UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiff American Immigration Council's ("Plaintiff" or "AIC") opposition [ECF No. 15] to Defendants' United States Department of Homeland Security ("DHS") and United States Immigration and Customs Enforcement ("ICE," together with DHS, "Defendants," the "Government," or the "Agency"), Motion for Summary Judgment fails to demonstrate why Defendants should not be entitled to judgment as a matter of law. In fact, in response to Plaintiff's request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Defendant (1) conducted a reasonable search; (2) produced all documents responsive to Plaintiff's request and subject to FOIA, and (3) properly withheld information pursuant to the statutory exemptions. Plaintiff's opposition relies solely on speculation and unwarranted attacks on ICE's FOIA office which acted in good faith throughout the processing of Plaintiff's FOIA request. Further, Plaintiff's opposition misapprehends the applicable law in an attempt to distract the Court from the basic facts in this case – that ICE provided Plaintiff with the documents it requested in a timely, agreed-upon manner and properly withheld information statutorily exempt from FOIA. Thus, Defendants are entitled to judgment as a matter of law.

I. SUMMARY OF UNDISPUTED FACTS[1]

Plaintiff submitted its FOIA request to the ICE FOIA Office by letter dated March 14, 2011. (St. of Mat. Facts ("SMF") ¶ 1.) Plaintiff's FOIA request sought information relating to an attorney's ability to be present during their clients' interaction with ICE, as well as what role the attorney may play during their clients' interactions with ICE, attorney conduct during interactions with ICE on behalf of their clients, and attorney appearances at ICE offices or other facilities. (SMF ¶ 2.) The ICE FOIA Office received Plaintiff's FOIA request on March 31, 2011. (SMF ¶ 3.) By letter dated March 31, 2011, the ICE FOIA Office acknowledged receipt of Plaintiff's FOIA request and assigned it FOIA case number 2011FOIA7112. (SMF ¶ 4.)

Upon receiving Plaintiff's FOIA request, consistent with the general procedures described above, the ICE FOIA Office reviewed the request and determined that based on the subject matter of the FOIA request, the following offices and divisions were likely to possess responsive records. (SMF ¶ 5.)[2] Accordingly the ICE FOIA Office tasked these offices with conducting searches for potentially responsive records (*see id*):

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[1] Pursuant to Local Civil Rule 7(h)(1), Defendants set forth those Statements of Material Fact that Plaintiff has conceded by failing to oppose them, as well as the statements which Plaintiff has indicated it opposes. Contrary to Local Civil Rule 7(h)(1), however, Plaintiff has failed in all instances except for paragraph 18 to identify the portions of the record on which it relies and, therefore, the Court may treat all of Defendants' Material Facts as conceded. LCvR 7(h)(1) ("An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, ***which shall include references to the parts of the record relied on to support the statement***.) (all emphases supplied).

[2] Puzzlingly, Plaintiff asserts that Statement of Material Fact Number 5 is "not material to Defendants' motion for summary judgment" – yet then challenges the scope of Defendants' search for 15 pages. As Plaintiff has not identified any portion of the record which would contradict Statement of Material Fact Number 5 and as this fact is in support of Defendants' demonstration of its reasonable and more-than-adequate search for information in response to Plaintiff's FOIA request, the Court may deem this fact conceded.

a. The ICE Office of Homeland Security Investigations ("HSI") (formerly ICE Office of Investigations) is responsible for investigating a wide range of domestic and international activities arising from the illegal movement of people and goods into, within, and out of the United States. HSI investigates immigration crime, human rights violations and human smuggling, smuggling of narcotics, weapons and other types of contraband, financial crimes, and cybercrime and export enforcement issues. Special agents conduct investigations aimed at protecting critical infrastructure industries that are vulnerable to sabotage, attack, or exploitation. In addition to ICE criminal investigations, HSI oversees the agency's international affairs operations and intelligence functions. HSI offices are located at ICE Headquarters in Washington, D.C., at the 26 Special Agent in Charge (SAC) Offices located throughout the United States, and at international ICE Offices located in 46 countries around the world.

b. The ICE Office of the Principal Legal Advisor ("ICE OPLA") provides legal advice, training, and services to support the ICE mission and defends the interests of the United States in the administrative and Federal Courts. ICE OPLA provides legal advice and guidance to the all ICE program office on a wide range of agency issues, including those related to the conduct and execution of HSI investigations and operations.

c. The ICE Office of Enforcement and Removal Operations ("ERO") is responsible for promoting public safety and national security by making certain through the enforcement of U.S. immigration laws that all removable aliens depart the United States. ERO makes use of its resources and expertise to transport aliens, to

manage them while in the custody and waiting for their cases to be processed, and to remove unauthorized aliens from the United States when so ordered.

