APA action for improper withholding of records because relief was possible under the FOIA itself); Thomas v. Fed. Aviation Admin., No. 05-2391, 2007 WL 219988 at *2 (D.D.C. Jan. 25, 2007) (finding that the APA did not apply because "the essence of [p]laintiff s claims . . . is that federal agencies improperly [withheld] documents requested by him"); Edmonds Inst, v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) (prohibiting APA review of agency's failure to respond to plaintiffs FOIA requests because "the FOIA statute offers a clear and simple remedy"). Cf. Phys. Comm. for Responsible Med., v. Dep't of Health & Human Servs., 480 F. Supp. 2d 119 (D.D.C. 2007) (dismissing challenge to denial of fee waiver request under the APA because there is an adequate remedy in court under FOIA for a fee waiver denial);

Here, AIC's APA claim rests solely upon alleged FOIA violations. The relief plaintiff seeks, however, is available under the FOIA itself. See 5 U.S.C. § 552(a)(4)(B). As this Court has explained, where a plaintiff's claims are based entirely on violations of the FOIA, APA review is unavailable. See Thomas, 2007 WL 219988 at *2. In light of the adequate remedy afforded by the FOIA, Plaintiff's APA claim should be dismissed.

D. USCIS PROPERLY APPLIED FOIA EXEMPTION (b)(5).

i. Records Withheld

The records USCIS withheld in full and in part pursuant to 5 U.S.C. § 552(b)(5) (FOIA Exemption (b)(5)) fall under the following categories of information:

(i) A legal opinion drafted by former counsel with the Immigration and Naturalization Services (INS) in November 1992 on INS proceedings with parties represented by an attorney. The legal opinion was written for internal INS review. The 1992 legal opinion was withheld in full. See Ex. H, Vaughn index, Ex. H. at index pg. nos. 2, 13, 63; Doc. Nos. 63-66, 470-473, 1503-1504.

(ii) Drafts of Chapter 12 of the USCIS Adjudicator's Field Manual (AFM). The subject of Chapter 12 of the AFM is USCIS proceedings with represented and unrepresented parties. The AFM is an internal agency field manual that contains instructions and procedures for use by agency employees (adjudicators) responsible for making determinations on immigration benefits for eligible individuals, primarily during in-person interviews with the individual seeking benefits. Some individuals appear before USCIS adjudicators with a representative - often an attorney - and others may appear without a representative. Copies of the draft AFM were withheld in full. See Ex. H, Vaughn index, at index pg. nos. 7-12, 16-30, 33, 47, 51-53, 56-57, 59, 62, 66, 69, 71-71, 83-86, 92 (multiple drafts of the AFM are described on these pages of the Vaughn index).

(iii) Drafts of proposed affidavits for inclusion with the AFM. These affidavits would be executed by individuals desiring to appear as a representative for an individual

seeking benefits from USCIS during an administrative hearing. Other affidavits would be executed by an individual who appeared before USCIS adjudicators without a representative. USCIS counsel prepared the various drafts of the affidavits and exchanged them with other USCIS counsel for review and comment. These records were withheld in full. Ex. H, Vaughn Index, at index pg. nos. 31-49, 53 (multiple copies of the draft affidavits are found on these pages of the Vaughn index).

(iv) Multiple emails from USCIS attorneys and other USCIS employees discussing content in the draft AFM and a proposed policy guidance to be issued by USCIS regarding the AFM. These emails contain legal opinions as well as proposed language to be inserted into the AFM and the proposed USCIS policy guidance. The emails were withheld in part. Ex. H, Vaughn Index, at index pg. nos. 3-9, 11-46, 48-81, 87-94, 111 (numerous USCIS attorney and staff emails are described on these pages of the index).

