UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 12-CV-00856 JEB**
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
	)	
Defendants.	)	
	)	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

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

Plaintiff American Immigration Council ("AIC") respectfully submits this memorandum of law in opposition to Defendants' United States Department of Homeland Security ("DHS") and United States Immigration and Customs Enforcement ("ICE") motion for summary judgment.

INTRODUCTION

Plaintiff AIC's suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeks records from DHS and its component ICE concerning individuals' access to legal counsel during their interactions with ICE. AIC submitted its FOIA request to ICE on March 14, 2011. AIC received no substantive response to its request for over four months and then filed an administrative appeal in August 2011. On September 27, 2011, a mere four days after ICE closed AIC's appeal because the request was still being processed, ICE informed AIC that it could not locate or identify *any* responsive records to AIC's FOIA request. AIC appealed that determination in October 2011, noting that ICE failed to search the Office of Detention Policy and Planning ("ODPP"), and pointing out that responsive records existed online, but that ICE had failed to locate and produce those documents.

In February 2012, ICE conceded that it likely had "additional responsive records" based on the information in AIC's October 2011 appeal. ICE admitted that "additional responsive records may be found in locations the agency *has not yet* searched." Defs. Mot. Summ. J. ECF No. 12-9 at 1 (*hereinafter* "Defs. 12-9"). ICE remanded AIC's appeal for additional processing and re-tasking to locate responsive documents.

Despite this remand, AIC received no substantive response to its requests and commenced this action on May 31, 2012, seeking declaratory and injunctive relief requiring Defendants to produce documents responsive to AIC's request.

After AIC commenced this litigation, Defendants conferred with AIC and discussed a rolling production of responsive documents. Defendants made five productions over the course of four months, and by November 2012, Defendants had released 6,906 pages of records related to AIC's FOIA request. Some of these records were released in full, some were released in part, and some were withheld in full on the basis of various FOIA exemptions.

AIC and Defendants sought to narrow the issues before this Court. After reviewing the documents produced by Defendants and reviewing a summary *Vaughn* index, AIC and Defendants entered into a joint stipulation regarding which of the withheld documents AIC would not challenge.

Defendants now move for summary judgment, relying on a declaration from Mr. Ryan Law, Deputy FOIA Officer of the Freedom of Information Act Office at U.S. Immigration and Customs Enforcement. Mr. Law's declaration outlines what Defendants contend was a reasonable and "comprehensive" search for records responsive to AIC's FOIA request. Defs. Mot. Summ. J., ECF No. 12 (*hereinafter* "Defs. Br."), at 8. This declaration, however, is deficient under controlling D.C. Circuit precedent because it describes neither the scope of the search Defendants undertook nor the search methods they employed. Further, Defendants' declaration is undermined by countervailing evidence.

Defendants' "summary *Vaughn* Index" describes general categories of documents withheld and purports to explain the applicability of certain FOIA exemptions justifying the withholding of these general categories of documents. However, the summary *Vaughn* index is

wholly inadequate. Categorical descriptions lack the requisite descriptive accuracy for the exemptions pertaining to each withheld record. Because Defendants' categorical grouping and description do not adequately establish the applicability of the exemptions claimed, AIC has no meaningful opportunity to seek the release of withheld documents.

Taken together, these facts demonstrate that Defendants have failed to meet their burden under Fed. R. Civ. P. 56(a). Thus, their motion must be denied.

ARGUMENT

I. Summary Judgment Standard

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

FOIA requires an agency to release all records that are responsive to a proper request unless a statutory exemption protects the records from disclosure. *See* 5 U.S.C. § 552(b); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980) ("[T]he defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements.") (internal citation and quotation omitted). The agency bears the burden of proving that it has fulfilled its FOIA obligations. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

For summary judgment purposes, an agency may rely on an affidavit or declaration that is relatively detailed, nonconclusory, and made in good faith. *Morley v. Cent. Intelligence*

Agency, 508 F.3d 1108, 1116 (D.C. Cir. 2007). However, conclusory and nonspecific declarations or affidavits are insufficient to support a grant of summary judgment. *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 891-92 (D.C. Cir. 1995) (reversing grant of summary judgment because agency's affidavit was conclusory and lacked sufficient detail to review adequacy of search). Summary judgment may be granted on the basis of agency declarations only "if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994) (internal citation and quotation omitted).