By letter dated August 11, 2011, Plaintiff submitted its appeal, to OPLA Government Information Law Division (GILD) alleging constructive denial of their request. (SMF ¶ 6.) By letter dated September 23, 2011, ICE OPLA GILD responded to the Plaintiff's appeal, indicating that the search was still ongoing, and that the case was currently being processed. (SMF ¶ 7.) By letter dated September 27, 2011, ICE responded to Plaintiff's March 14, 2011, FOIA request. (SMF ¶ 8.) ICE informed Plaintiff that a search of the records failed to produce records responsive to the Plaintiff's request. (SMF ¶ 9.)

By letter dated October 27, 2011, Plaintiff appealed ICE's September 27, 2011 response. (SMF ¶ 10.) ICE OPLA GILD responded to the Plaintiff's October 27, 2011 appeal challenging the adequacy of the search, and remanded the request to the ICE FOIA Office for additional searches and processing by letter dated February 29, 2012. (SMF ¶ 11.) In a letter dated March 1, 2012, ICE issued an acknowledgment of the remanded request and assigned the remanded request FOIA case number 2012FOIA8229. (SMF ¶ 12.) In addition to a re-tasking of the components listed above, ICE tasked the Office of Detention Policy and Planning. (SMF ¶ 13.)

The Office of Detention Policy and Planning ("ODPP") leads ICE's efforts to overhaul the current immigration detention system, an effort which requires extensive collaboration and consultation with both internal and external stakeholders. (SMF ¶ 14.)[3] ODPP is charged with

[3] Plaintiff states that Paragraphs 14-16 are not material to Defendants' motion for summary judgment. Again, Plaintiff fails to cite to any support in the record for this contention and Plaintiff's statement is undercut by its lengthy challenge of Defendants' search in response to its FOIA request. That is to say, the descriptions of the Agency components and their missions help explain why they were tasked with conducting searches for responsive documents – statements entirely relevant and, in fact, ***essential*** to Defendants' motion.

designing a detention system that meets the unique needs of ICE's detained population. (SMF ¶ 15.) ODPP shapes the future design, location and standards for civil immigration detention facilities so that ICE no longer relies primarily on existing penal models. (SMF ¶ 15.) ICE considers access to legal services, emergency rooms and transportation hubs, among other factors when determining future facility locations. (SMF ¶ 16.)

Subsequently, on April 27, 2012, Plaintiff appealed the constructive denial of its request and any implied fee waiver denial construed by the March 1, 2012 acknowledgment letter of ICE. (SMF ¶ 17.) Then, on May 31, 2012, Plaintiff filed the complaint in this case (SMF ¶ 18.)[4] After commencement of this litigation, the ICE FOIA Office continued the process of searching for and processing records responsive to Plaintiff's FOIA request; a process that had already begun before Plaintiff filed its lawsuit. (SMF ¶ 19.)

After conferring, the parties agreed to a rolling production and, after five interim releases, ICE produced a total of 6,906 pages of records subject to FOIA and responsive to the Plaintiff's request. (SMF ¶ 20.)[5] ICE informed Plaintiff through counsel that portions of the records were withheld pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). (SMF ¶ 21.)[6]

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[4] Plaintiff's challenge to Paragraph 18 (the only challenge that cites to the record in this case), is conceded. Due to a scrivener's error, the Law Declaration and Defendants' Motion for Summary Judgment stated the incorrect date of Plaintiff's filing of its complaint.