(v) A PowerPoint presentation prepared by the USCIS Office of Chief Counsel entitled "USCIS Adjudicator Interaction with Private Attorneys and Representatives." This PowerPoint was developed by the Office of Chief Counsel in order to provide training to USCIS adjudicators that engaged in face-to-face interviews with individuals and their representatives when seeking immigration benefits from the USCIS. Withheld in full. Ex. H, Vaughn Index, at index pg. nos. 1, 6, 103, 107; Doc. Nos. 8-56, 119-218, 1923-1928, 1949-1954.

(vi) A legal memorandum and USCIS procedures regarding the role of consultants in "credible fear" interviews for asylum and refugee applicants. These documents

were withheld in full. Ex. H, Vaughn Index, at index pg. nos. 5-6; Doc. Nos. 103-106.

(vii) Copies of a G-1056 internal clearance routing sheet, used by USCIS to track attorneys' amendments and edits on the draft AFM. Withheld in full. Ex. H at index pg. nos. 60, 67-68; Doc. Nos. 1428-1429, 1540-1556.

(viii) Policy guidance regarding information for applicants and petitioners, includes a list of attorneys ineligible to participate in USCIS interviews. The list is no longer current. Withheld in full. Ex. H, Vaughn Index, at index pg. no. 65; Doc. Nos. 1521-1525.

(ix) Copies of a draft letter, unsigned, from the USCIS Director to AIC and the American Immigration Lawyers Assoc. (AILA) regarding interviewees' access to counsel. This is a draft letter and withheld in full. Ex. H, Vaughn Index, at index pg. nos. 74, 82-83; Doc. Nos. 1662, 1693, 1697, 1699, 1701.

(x) A USCIS legal memorandum regarding the proposed changes to the AFM, Chp. 12. Withheld in full. Ex. H, Vaughn Index, at index pg. no. 84; Doc. Nos. 1723-1727.

(xi) Memorandum from USCIS Legislative Counsel to USCIS Chief Counsel regarding members of USCIS's Fraud Detection and National Security Division contact with individuals. Withheld in full. Ex. H, Vaughn Index, at index pg. nos. 90, 93; Doc. Nos. 1785-1787.

(xii) Memorandum from a USCIS District Office to its staff regarding access to USCIS office space. Withheld in full. Ex. H, Vaughn Index,. at index pg. no. 95; Doc. Nos. 1849-1850.

(xiii) Emails from USCIS staff discussing various AILA conferences they attended. These AILA de-briefs dated between March 2007 and December 2009. Discussions with AILA and among USCIS staff helped shape agency action related to policy on representatives in immigration proceedings. The emails were withheld in full. Ex. H, Vaughn Index, at index pg. nos. 99-102, 115-116, 118, 121; Doc. Nos. 1900-1906, 1908-1918, 1991-1992, 1995-1997, 2001-2002, 2037.

(xiv) Emails discussing agency procedures for when a private attorney has two or more N-400 (naturalization) interviews scheduled at the same time. Also discusses the G-28 entry of appearance form. These emails between USCIS staff were withheld in full. Ex. H, Vaughn Index, at index pg. no. 102; Doc. Nos. 1908-1918.

(xv) Emails between USCIS staff discussing an incident that led to a complaint raised by AILA and an attorney over a specific immigration hearing; dated Aug. 14-15, 2008. Ex. H, Vaughn Index, at index pg. no. 103; Doc. Nos. 1919-1921. Withheld in full.

(xvi) Email discussing agency procedures for the "reception window" where individuals and representatives that have interviews with a USCIS adjudicator "check-in" for their hearing. Withheld in full. Ex. H, Vaughn Index, at index pg. no. 104; Doc. No. 1929.

(xvii) Excerpts from the former INS Adjudicators' Field Manual Section 12.1, regarding individuals with representatives. Withheld in full. Ex. H, Vaughn Index, at index pg. no. 106; Doc. No. 1938.

(xviii) Emails between USCIS staff regarding a policy at USCIS field office concerning attorney representatives. Withheld in full. Ex. H, Vaughn Index, at index pg. nos. 107, 118-120; Doc. Nos. 1940, 2017-2018, 2030.