Good faith searches are critical to the congressional intent of FOIA—to ensure that community members can access government records and thereby be informed about "*what their government is up to*." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (emphasis in original) (internal citation and quotation omitted). Production of the requested documents vindicates the public's right to be part of "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978).

II. Defendants Failed to Show That They Conducted an Adequate Search.

Defendants have failed to demonstrate that their search was adequate. Mr. Law's declaration is nonspecific and conclusory and therefore fails to sustain the agency's burden of proof for summary judgment. Likewise, Defendants summarily argue in just one paragraph of their memorandum in support of summary judgment that their search was "comprehensive" and "reasonable" without providing any explanation. Defs. Br. at 7-8. Additionally, countervailing evidence affirmatively shows the inadequacy of Defendants' search. Because Defendants have

not met their burden under Fed. R. Civ. P. 56, this Court should deny their motion for summary judgment.

A. Defendants' Declaration Lacks Sufficient Detail.

The government must conduct a reasonable search for records responsive to a FOIA request. *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Specifically, the government must show "beyond material doubt that its search was reasonably calculated to uncover all relevant documents" and must search all records systems likely to contain responsive records. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325-26 (D.C. Cir. 1999) (internal citation and quotation omitted). An agency's search must be "more than perfunctory" and must "follow through on obvious leads to discover requested documents." *Id.* at 325 (internal citation omitted).

1. The Government Bears the Burden to Demonstrate the Adequacy of a Search and Provide Sufficient Detail to Support the Search Conducted.

To support a motion for summary judgment in a FOIA case, an agency's affidavit must be "reasonably detailed" in describing the search terms used, the nature of the search performed, and "averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68. This affidavit must provide "more than glib government assertions of complete disclosure or retrieval." *Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec.*, 2012 WL 6809301, at *4 (S.D.N.Y. Dec. 27, 2012) (internal quotation omitted). The D.C. Circuit has held that such an affidavit must describe "*what records* were searched, *by whom*, and through *what process*." *Steinberg*, 23 F.3d at 551-52 (emphasis added); *see Weisberg*, 627 F.2d at 371 (finding that agency affidavits that "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requestor] to

challenge the procedures utilized" cannot support summary judgment); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 2012 WL 5928643, at *5-6 (D.D.C. Nov. 27, 2012) (finding agency's declaration insufficient because it said "nothing about what kinds of records the offices keep, which records or databases the offices searched through, or how the offices conducted their searches"). The affidavit must also "describe at least generally the structure of the agency's file system," which renders any further search unlikely to disclose additional relevant information. *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987). Such information is required to allow a requester to challenge the search's adequacy and to allow the court to assess the search's adequacy for summary judgment purposes. *See Oglesby*, 920 F.2d at 68.

When an agency's affidavit or declaration fails to describe the nature of its record keeping system, what files were searched or how the search was conducted, the D.C. Circuit and other courts have determined that the agency's search was inadequate. *Compare Nation Magazine, Wash. Bureau*, 71 F.3d at 891 (determining that Customs failed to "describe its recordkeeping system in sufficient detail" to allow the court to identify what subject matter files might have information responsive to the FOIA requests); *Steinberg*, 23 F.3d at 552 (remanding to assess adequacy of U.S. Attorney's search because agency did not describe search's mechanics and relied on conclusory statement from one office that no responsive records existed); *Am. Immigration Council*, 2012 WL 5928643, at *6 (denying agency's motion because it could not determine search's adequacy based on inadequate declaration); *ACLU of S. Cal. v. U.S. Dep't of Homeland Sec.*, 2012 WL 5342411, at *4 (C.D. Cal. Oct. 25, 2012) (determining ICE's search was inadequate because of "incomplete and inconsistent search terms" and because of "ample countervailing evidence"); *and El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp.