[5] Plaintiff, without citing to the record, opposes Paragraph 20 saying that it "denies that ICE's production is the totality of documents responsive to AIC's FOIA request." Plaintiff's opposition is troubling for two reasons: first, nowhere in Paragraph 20 did Defendants state that the "production was the totality of documents responsive to AIC's FOIA request" and Plaintiff's denial is therefore unfounded; second, contrary to Plaintiff's speculative claim and as explained fully both in Defendants' motion and in this reply, the Agency conducted a more than adequate and reasonable search and produced almost 7,000 documents to Plaintiff after several meet-and-confer sessions.

[6] Plaintiff's opposition, without citing to the record, contains legal argument which Defendants address in their Motion, but does not (and cannot) refute the simple fact that

Upon further review of the produced records, after conferring in good faith, and to narrow the issues in dispute before the Court, Plaintiff and the Defendants have jointly entered into a stipulation stating which documents remain in dispute for purposes of this litigation. (SMF ¶ 22.)

ICE provided Plaintiff with a summary Vaughn Index identifying the types of information withheld pursuant to a particular FOIA Exemption. (SMF ¶ 23.)[7] Where withheld information could be included in a specific category, ICE provided a separate Vaughn entry for such information. (SMF ¶ 24.)[8] ICE's use of a summary Vaughn Index is a customary practice, particularly in cases like this one where a large number of potentially responsive documents subject to FOIA is identified. (SMF ¶ 25.)[9] Thus, after conducting a reasonable search, ICE has now produced all non-exempt information subject to FOIA responsive to Plaintiff's request. (SMF ¶ 26.)[10]

Defendants did, in fact, withhold information pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E).

[7] Plaintiff's opposition to Statement of Material Fact Number 23 does not address the validity of the simple, factual allegation or its materiality, but rather raises legal arguments addressed elsewhere by the parties.

[8] Again, Plaintiff's opposition to Statement of Material Fact Number 24 does not address the validity of the actual factual allegation or its materiality to Defendants' motion, but rather raises legal arguments addressed elsewhere by the parties.

[9] Plaintiff's contention that the statement in Statement of Material Fact Number 25, "the use of a summary *Vaughn* is a common practice," is inappropriate for a Local Civil Rule 7(h)(1) statement is completely unfounded and, contrary to the mandate of the very rule Plaintiff itself cites, unsupported by any citation to the record.

[10] The remainder of Plaintiff's opposition to Defendants' Statement of Material Facts simply contains legal argument that is addressed in the parties' memoranda of points and authorities.

II. THE AGENCY'S SEARCH WAS REASONABLE AND ADEQUATE

Despite numerous good faith discussions[11] among the parties addressing the number of potentially responsive documents located and inquiries to the Plaintiff from the Government whether there appeared to be any large categories of information missing from the productions, the first fifteen (15) pages of Plaintiff's opposition addresses the adequacy and reasonableness of the Agency's search. While the Agency believes the Declaration of Ryan Law attached to its Statement of Material Facts [ECF No. 12-2] in support of Defendants' Motion for Summary Judgment adequately explains the search, in an abundance of caution the Government has attached a Supplemental Declaration of Ryan Law (attached hereto as Exhibit "1") to provide even more detail of exactly how the search was conducted. This supplemental declaration provides, among other things:

1.) ***the ICE components searched*** (ICE Office of Enforcement and Removal Operations ("ERO"), the ICE Office of Homeland Security Investigations ("HSI"), the ICE Office of the Principal Legal Advisor ("OPLA"), and the ICE Office of Detention, Policy, and Planning ("ODPP")), *see* Supp. Law. Decl. at 2, ¶ 6;

2.) ***the employees*** conducting the searches, as well as the ***timing and duration of the searches*** conducted, broken down by individual component

   a. for OPLA – *id.* at 3, ¶¶ 10, 15; *id.* at 4, ¶¶ 18-19, 23;

   b. for ERO – *id.* at 5, ¶ 28; *id.* at 6, ¶ 35;

   c. for ODPP – *id.* at 6, ¶ 39;

[11] These discussions were not fruitless, though, as the parties did reach agreement on several issues and the Plaintiff (to its credit) did in good faith agree to stipulate to the processing of a number of documents and withholdings.

d. for HSI – *id.* at 44;

3.) the ***search terms utilized for these searches*** – *id.* at ¶¶ 11, 13, 17, 20-22, 25-26, 30-31, 33-34, and 36; and

4.) the ***databases, physical spaces, and other computer files searched*** – *id.* at ¶¶ 11-14, 16-17, 20-22, 24-26, 29-31, 33, and 36.