(xix) Excerpts from Chp. 15.8 and App. 15.2 of the AFM regarding interviewing techniques for USCIS adjudicators and USCIS procedures for interviews with individuals seeking benefits. Withheld in full. Ex. H, Vaughn Index, at index pg. nos. 108, 114; Doc. Nos. 1955-1967, 1987-1989.

(xx) Email between USCIS staff regarding an immigration hearing and certain events pertaining to it. Withheld in full. Ex. H, Vaughn Index, at index pg. no. 109; Doc. No. 1970.

(xxi) Emails between USCIS staff on observers, including attorneys, at interviews and the G-28 entry of appearance form used by attorneys. Ex. H, Vaughn Index, at index pg. nos. 110-111, 117; Doc. Nos. 1972-1978, 2010-2012. Withheld in part.

(xxii) Copy of a letter provided to an Immigration Services Officer re: participation in USCIS's I-485 program. Withheld in full. Ex. H at index pg. no. 113; Doc. Nos. 1981-1983.

(xxiii) Emails between USCIS staff regarding I-485 (application to adjust permanent residence or adjust status) team meeting minutes. Withheld in full. Ex. H, Vaughn Index, at index pg. no. 114; Doc. Nos. 1984-1986.

(xxiv) Copy of a letter of complaint from a private attorney re: USCIS policy on attorneys representing beneficiaries during I-130 hearings (petition for alien relative). Withheld in full. Ex. H, Vaughn Index, at index pg. no. 121; Doc. Nos. 2034-2036.

ii. Exemption (b)(5)

The Freedom of Information Act "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004)(citing John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989)). Accordingly, the act requires agencies to release documents responsive to a properly submitted request, but also provides nine statutory exemptions to this general disclosure obligation. See 5 U.S.C. §§ 552(a)(3), (b)(1)-(b)(9). While the nine exemptions should be "narrowly construed," Fed. Bureau of Investigation v. Abramson, 456 U.S. 615, 630 (1982), the Supreme Court has made clear that courts must give them "meaningful reach and application." John Doe Agency, 493 U.S. at 152. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (citation omitted).

Exemption 5 of the FOIA exempts from disclosure "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 interpreted Exemption 5 as allowing an agency to withhold from the public documents which a private party could not discover in litigation with the agency. U.S. v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975). Exemption 5 incorporates privileges that the government enjoys under the relevant statutory and case law in the pretrial discovery context. Fed. Trade Comm'n v. Grolier, Inc., 462 U.S. 19, 26 (1983). Agency documents that are not routinely discoverable in civil litigation are exempted from disclosure under Exemption 5. Id. at 27. Accordingly, Exemption 5 allows an agency to

invoke civil discovery privileges, including the attorney-client privilege, attorney work-product privilege, and the executive deliberative process privilege, to justify the withholding of documents that are responsive to a FOIA request. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).

1. Attorney Work-Product.

It is well settled that Exemption 5 was intended to encompass the work-product doctrine. Announced in Hickman v. Taylor, 329 U.S. 495 (1947), the work-product doctrine is codified in the Federal Rules of Civil Procedure, which provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for another party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Fed. R. Civ. P. 26(b)(3).

Under the FOIA, work-product materials are not considered to be routinely available in litigation because they can only be released under Rule 26(b)(3) upon showings of substantial need and undue harm by the party seeking discovery. Grolier, 462 U.S. at 27. In light of the information contained in the withheld documents and their purpose relating to USCIS administrative hearings, such documents would be clearly protected from disclosure under Rule 26(b)(3) in civil litigation, thus making them exempt from disclosure under Exemption 5. See also Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 369 (D.C. Cir. 2005) ("Any part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under Exemption 5.") (internal quotation omitted). Only documents routinely disclosable in civil discovery fall outside the protection of the exemption. Martin v. Office of Special Counsel, MSPB, 819 F.2d 1181, 1184-87 (D.C. Cir. 1987).