2d 285, 308 (D. Conn. 2008) (determining that USCIS's search was inadequate because it failed to sufficiently describe structure of agency's file system and did not justify its decision not to search all databases), *with Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 20-22, 24 (D.D.C. 2011) (finding search adequate because detailed information was released about how and by whom search was conducted); *Petit-Frere v. U.S. Attorney's Office for the S. Dist. of Fla.*, 800 F. Supp. 2d 276, 280 (D.D.C. 2011) (finding search adequate because declaration specified what files were searched, why those files were searched, search terms employed, and search method used), *aff'd* 2012 WL 4774807 (D.C. Cir. Sept. 19, 2012); *and Hussain v U.S. Dep't of Homeland Sec.*, 674 F. Supp. 2d 260, 265-67 (D.D.C. 2009) (finding USCIS's search to be adequate because it found the only file reasonably within its possession). Without "an elementary description of the general scheme of an agency's file system," a FOIA requester lacks a basis to challenge an agency's claim that "any further search [is] unlikely to disclose additional relevant information." *El Badrawi*, 583 F. Supp. 2d at 300 (internal citation and quotation omitted) (alteration in original).

2. Mr. Law's Declaration Fails to Satisfy the D.C. Circuit's Standard for Demonstrating Specificity and Adequacy.

Mr. Law's declaration is replete with general information about ICE's FOIA process but lacks specific details relating to Defendants' searches in response to AIC's request. The declaration generally explains the roles of the four identified offices within ICE that potentially have responsive records, namely Homeland Security Investigations ("HSI"); Office of the Principal Legal Advisor ("OPLA"); Enforcement and Removal Operations ("ERO"); and Office of Detention Policy and Planning ("ODPP"),[1] and generally explains the records systems from

[1] ODPP was not searched until ICE conceded that its initial search in response to AIC's FOIA request was inadequate and remanded AIC's case for additional processing. Defs. 12-9.

which ICE retrieved records responsive to AIC's request, namely External Investigation Records ("EIR"); Immigration and Enforcement Operational Records ("ENFORCE"); and Alien Medical Records ("AMR"). Defs. Mot. Summ. J., ECF No. 12-2, Declaration of Ryan Law (*hereinafter* "Law Decl."), ¶¶ 16, 20, 28-29. Mr. Law also states that according to ICE's standard procedures, when ICE receives a FOIA request, the ICE FOIA Office determines the appropriate offices to respond to the request and then provides each office's point of contact ("POC") a copy of the request as well as specific instructions for searching for responsive records. Law Decl. ¶ 7. These POCs then forward that information "to the individual employee(s) or component office(s) within the program office that they believe are most likely to have responsive records." Law Decl. ¶ 7. In response, the chosen employees and component offices provide any records to their POC who in turn provide those records to ICE's FOIA office. Law Decl. ¶ 7.

The Law declaration fails to satisfy the D.C. Circuit's specificity requirement. The declaration does not state that Mr. Law is personally aware of the search procedures used within each program office, within each component office, or by the individual employee that received AIC's FOIA request. The declaration fails to detail the actual searches performed (including the search terms employed) after receipt of AIC's FOIA Request or the instructions provided to perform those searches. *See* Law Decl. ¶ 7. Mr. Law asserts that ICE offices tasked with searching for records have discretion regarding what files to search. Law Decl. ¶ 7. While offices may have some discretion when conducting their searches, an agency still must explain (and cannot unilaterally make itself exempt from such explanations) how those offices conducted their searches—what files were searched and why; the search terms employed; the search methods used; who conducted those searches in each office; and why additional searches would have been futile. Moreover, given that the declaration states that the ICE FOIA office provides

specific search instructions to the offices, the agency's failure to describe those search instructions here is inexplicable.

In addition, although the Law declaration provides general information on the record systems from which the agency retrieved responsive documents, it fails to explain why these records systems were searched, whether the agency searched other records systems, and if not, why not.[2] The declaration also describes ICE employees' use and storage of emails and states that individual employees may search their email for responsive documents. *See* Law Decl., ¶¶ 9-15. However the declaration does not state that any employees were specifically tasked with searching emails responsive to AIC's request and does not describe which employees searched emails or which search terms were used. The declaration also fails to indicate if other electronic files or paper files were searched despite acknowledging that employees keep their files in paper and electronic format and use a variety of systems including DVDs, CDs, and USB devices. Law Decl., ¶¶ 7-8.

