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' MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of Homeland Security and United States Immigration and Customs Enforcement ("Defendants" or the "Agency"), respectfully move, by and through undersigned counsel, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as no genuine issue of material fact exists that Defendants have satisfied all of their obligations pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 in response to Plaintiff American Immigration Counsel's ("Plaintiff") request for information. As demonstrated by the attached Statement of Material Facts Not in Genuine Dispute and the following Memorandum of Points and Authorities, Defendants are entitled to judgment as a matter of law as Defendants conducted a reasonable search, produced all documents responsive to Plaintiff's request and subject to FOIA, and properly withheld information pursuant to the statutory exemptions.

Dated: January 24, 2012
Washington, DC

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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"), by and through undersigned counsel, files this Memorandum of Points and Authorities in support of its Motion for Summary Judgment. Defendants are entitled to judgment as a matter of law as, in response to Plaintiff American Immigration Council's ("Plaintiff" or "AIC") 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.

SUMMARY OF RELEVANT FACTS

Plaintiff submitted its FOIA request to the ICE FOIA Office by letter dated March 14, 2011. (*See* Decl. of Ryan Law, Deputy FOIA Officer, ICE [attached to Def. St. of Mat. Facts as Exhibit "1," hereinafter "Law Decl."] at 9, ¶ 17.) 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. (*Id.*) The ICE FOIA Office received Plaintiff's FOIA request on March 31, 2011. (*Id.* at 10, ¶ 18.) By letter dated March 31, 2011, the ICE FOIA Office acknowledged receipt of Plaintiff's FOIA request and assigned it FOIA case number 2011FOIA7112. (*Id.* at 10, ¶ 19.)

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. (*Id.* at 10, ¶ 20.) Accordingly the ICE FOIA Office tasked these offices with conducting searches for potentially responsive records (*see id.* at 10, ¶ 20):

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 the ICE Office of the Principal Legal Advisor (OPLA) Government Information Law Division (GILD) alleging constructive denial of their request. (*Id.* at 11, ¶ 21.) 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. (*Id.* at 11-12, ¶ 22.) By letter dated September 27, 2011, ICE responded to Plaintiff's March 14, 2011, FOIA request. (*Id.* at 12, ¶ 23.) ICE informed Plaintiff that a search of the records failed to produce records responsive to the Plaintiff request. (*Id.*)

By letter dated October 27, 2011, Plaintiff appealed ICE's September 27, 2011 response. (*Id.* at 12, ¶ 24.) 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. (*Id.* at 12, ¶ 25.) In a letter dated March 1, 2012, ICE issued an acknowledgment of the remanded request and assigned the remanded request FOIA case number 2012FOIA8229. (*Id.* at 12, ¶ 27.) In addition to a re-tasking of the components listed above, ICE tasked the Office of Detention Policy and Planning. (*Id.* at 12, ¶ 28.)

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. (*Id.* at 12, ¶ 29.) ODPP is charged with designing a detention system that meets the unique needs of ICE's detained population. (*Id.* at 12-13, ¶ 29.) ODPP shapes the future design, location and standards for civil immigration detention facilities so that ICE no longer relies primarily on existing penal models. (*Id.* at 13, ¶ 29.) ICE considers access to legal services, emergency rooms and transportation hubs, among other factors when determining future facility locations. (*Id.*)

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. (*Id.* at 13, ¶ 30.) Then, on March 31, 2012, Plaintiff filed the complaint in this case [ECF No. 1]. 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. (*See* Law Decl. at 13, ¶ 32.)

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. (*Id.* at 13, ¶ 33.) 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). (*Id.* at 13, ¶ 34.) 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. A copy of the Joint Stipulation is attached to Defendants' Statement of Material Facts as Exhibit "2."