In light of the Supplemental Declaration of Ryan Law, there can be no doubt that the Agency has demonstrated that it conducted a more than adequate, reasonable search for documents responsive to Plaintiff's FOIA request.

As Defendants noted in their Motion for Summary Judgment, "'The standard for determining whether a search was adequate depends on the adequacy of the search for documents, not whether additional potentially responsive documents exist.'" *Lardner v. F.B.I.*, 875 F. Supp. 2d 49 (D.D.C. 2012) (Lamberth, C.J.) (quoting *Steinberg v. Dep't of Justice,* 23 F.3d 548, 551 (D.C. Cir. 1994)). Further, "[a]n adequate search consists of a good faith, reasonable search of those systems of records likely to possess the requested information. *Id.* (citing *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Here, the original Law Declaration and the supplemental Law Declaration attached demonstrate clearly that, contrary to Plaintiff's argument, the Agency conducted a reasonable, thorough, and more than adequate search in response to Plaintiff's FOIA request.

Similarly, Plaintiff's extensive argument about potential documents it believes should have been located is contrary to case law and without merit. In fact, even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent and reasonable. *Nation Magazine, Wash. Bureau v. U.S. Customs Srvc.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). Further,

the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. *Maynard v. CIA*, 986 F.2d 547, 564 (1st Cir. 1993). Plaintiff's unsupported allegations do not demonstrate either bad faith on the part of the Agency or that the Agency's search was unreasonable, but the two Law Declarations demonstrate that the Agency performed a thorough search that was more than adequate and reasonable. Therefore, Defendants are entitled to summary judgment.

III. ICE's Withholdings Were Appropriate

The remainder of Defendants' opposition consists of challenges to the information that ICE appropriately withheld as it is statutorily exempt from public disclosure under FOIA. While Plaintiff (to its credit) stipulated to and agreed to limit the scope of its challenges to the documents with information withheld, its arguments in its opposition are unavailing and, at times, simply mystifying. As an example, and in a clear demonstration of Plaintiff's overreach, Plaintiff attempts to contest that litigation reports prepared by agency counsel as well as the notes made by attorneys are not exempt from FOIA under Exemption 5 and the attorney work product doctrine. (*See* Pl. Opp. [ECF No. 15] at 24-27.) Further, much of Plaintiff's argument against the Agency's withholdings consists of selective editing of the descriptions provided in the Law Declaration and the contemporaneous *Vaughn* index – assumedly trying to imply that the Agency provided much less information than it actually did to support its withholdings. However, as the Law Declaration and the *Vaughn* index demonstrate, the Agency has provided more than adequate descriptions of the information withheld and the reasons why. Thus, Defendants are entitled to summary judgment.

A. Exemption (b)(5)

First, contrary to Plaintiff's arguments in its opposition, the Agency properly withheld information pursuant to FOIA Exemption 5. Exemption (b)(5) protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption applies to materials that would be privileged in the civil discovery context, including materials that would be protected by the deliberative process privilege, the attorney work product privilege and the attorney-client privilege. *NLRB v. Sears, Roebuck Bd.*, 421 U.S. 132, 149 (1975); *see also Stonehill v. I.R.S.*, 558 F.3d 534, 538-39 (D.C. Cir. 2009).