Here, the Agency identified and described in detail in its Vaughn index documents that clearly fall within the protections of the attorney work-product privilege. These documents, most of which are emails, drafts of proposed agency policy - such as the AFM - with counsel's comments as well as legal memoranda and letters, contain legal opinions on the development of USCIS policy and procedures for administrative hearings in which an individual appears with or without a representative. See supra at D (i)-(vi), (ix)-(xi), (xix).

For the attorney work-product privilege to apply, the litigation at issue need not be judicial, rather, courts have found that the attorney work-product privilege extends to documents prepared in anticipation of administrative litigation, partially because "administrative litigation certainly can beget court litigation and may in many circumstances be expected to do so." Exxon Corp. v. Dep't of Energy, 585 F.Supp. 690, 700 (D.D.C.1983). Here, these records contain the mental impressions of agency counsel. They were prepared with administrative litigation in mind; the USCIS policy guidance and AFM under discussion in these privileged records were prepared in order to assist USCIS staff involved in USCIS administrative hearings with represented and unrepresented individuals. Individuals seeking benefits from USCIS often can appeal an adverse ruling to federal court. As a result, it is imperative USCIS staff understands how to interact with represented and unrepresented individuals at the administrative level.

Consequently, these records are privileged under the attorney work-product doctrine and protected from disclosure under Exemption 5. See also Martin, 819 F.2d at 1187 (finding that attorney notes were protected from disclosure under Exemption 5 of FOIA, noting that "[a] clearer case for application of Hickman v. Taylor, is difficult to imagine); see also Jackson v. U.S. Attorney's Office, Dist. of N.J., 293 F. Supp. 2d 34, 40 (D.D.C. 2003) (Leon, J.) (finding attorney's notes protected by Exemption 5 under work-product doctrine).

2. Attorney-Client Communications.

It is well settled that Exemption 5 exempts from disclosure materials protected by the attorney-client privilege. See Loving v. Dept. of Defense, 550 F.3d 32, 37 (D.C. Cir. 2008) ("Exemption 5 incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant -- including the Presidential communications privilege, the attorney-client privilege, the work product privilege, and the deliberative process privilege -- and excludes these privileged documents from FOIA's reach.") (quotation marks omitted). The attorney-client privilege rests at the center of our adversary system and promotes "broader public interests in the observance of law and administration of justice" and "encourage[s] full and frank communication between attorneys and their clients." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The attorney-client privilege "protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." See In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." Tax Analysts v. Internal Revenue Serv., 117 F.3d 607, 618 (D.C. Cir. 1997).

Here, the Agency withheld records pursuant to the attorney-client privilege. These documents include legal memoranda, confidential communications between USCIS agency attorneys and communications to non-attorney employees of USCIS. Other documents included PowerPoint presentations prepared by USCIS counsel in order to brief USCIS employees on legal issues related to handling interviews with represented and unrepresented individuals. See supra at D (i), (iv), (v), (xi) and (xiii).

USCIS has identified the attorney-authored documents and date of these communications. In these communications (emails and presentations) attorneys are conveying

impressions of USCIS immigration proceedings involving represented and unrepresented individuals and developing agency policy regarding the same. These are clearly protected communications under the attorney-client privilege. See Reliant Energy Power Generation, Inc. v. Fed. Energy Regulatory Comm'n, 520 F. Supp. 2d 194, 206-07 (D.D.C. 2007) (Friedman, J.) ("The privilege applies to disclosures made by a client to an attorney as well as an attorney's written communications to a client."); (internal quotation marks omitted); Consequently, USCIS's Exemption 5 withholdings under the attorney-client privilege are proper as a matter of law.