ICE provided Plaintiff with a summary Vaughn Index identifying the types of information withheld pursuant to a particular FOIA Exemption. (Law Decl. at 13, ¶ 36.) Where withheld information could be included in a specific category, ICE provided a separate Vaughn entry for such information. (*Id.*) 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. (*Id.* at 13-14, ¶ 36.) Thus, after conducting a reasonable search, ICE has now produced all non-exempt information subject to FOIA responsive to Plaintiff's request.

ARGUMENT

I. Standard of Review

A. General Summary Judgment Standard

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Id.* at 247. "The burden on the moving party 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 instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment here, the Plaintiff (as the non-moving party) must present some objective evidence that would enable the Court to find he is entitled to relief. In *Celotex Corp. v. Catrett*, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986). In *Anderson*, the Supreme Court further explained that "the 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; *see also Laningham v. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (the non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor). In *Celotex*, the Supreme Court further instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. Summary Judgment Standard as Applied to FOIA Cases

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment. *See Cappabianca v. Commissioner, U.S. Customs Serv.*, 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment") (citing

Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993)). 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); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

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 in question were produced or are exempt from disclosure. *Hayden v. NSA*, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (summary judgment in FOIA cases may be awarded solely on the basis of agency affidavits "when the affidavits describe 'the documents and the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'") (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). *See also Public Citizen, Inc. v. Dep't of State*, 100 F. Supp. 2d 10, 16 (D.D.C. 2000), *aff'd in part, rev'd in part*, 276 F.3d 634 (D.C. Cir. 2002).

II. ICE Conducted a Reasonable Search in Response to Comptel's Request

As this Court recently noted, "'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). As discussed above, in response to Plaintiff's FOIA request, the Agency performed comprehensive searches of several different DHS components. (*See* Law Decl. at 12-13, ¶¶ 27-30.) In fact, after initially not identifying any responsive records, in response to Plaintiff's request the Agency expanded its search to additional components and re-tasked those components already searched to conduct an additional search. (*Id.* at 10-13 ¶¶ 20, 23-30.) Therefore, the Agency's search was reasonable and Defendant is entitled to judgment as a matter of law.

III. ICE's Withholdings Were Appropriate

As discussed above, ICE conducted a thorough search for documents subject to FOIA that were responsive to Plaintiff's request. Based on this search, ICE identified, processed, and produced 6,906 pages of records on a rolling basis. In fact, ICE originally identified and processed a smaller number of documents (1,084 pages) and produced a summary *Vaughn* index for those first 1,084 pages to Plaintiff. Additionally, after ICE identified additional 5,000 or so pages of potentially responsive documents, it provided Plaintiff with a sample of the type of document contained in the 5,000 pages to allow Plaintiff to make a meaningful choice as to whether it wanted those pages processed and produced. Further, pursuant to its regulations, ICE waived all fees for Plaintiff.

For these and other reasons, the parties were able to meet and confer and agree upon a stipulation that reduces the issues in dispute in this litigation. (*See* Joint Stip., Ex. 2.)[1] As shown

[1] The pages with information withheld still in dispute are Bates stamped numbers 2012FOIA8229.0001 – 0215, 0222 – 0241, 0433 – 0448, 0519 – 0549, 0582 – 0583, 0621 – 0657, 0725 – 0747, 0782 – 0802, 0817 – 0820, 0823 – 0829, 0841 – 0844, 0848 – 0854, 0856 – 0858, 0860 – 0898, 0900 – 0917, 0920 – 0923, 0925 – 0933, 0935 – 0947, 0963 – 0966, and 0985 – 1084.

below, the information withheld on the remaining pages of the documents produced to Plaintiff is statutorily exempt from disclosure under FOIA under Exemptions (b)(5), (b)(6), (b)(7)(C), and/or (b)(7)(E). Therefore, as all documents and information subject to FOIA and responsive to Plaintiff's request has been produced, Defendants are entitled to judgment as a matter of law.