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

i. Deliberative Process

Plaintiff makes a half-hearted attack on Defendants' assertion of the deliberative process prong of Exemption 5 and, ignoring Defendants' Motion for Summary Judgment, attacks straw men. At the start of its argument on this issue, Plaintiff, misleadingly, states that Defendants withheld documents improperly under the deliberative process by labeling them as "deliberative as to the next steps counsel would pursue in the case." (Pl. Mem. in Opp. at 25.) In what can

only be seen as an attempt to cloud the Defendants' assertion of Exemption 5, Plaintiff fails to provide the proper context, namely, that the documents Plaintiff refers to were withheld under the attorney-client privilege and attorney work product doctrine, but used the word "deliberative" in the description merely to indicate the documents' timing – that is to say, the information was clearly within the context of imminent litigation. As the entire explanation reads:

> These documents are withheld in part pursuant to FOIA Exemption 5. FOIA Exemption 5 is applied to protect from disclosure counsel discussions of significant ongoing litigation cases. ***These materials were prepared in contemplation of litigation and were deliberative as to the next steps counsel would pursue in the case, and were discussions regarding the case between agency counsel and the client.*** The disclosure of these materials would have a chilling effect on counsel discussing deliberative measures to take in a case, would prevent the client from fully informing counsel of the circumstances of the case, and would frustrate the adversarial trial process by refusing to insulate the attorney's preparation from scrutiny.

(Def. *Vaughn* Index [ECF No. 12-10] at 4 (emphasis added).) Importantly, nowhere in Defendants' Motion for Summary Judgment did they argue that these documents were withheld under the deliberative process privilege prong of Exemption 5.

Plaintiff doubles down on this tactic, attacking the purported application of the deliberative process doctrine to another group of documents which Defendants argued was exempt from FOIA pursuant to the attorney-client privilege and attorney work product prongs of Exemption 5. Plaintiff states that Defendants improperly invoked the deliberative process when withholding Emails and draft discussions regarding NGO questions. (Pl. Mem. in Opp. at 25.) But, again, this is an incorrect and/or misleading interpretation of the *Vaughn* index. The *Vaughn* actually reads:

> These documents are withheld in part pursuant to FOIA Exemption 5. FOIA Exemption 5 is applied to protect from disclosure discussions between counsel on possible ways to respond to NGO inquiries. In each instance, ICE employees were communicating with agency counsel requesting legal advice and guidance. These materials were proposing various ways to respond to questions on when an alien is entitled to an attorney during an I-213 interview, and extending the status of F-1 students. ***These were discussions***

> ***between agency counsel and its client and deliberated different circumstances and scenarios and what possible responses would be under those circumstances.*** The disclosure of these materials would interfere with the attorney client relationship, where the attorney's advice depends on being fully informed by his/her client, and would have a chilling effect on the free and frank exchange of ideas within the agency.

(Def. *Vaughn* Index [ECF No. 12-10] at 3 (emphasis added).) Thus, Plaintiff's opposition to Defendants' assertion of the deliberative process simply cannot be taken seriously.

In reality, the information the Agency properly withheld pursuant to the deliberative process prong of exemption (b)(5) consists of three categories of information. Each was part of the internal deliberations of federal government employees regarding issues that resulted in final agency decisions: 1) several documents contain draft ICE operation plans including comments on the premises description, draft investigation summaries, draft Operational Procedures, and proposed personnel assignments; 2) drafts of declarations prior to their finalization for submission to the Court; and 3) information contained in an e-mail related to an ongoing discussion with comments and edits on a draft operation plan. Each of these documents is a pre-decisional document that reflects the advisory opinions or recommendations of ICE employees related to the final ICE operation plans. Therefore, as all of these documents are both pre-decisional and part of the Agency's deliberative process, they are exempt from public disclosure and the Agency's withholding was proper. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001).

ii. Attorney-Client and Attorney Work-Product Privileges

Similarly, Plaintiff's attacks on the Defendants' withholdings pursuant to the attorney-client privilege and attorney work product doctrines misapprehend the record and selectively take quotations out of context. Plaintiff claims that Defendants have not sufficiently demonstrated that the information withheld was legal advice and/or in the context of litigation.

Plaintiff's challenges are without merit and the Law Declaration and *Vaughn* index provide more than ample description to demonstrate that the information was either shared between an attorney and his client relating to the legal matter on which the client seeks advice and in contemplation of litigation. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *Cities Serv. Co. v. FTC*, 627 F. Supp. 827, 832 (D.D.C. 1984).