3. Deliberative Process Privilege

To withhold a responsive document under the deliberative process privilege, the agency must demonstrate that the document is "both predecisional and deliberative." Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993). Whether a particular document is protected by the deliberative process privilege depends on two factors: first, whether the document is predecisional, whether it was generated before the adoption of an agency policy; and, second, whether the document is deliberative, whether it reflects the give-and-take of the consultative process. Coastal States Gas Corp., 617 F.2d at 866. In making those determinations, courts consider whether the document is so candid and personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency; whether the document is recommendatory in nature or is a draft of what will become a final document; and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another. Id. The Supreme Court commented that, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a

concern for appearances and for their own interests to the detriment of the decision-making process." United States v. Nixon, 418 U.S. 683, 705 (1974).

The USCIS withheld multiple records under the deliberative process privilege. These records are pre-decisional and deliberative; they contain factual distillations and deliberative analysis regarding how to proceed administratively in USCIS immigration proceedings with represented and unrepresented individuals that are seeking benefits from the USCIS. See NYC Apparel FZE v. U.S. Customs & Boarder Protection, 484 F. Supp. 2d 77, 98 (D.D.C. 2007) (Walton, J.) (finding that agency attorney's "memorandum" regarding an agency proceeding was protected by the deliberative process privilege, and thus, subject to Exemption 5).

The exempted records contain USCIS attorneys' impressions and recommendations on developing agency policy regarding represented and unrepresented individuals appearing in USCIS proceedings. Multiple drafts of proposed agency policies, including an amended USCIS AFM and USCIS policy guidance on the amended AFM, are included in the records withheld pursuant to the deliberative process privilege. See supra at D (i)-(iv), (vi)-(xxiv). Other records appropriately withheld pursuant to the deliberative process privilege include emails between USCIS staff discussing procedures regarding representatives' access to USCIS offices, the ability of representatives to participate in immigration proceedings and letters to private attorneys and organizations regarding the role of representatives in immigration proceedings. Id. These documents are pre-decisional and deliberative because they reflect the give-and-take of the wide array of agency communications prior to issuing the AFM and policy guidance on the role of representatives in USCIS proceedings.[6]

[6] The interim policy guidance (Policy Memorandum, PM-602-0055) regarding the proposed amendment to Chap. 12 of the AFM was published by USCIS on December 11, 2011 at:

As stated in Nixon, 418 U.S. at 705, if internal agency communication regarding development of policy is publicly disseminated, then this would tend to temper and undermine the agency decision making process. Consequently, USCIS's deliberative process privilege withholdings are proper.

E. USCIS PROPERLY APPLIED FOIA EXEMPTION (b)(6).

i. Records Withheld

The records USCIS withheld in part pursuant to 5 U.S.C. § 552(b)(6) (FOIA Exemption (b)(6)) are devoted to the following categories of information:

(i) The redaction of portions of USCIS emails that contain USCIS employee cell phone or personal office numbers. See Ex. H, Vaughn Index, at index pg. nos. 1, 13-19, 20-27, 29, 49-54, 73-74, 78, 80-81 (multiple emails with redacted phone numbers are listed on these pages of the index).

(ii) The redaction of portions of USCIS emails that contain telephone passcode numbers utilized for internal USCIS conference calls. Some emails contain both a telephone passcode number and employees' personal phone numbers. Ex. H, Vaughn Index, at index pg. nos. 32-33, 43, 47-48 (multiple emails with redacted phone numbers and passcode numbers are listed on these pages of the index).

(iii) The redaction of personal information in USCIS emails related to USCIS contractors serving overseas; this information includes personal names and contact information and provides some details on the movement of these individuals into foreign countries. Ex. H, Vaughn Index, at index pg. no. 3; Doc. Nos. 75-76.

---

http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Role_of_Private_Attorneys_PM_Approved_122111.pdf. Comments were invited; the comment period closed February 14, 2012. The final version of the AFM has not been issued by USCIS.