A. Exemption (b)(5)

First, 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). In *Stonehill*, the D.C. Circuit analyzed the interaction between Exemption 5 and the civil litigation discovery process and found Exemption 5 to be more expansive than civil discovery privileges. 558 F.3d at 539. The D.C. Circuit explained that "not all documents available in discovery are also available pursuant to FOIA." *Id.* Exemption 5 protects "those memoranda which would not *normally* be discoverable in civil litigation against an agency," whereas in civil litigation "case-specific exceptions can sometimes permit discovery of otherwise privileged material." *Id.* (internal citation and quotation omitted) (citing *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983) ("It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the normally privileged.")). Thus, Exemption 5 protects all information that would "not normally be discoverable in civil litigation against an agency," regardless of whether

– if this were an ordinary civil suit – a litigant might be able to establish special circumstances justifying disclosure of the information in discovery.

Here, 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 properly 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

The deliberative process privilege naturally protects the "decision making processes of government agencies." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). As the Supreme Court stated in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, "deliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" 532 U.S. 1, 8-9 (2001) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted)). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' *Sears, Roebuck & Co.*, at 151, by protecting open and frank discussion among those who make them within the Government." *Id.* at 9 (citing *EPA v. Mink*, 410 U.S. 73, 86-87 (1973); *United States v. Weber Aircraft Corp.*, 456 U.S. 792, 802 (1984)). To qualify for the deliberative

process privilege, the government must show that the documents are both "pre-decisional" and "deliberative." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 186 (1975). Documents are pre-decisional when they precede an agency decision and are prepared in order to assist an agency in arriving at its decision. *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006); *see also Grand Central Partnership v. Cuomo*, 166 F.3d 473, 482 (2d Cir.1999). Documents are deliberative when they comprise any part of the process by which government decisions are made. *Id.*; *see also Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) ("[I]t is the document's role in the agency's decision-making process that controls.")

The information withheld in this case pursuant to the deliberative process prong of exemption (b)(5) was part of the internal deliberations of federal government employees regarding issues that resulted in final agency decisions. First, several documents contain draft ICE operation plans including comments on the premises description, draft investigation summaries, draft Operational Procedures, and proposed personnel assignments. 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 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 Klamath*, 532 U.S. at 8-9.

The next category of documents consists of drafts of declarations prior to their finalization for submission to the Court. These documents, which are clearly unsigned, draft versions containing comments and edits are pre-decisional and deliberative, with the final Agency action represented by the final, signed versions of the declarations. *See Klamath*, 532

U.S. at 8-9. Therefore, this information was properly withheld under the deliberative process privilege prong of Exemption (b)(5).

Finally, the Agency withheld information contained in an e-mail related to an ongoing discussion with comments and edits on a draft operation plan (as discussed above). As this e-mail contains pre-decisional, deliberative commentary between Agency employees, it is exempt from disclosure. This exchange epitomizes the "frank and open" discussion among federal employees that the deliberative process privilege is intended to protect. The public disclosure of highly deliberative discussions such as these would decrease the quality of Agency decision-making and, therefore, under both the plain language of the statute and binding precedent, the information is exempt from public disclosure. *See id.*

ii. Attorney-Client and Attorney Work-Product Privileges

Next, the Agency properly withheld or redacted information under exemption (b)(5) as it was protected by either the attorney-client privilege or attorney work-product doctrine. As noted above, Exemption (b)(5) protections run parallel to the civil discovery privileges. *Sears, Roebuck & Co.*, 421 U.S. at 149. The attorney-client privilege protects confidential information shared between an attorney and his client relating to the legal matter on which the client seeks advice. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The attorney work-product privilege protects documents prepared by an attorney in contemplation of litigation. *Cities Serv. Co. v. FTC*, 627 F. Supp. 827, 832 (D.D.C. 1984) (holding the work-product privilege to cover documents relating to settlement); *see also* Fed. R. Civ. P. 26(b)(3).