In fact, the information withheld was clearly protected by either the attorney-client privilege or the attorney work-product doctrine, or even both privileges – as is plainly evident by the descriptions and, in some cases, the titles of the documents themselves. The first category of documents consists of requests for Department of Justice representation by Agency employees. (*See* Vaughn Index at 3, attached to Law Decl. [referencing Bates # 2012FOIA8229.00584-00586, 00724, 00948-00949].) As these documents, on their face, request legal advice and representation from counsel for a specific purpose, they are exempt from disclosure under the attorney-client privilege and are properly withheld pursuant to Exemption 5. The second category of information properly withheld pursuant to Exemption 5's attorney privileges consists of litigation reports and attorney notes regarding ongoing cases. (*See id.* [referencing Bates # 2012FOIA8229.00659-00724, 00950-00959, 01022].) These documents are the textbook examples of attorney work product and information protected from disclosure by the attorney-client privilege. Indeed, the information withheld was all created in contemplation of litigation, or, in most cases, in furtherance of ongoing litigation and contains the frank and candid assessment of various legal options by Agency counsel. To compel the disclosure of this type of information would have an immediate and drastic chilling effect on all interactions between Agency counsel and Agency employees and among Agency counsel themselves; therefore, this

information is properly withheld under the attorney-client and attorney work product prong of Exemption 5. *Mead Data Cent.*, 566 F.2d at 252.

Next, the third category (Bates # 2012FOIA8229.0782-0783, 0788-0789, 0795, 0817-0818, 0824, 0829, 0845, 0877-0878, 0963-0964), consists of e-mails and draft discussions of attorneys discussing various ways to respond to questions regarding when an alien is entitled to an attorney during a specific category of interview, and providing legal advice based on different circumstances and scenarios. The information withheld, therefore, entirely consists of employees seeking legal advice in response to a specific issue or is the analysis and recommendation of Agency counsel – both types of information that are exempt from public disclosure. *Mead Data Cent.*, 566 F.2d at 252; *Cities Serv. Co.*, 627 F. Supp. at 832. Finally, the Agency also withheld information from e-mails regarding specific litigation cases or enforcement operations. (Bates # 2012FOIA8229.0798-0799, 000801, 0805, 0809-0810, 0913-0915, 0932-0933, 0965-0966, 01020-01021.) This type of information, just like the e-mails discussed above, is comprised of employees seeking legal advice in response to a specific issue or is the analysis and recommendation of Agency counsel and either type of information is exempt from public disclosure. Thus, as the information withheld is the request for legal advice from a client to an attorney or is the work product of attorneys analyzing legal issues presented to them, this information is properly withheld or redacted under Exemption (b)(5).

B. Exemption (b)(6)

As Plaintiff failed to oppose the Agency's arguments in support of its assertion of Exemption 6 to withhold documents, the Court may treat those arguments as conceded. *Lewis v. District of Columbia*, No. 10-5275, 2011 WL 321711, at *1 (D.C. Cir. Feb. 2, 2011) (per curiam) ("'It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive

motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'") (quoting *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004)). Thus, Defendants are entitled to judgment as a matter of law for the reasons set forth in their Motion.

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

In its opposition, Plaintiff fails to overcome the strong deference the Court should give to ICE when it decides to invoke Exemption 7 as ICE is a law enforcement agency. *See, e.g.*, *Abdelfattah v. U.S. Imm. & Customs Enforcement*, 851 F. Supp. 2d 141, 145 (D.D.C. 2012) ("[W]here an agency [ICE] specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.") (first alteration in original, additional quotation and citation omitted). Plaintiff's argument particularly falls flat in light of the material contemplated by its own FOIA request – an attorney's ability to be present during their clients' interaction with ICE, as well as what role the attorney may play during their clients' interactions with ICE, attorney conduct during interactions with ICE on behalf of their clients, and attorney appearances at ICE offices or other facilities. (SMF ¶ 2.) As this information clearly relates to activities that ICE performs in a law enforcement and national security context – e.g., investigations, arrests, and detention of illegal aliens – Plaintiff's challenge to ICE's ability to invoke Exemption 7 is without merit.