(iv) The redaction of information in a USCIS employee's email concerning the employee's personal leave. Ex. H, Vaughn Index, at index pg. no. 30; Doc. No. 1041.

(v) The redaction of a personal comment in a USCIS employee's email. Ex. H, Vaughn Index, at index pg. no. 96; Doc. No. 1885.

(vi) The redaction of names of USCIS employees and private attorney in emails related to specific immigration hearings before USCIS. Ex. H, Vaughn Index, at index pg. nos. 106, 110, 113- 116-117, 119; Doc. Nos. 1940, 1975, 1991-1992, 1999-2000, 2006, 2010-2012, 2017-2018, 2025, 2028-2029, 2032-2033.

(vii) The redaction of USCIS file numbers pertaining to aliens who were interviewed by USCIS immigration service officers during administrative proceedings. Ex. H, Vaughn Index, at index pg. nos. 107-108, 110-111, 115-116; Doc. Nos. 1970, 1978, 2010-2012.

The USCIS Vaughn index and Declaration of Jill Eggleston resolve any doubts regarding the sufficiency of the USCIS segregability analysis related to these records. The Vaughn index sets forth in great detail the information that is being withheld, which is largely comprised of only single line redactions of names and telephone numbers and other personal information that was properly withheld pursuant to Exemption (b)(6).

ii. Exemption (b)(6)

FOIA Exemption (b)(6) provides for the withholding of matters contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). The primary purpose of enacting Exemption (b)(6) was "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

The Supreme Court has adopted a broad construction of the privacy interests protected by this exemption, has rejected a "cramped notion of personal privacy[,]" and has emphasized that "privacy encompass[es] the individual's control of information concerning his or her person." Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989). Privacy is of particular importance in the FOIA context because a disclosure required by FOIA is a disclosure to the public at large. See Painting & Drywall Work Pres. Fund, Inc. v. Dep't of Housing and Urban Dev., 936 F.2d 1300, 1302 (D.C. Cir. 1991). Moreover, "even though 'an event is not wholly 'private' [it] does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" Fed. Labor Relations Auth. v. Dep't of Veterans Affairs, 958 F.2d 503, 510 (2d Cir. 1992)(quoting Reporters Comm. for Freedom of the Press., 489 U.S. at 763). The Supreme Court has concluded that "as a categorical matter . . . a third party's request for . . . information about a private citizen can reasonably be expected to invade that citizen's privacy." Reporters Comm. for Freedom of the Press, 489 U.S. at 780. "The threshold is fairly minimal, such that all information which applies to a particular individual is covered by Exemption 6, regardless of the type of file in which it is contained." Conception v. Fed. Bureau of Investigations, 606 F.Supp.2d 14, 35 (D.D.C. 2009) (citations and internal quotation marks omitted).

In evaluating an Exemption (b)(6) withholding, a court must balance the subject individual's right to privacy against the public's interest in disclosure. Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976). See Am. Civil Liberties Union v. Dep't of Justice, --- F.Supp.2d ---, 2010 WL 1140868, *1 (D.D.C. March 26, 2010)("The proper application of . . . [E]xemption[(b)(6)] requires a balancing of individual privacy interests against the public

interest.")(citing Reporters Comm. for Freedom of the Press, 489 U.S. at 776)). As the District of Columbia Circuit has stated:

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

Pub. Citizen Health Research Group v. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978). If an individual's privacy interest is implicated, then a FOIA requestor must show that "(1) the public interest is a significant one; and (2) the information is likely to advance that interest." Am. Civil Liberties Union, 2010 WL 1140868, at * 1 (citing Harrison, 377 F.Supp.2d at 147; Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 172 (2003)). See Carter v. Dep't of Commerce, 830 F.2d 388, 391-92 nn.8 & 13 (D.C. Cir. 1987)(A plaintiff bears the burden of demonstrating that the release of the withheld documents would serve this interest.).