Here, the documents withheld or redacted pursuant to Exemption 5 were protected by either the attorney-client privilege or the attorney work-product doctrine, or, in some cases, both privileges. 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)

Exemption 6 of FOIA allows agencies to withhold "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). To make the determination of whether the release of a file would result in a clearly unwarranted invasion of personal privacy, courts balance the private interest involved "against the public interest (namely, 'the basic purpose of the Freedom of Information Act,' which is 'to open agency action to the light of public scrutiny')." *Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372-73 (1976) (internal quotation marks omitted)). "The focus of the public interest analysis is the citizens' right to know 'what their government is up to.'" *Id.* (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citations omitted)); *see also Beck v. Dep't of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993) (stating that the standard from Reporters Committee "is applicable in the case of Exemption 6"). As a release under FOIA makes information "publicly available," *see id.*, neither "'the identity of the

requesting party' nor 'the particular purpose for which the document is being requested' is relevant." *Id.* (quoting *Reporters Comm.*, 489 U.S. at 771-72.

"If there is no public interest in the disclosure of certain information, 'something, even a modest privacy interest, outweighs nothing every time.'" *Id.* (quoting *Nat'l Ass'n. of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). Further, "[e]ven seemingly innocuous information can be enough to trigger the protections of Exemption 6." *Id.* at 278. As the D.C. Circuit discussed in *Horowitz*, the Supreme Court has held that Exemption 6 "shielded the names and home addresses of agency employees from being released to unions that requested the lists under FOIA." *Id.* (discussing *United States Dep't of Defense v. Fed. Labor Rel. Auth.*, 510 U.S. 487, 502 (1994)). Additionally, "as 'other parties, such as commercial advertisers and solicitors, must have the same access under FOIA as the unions'; releasing the lists to the unions would have necessitated giving other parties access as well." *Id.* (quoting *Fed. Labor Rel. Auth.*, 510 U.S. at 502). The Supreme Court thus held that that the privacy interests outweighed the "negligible" public interest at stake. *Id.* at 502. *See also Wood v. FBI*, 432 F.3d 78, 85-87 (2d Cir. 2005) (holding names of government investigators and third parties as well as subjects of administrative investigation may be withheld); *Appleton v. FDA*, 451 F. Supp. 2d 129, 145-46 (D.D.C. 2006) (upholding redaction of the names of drug company employees and information identifying interviewees and other individuals in investigation files pursuant to Exemption 6); *Concepcion v. FBI*, 606 F. Supp.2d 14, 35-39 (D.D.C. 2009) (upholding redaction of the names of third parties in investigative files under Exemption 6).

Here, the Agency properly withheld information pursuant to Exemption 6. The information withheld under Exemption 6 consists of personal and private identifying information of ICE law enforcement officers third party names, signatures, case numbers, email addresses,

social security numbers, telephone numbers, unique statements that could be used to identify an individual, and other personally identifiable information, the release of which would constitute an unwarranted invasion of personal privacy and possibly subject the persons to harassment by the public and inquiries by the media. (*See* Vaughn Index, attached to Law Decl.) All of this personal information contained within the documents was properly withheld pursuant to Exemption 6. In each instance, the individuals have an expectation of privacy that their names, addresses, phone numbers, and other personally-identifying information will not be publicly released. Additionally, there is little (if any) public interest in learning this information. Thus, when conducting the "balancing" test, the Court should find that the privacy interest of the individuals far outweighs the public interest in the public disclosure of their private information. *Horowitz*, 428 F.3d at 278. Therefore, the information was properly withheld pursuant to Exemption 6 and the Agency is entitled to judgment as a matter of law.

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

ICE is the largest investigation arm of DHS and "is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises." (Law Decl. at 17, ¶ 47.) The information subject to FOIA and responsive to Plaintiff's request here pertain to the access of counsel for individuals once they are in ICE custody pursuant to federal criminal and immigration law. (*See id.*) Therefore, all documents at issue here were compiled for a law enforcement purpose. *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).