D. Exemption (b)(7)(C)

Plaintiff has chosen not to challenge Defendants' withholdings pursuant to Exemption 7(C), as well. As Plaintiff failed to oppose the Agency's arguments in support of its assertion of Exemption 7(C) to withhold documents, the Court may treat those arguments as conceded. *Lewis*, 2011 WL 321711, at *1 ("'It is well understood in this Circuit that when a plaintiff files

an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'") (quoting *Hopkins*, 284 F. Supp. 2d at 25). Thus, Defendants are entitled to judgment as a matter of law for the reasons set forth in their Motion.

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

Plaintiff's opposition attempts to water down the deference accorded a law enforcement agency when invoking Exemption 7(E) pursuant to both the policy behind the statutory language as well as binding case law. In fact, under Exemption 7(E), a law enforcement agency may withhold "'records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.'" *Blackwell v. F.B.I.*, 646 F.3d 37, 40 (D.C. Cir. 2011) (quoting 5 U.S.C. § 552(b)(7)(E)). However, the D.C. Circuit reads the expansion broadly instructing that "'the exemption looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.'" *Id.* at 42 (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)). In fact, "Exemption 7(E) sets a relatively low bar for the agency to justify withholding: 'Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested

information might create a risk of circumvention of the law.'" *Id.* (quoting *Mayer Brown*, 562 F.3d at 1194) (internal quotation marks and alterations omitted).

Again, in an attempt to make it appear that the Law Declaration and *Vaughn* index provide much less information than those documents actually do, Plaintiff summarily states that Defendants merely claim that it withheld "'law enforcement techniques including agent assignment codes, operation names, agency case numbers . . . and encounter identification numbers' and 'law enforcement personnel assignments, staffing, and team compositions in a law enforcement operation.'" (Pl. Mem. in Opp. [ECF No. 15] at 32 (quoting Def. *Vaughn* Index).) Plaintiff then claims that this information is insufficient to establish a nexus between law enforcement duties or investigations and the withheld documents. But both Defendants' Motion and the selectively omitted language in the *Vaughn* index do exactly that.

In fact, the Agency identified several categories of law enforcement techniques and procedures that are exempt from public disclosure. First, agent assignment codes, operation names, agency case numbers, National Program Manager email addresses, TECS Access Codes, Program Codes, Radio Channels, and encounter identification numbers found throughout the documents directly identify and explain how law enforcement officers access databases, access case material, access agency radio channels, store evidence, reference related cases, or otherwise develop and maintain information in a case – both a law enforcement technique and procedure. (Law Decl. at 20-21, ¶¶ 53-56.)

Even more specifically, the Agency withheld information related to: 1) how law enforcement officers determine when, where, and under what circumstances to conduct a search for contraband; 2) whether or not undercover agents were utilized during an operation, team assignments and premises descriptions for operations; and 3) law enforcement personnel assignments, staffing, and team composition in a law enforcement operation. Each of these

categories of information is clearly a law enforcement technique or procedure within ICE's law enforcement mission and the public disclosure of it creates, at the very least, "the chance of a reasonably expected risk" of circumvention of these techniques and procedures by the targets of ICE's law enforcement activities and, therefore, the information is exempt from FOIA pursuant to Exemption 7(E). *Blackwell*, 646 F.3d at 40. Therefore, Defendants have more than adequately established that their withholdings pursuant to Exemption 7(E) were proper and Plaintiff's arguments to the contrary are unavailing.

IV. All Reasonably Segregable Information Was Released

Finally, Plaintiff's speculative argument (fully contradicted by the language of the Law Declaration) that the Agency failed to release all reasonably segregable information is without merit. In fact, the Agency "is 'entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.'" *Hodge v. F.B.I.*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quoting *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1117 (D.C. Cir .2007)). Plaintiff's opposition falls far short of overcoming that presumption and instead relies on unfounded and speculative attacks on the Law Declaration. Here, the Agency has declared that it reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied to ensure that all non-exempt information was released, and with respect to the records that were released in part, all information not exempted from disclosure pursuant to FOIA exemptions specified above was correctly segregated and non-exempt portions were released. (*See* Law Decl. at 22, ¶¶ 58-60.) Therefore, all segregable information has been released and Defendants are entitled to judgment as a matter of law.

CONCLUSION

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

Dated: March 29, 2013
Washington, DC

Respectfully submitted,

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