The review of an agency's withholding under Exemption 6 proceeds in two stages: first, the Court must decide whether the information is subject to protection under the exemption; and second, the Court must determine whether disclosure would constitute a "clearly unwarranted invasion of personal privacy." Washington Post Co. v. Dep't of Health and Human Servs., 690 F.2d 252, 260 (D.C. Cir. 1982). With respect to the first stage, the threshold for the application of Exemption 6 is "minimal." Id. As previously indicated, Exemption 6 provides for the withholding of matters contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). "The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual." Lepelletier v. Fed. Deposit Ins. Corp., 164 F.3d 37, 46 (D.C. Cir. 1999), quoting Dep't of State v. Wash. Post Co., 456 U.S. 5at 602 ("The term 'similar files' is not "limited to files containing 'intimate details' and 'highly personal'

information," and is, instead, intended by Congress "to have a broad, rather than a narrow, meaning."). The Court also has emphasized that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." Reporters Comm. for Freedom of the Press, 489 U.S. at 763.

The Supreme Court has found that "[i]ncorporated in the 'clearly unwarranted' language is the requirement for . . . [a] 'balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" Lepelletier, 164 F.3d at 46, citing Dep't of Defense v. Fed. Labor Relations Auth., 964 F.2d 26, 29 (D.C. Cir. 1992) (citations omitted). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" Lepelletier, 164 F.3d at 46, quoting Fed Labor Relations Auth., 510 U.S. at 497; see also Reporters Comm. for Freedom of the Press, 489 U.S. at 773.

Here, USCIS employee cell phone numbers, conference call passcodes, employee's personal leave information, contractor's personal information, immigration file numbers and names and details about individuals in specific immigration proceedings were withheld. The release of this information clearly is not in the public interest and would not "she[d] light on [USCIS]'s performance of its statutory duties . . . ." Lepelletier, 164 F.3d at 46. Moreover, even if there were some public interest in this information, it could not outweigh an employee's or other third-party's right to privacy. Consequently, USCIS correctly withheld these documents, in part, because release of the redacted portions would pose a clearly unwarranted invasion of

personal privacy of the records' subjects.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion to Dismiss Plaintiff's claims seeking injunctive and declaratory relief, and claims under the APA be dismissed. See Fed. R. Civ. P. 12(b)(1). Defendants also request that their Motion for Summary Judgment on Plaintiff's FOIA claim be granted because there is no genuine issue of material fact, and Defendants are entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a).

Respectfully submitted,

RONALD C. MACHEN, JR., D.C. Bar No. 447889
United States Attorney

DANIEL F. VANHORN, D.C. Bar No. 924092
Acting Chief, Civil Division

BY: /s/ *Marian L. Borum*
MARIAN L. BORUM, D.C. Bar No. 435409
Assistant United States Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-6531 (telephone)
(202) 514-8780 (facsimile)
Marian.L.Borum@usdoj.gov

Of Counsel:

Alan D. Hughes, Esq.
Associate Counsel, Office of Chief Counsel
U.S. Citizenship & Immigration Services
U.S. Department of Homeland Security

CERTIFICATE OF SERVICE

I certify that, on this 31st day of May 2012, the foregoing was sent via the Court's Electronic Case Filing System to Plaintiff as follows:

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

/s/ *Marian L. Borum*
MARIAN L. BORUM
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	**Civil Action No. 11- 1971 (JEB)**
	)	
Defendants	)	
	)	

ORDER

Upon consideration of Defendants' Motion to Dismiss, Plaintiff's Opposition, and the entire record herein, it is this _____ day of _____, 2012,

ORDERED that Defendants' Motion to Dismiss is hereby GRANTED.

_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	**Civil Action No. 11- 1971 (JEB)**
	)	
Defendants	)	
	)	

ORDER

Upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's Opposition, and the entire record herein, it is this _____ day of _____, 2012,

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

_____
United States District Judge

Copies to:

Marian L. Borum
Assistant United States Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530

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