Thus, as ICE is a law enforcement agency and the records at issue were compiled for a law enforcement purpose, the Agency properly invoked Exemptions 7(C) and 7(E).

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

Under Exemption 7(C) (in a similar fashion to Exemption 6), "records or information compiled for law enforcement purposes" may be withheld "to the extent that" disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Further, "'Exemption 7(C) is more protective of privacy than Exemption 6' and thus establishes a lower bar for withholding material." *A.C.L.U. v. U.S. Dep't of Justice*, 655 F.3d 1, 6 (D.C. Cir. 2011) (quoting *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 496 n.6 (1994); citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165-66 (2004)). In determining whether the release of particular information would constitute "an 'unwarranted' invasion of privacy under Exemption 7(C), the Court 'must balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect.'" *Id.* (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989); citing *Favish*, 541 U.S. at 171) (additional citations omitted)). Finally, "As a result of Exemption 7(C), FOIA ordinarily does not require disclosure of law enforcement documents (or portions thereof) that contain private information." *Blackwell v. F.B.I.*, 646 F.3d 37, 41 (D.C. Cir. 2011) (citing *Martin v. Dep't of Justice*, 488 F.3d 446, 457 (D.C. Cir. 2007); *Boyd v. Criminal Division of the Dep't of Justice*, 475 F.3d 381, 387–88 (D.C. Cir. 2007); *Oguaju v. United States*, 378 F.3d 1115, 1117 (D.C. Cir. 2004); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991). In fact, the D.C. Circuit has explained, "privacy interests are particularly difficult to overcome when law enforcement information regarding third parties is

implicated . . . [and] the Supreme Court has made clear that requests for such third party information are strongly disfavored." *Id.* (quoting *Martin*, 488 F.3d at 457).

Here, the Agency withheld the same information pursuant to Exemption 7(C) as that discussed above as withheld pursuant to Exemption 6. Specifically, the information consists of personal and private identifying information of ICE law enforcement officers third party names, signatures, case numbers, email addresses, social security numbers, telephone numbers, unique statements that could be used to identify an individual, and other personally identifiable information, the release of which would constitute an unwarranted invasion of personal privacy and possibly subject the persons to harassment by the public and inquiries by the media. As stated in the Law Declaration, there is no public interest in the disclosure of this information, and, in fact, should this information be subject to public disclosure, the parties would become susceptible to harassment, humiliation, embarrassment, and/or hostility – each of which constitutes a clearly unwarranted invasion of privacy. (Law Decl. at 18-19, ¶¶ 48-50.) This information is precisely the type of information that courts have held is exempt from disclosure pursuant to Exemption 7(C). In fact, this Court has repeatedly upheld redaction of government employees' and third-parties' names and other personally-identifying information contained in law enforcement files when those names and information are involved in the conduct of the investigation. *See, e.g.*, *Abdelfattah*, 851 F. Supp. 2d at 145; *Concepcion v. FBI*, 606 F. Supp. 2d 14, 38-39 (D.D.C. 2009); *Amusco v. Dep't of Justice*, 600 F. Supp. 2d 78, 97 (D.D.C. 2009); *Singh v. FBI*, 574 F. Supp. 2d 32, 48-49 (D.D.C. 2008). Thus, ICE properly withheld the personally identifying information pursuant to Exemption 7(C).

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

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*, 646 F.3d at 40 (quoting 5 U.S.C. § 552(b)(7)(E)). In this Circuit, "'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).

Here, 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.

IV. All Reasonably Segregable Information Was Released

Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Although the agency "must provide a 'detailed justification' for its non-segregability," it "is not required to provide so much detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting *Mead Data*, 566 F.2d at 261). 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, Defendants respectfully requests that the Court enter judgment in their favor. A proposed order is attached.

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Washington, DC

Respectfully submitted,

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