Further, the declaration fails to describe how the agency keeps, tracks and searches the primarily policy-related of documents that AIC requested. Such a description would be particularly instructive here given that the records systems Mr. Law describes in paragraph 16 primarily focus on individual case files (i.e., records related to individual investigations, individuals detained by ICE, and individuals' medical records) and are not the type of files that

[2] In recent FOIA cases, courts have found ICE's declarations to lack adequate explanations regarding their searches. *See Nat'l Immigration Project of the Nat'l Lawyers Guild*, 2012 WL 6809301, at * 4 (requiring ICE to provide more detailed affidavit when its declaration failed to describe file systems searched or search terms used); *Electronic Frontier Foundation v. U.S. Dep't of Defense*, 2012 WL 4364532, at *14-15 (N.D. Cal. Sept. 24, 2012) (requiring ICE to provide another declaration because its declaration failed to address why certain employees only search their own files, whether other agency-wide systems had responsive documents, and whether those systems were searched).

likely would be responsive to AIC's FOIA request. In short, there is nothing in the declaration to support Defendants' contention that this search was "comprehensive," let alone adequate or reasonable. Rather, it appears that Mr. Law clearly lacked any knowledge on "what the chosen program offices did after receiving the requests." *Am. Immigration Council*, 2012 WL 5928643, at *5.

Additionally, Mr. Law's declaration is legally insufficient because it fails to explain why offices other than HSI, ERO, OPLA, and ODPP would not have responsive records. In fact, neither AIC nor this Court has any way of knowing whether HSI's Special Agent in Charge ("SAC") offices, ERO's field offices, or OPLA local chief counsel offices or sub-offices[3] were engaged in searching for records responsive to AIC's FOIA request.[4] For example, as noted on ICE's publicly available website, SAC offices administer and manage the investigative and enforcement activities within their geographic area, and to accomplish this, these offices "develop, coordinate, and implement enforcement strategies to ensure conformance with national policies and procedures and to support national intelligence programs."[5] To the extent that these

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[3] OPLA is DHS' largest legal program and provides "legal advice, training and services in cases related to the ICE mission." OPLA has 26 Chief Counsel Offices throughout the country. Additionally, OPLA is divided into thirteen divisions. http://www.ice.gov/about/offices/leadership/opla/

[4] Plaintiff's request encompassed "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. Immigration and Customs Enforcement (ICE), whether issued or maintained by ICE Headquarters offices (including but not limited to the Office of the Assistant Secretary (OAS), Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI), Management and Administration, Office of the Principal Legal Advisor (OPLA), and the Office of Detention Policy and Planning (ODPP), including any divisions, subdivisions or sections therein; ICE field offices, including any divisions, subdivisions or sections therein; local Offices of Chief Counsel; and/or any other ICE organizational structure." Defs. Mot. Summ. J., ECF No. 12-3 at 1 (*hereinafter* "Defs. 12-3").

[5] http://www.ice.gov/contact/inv/.

strategies related to access counsel, these policies and procedures would be responsive to AIC's FOIA request.

Instead, Mr. Law generally states that the POCs in each program office sent AIC's FOIA request and instructions "to the individual employee(s) or component office(s) within the program office that they believe are most likely to have responsive records." Law Decl. ¶ 7. The declaration provides no information about which component offices received AIC's FOIA requests or the instructions provided by ICE's FOIA office. His declaration fails to indicate which offices (if any) had no responsive documents and whether any follow up was done. Without this necessary information, AIC and this Court can only guess how Defendants conducted their search and whether all of the appropriate offices searched for responsive documents.

This lack of specificity about the searches within these offices is particularly troubling given the dearth of records from the field. Excluding documents no longer in dispute in this case, many of the records Defendants identified and/or released came from ICE leadership and headquarters offices. *See* Declaration of Beth Werlin ("Werlin Decl."), ¶ 4. ICE, however, has local offices nationwide , and many of these offices regularly interact with noncitizens and their attorneys. *See* Werlin Decl., ¶ 4. ICE's own website shows that (1) HSI has 26 field offices,[6] (2) ERO has 24 field offices,[7] and (3) OPLA has 26 Chief Counsel Offices.[8] *See id.* The fact that very few of the documents ICE released came from local offices, together with ICE's failure to explain how the search was conducted and whether any local offices conducted a search, calls into question ICE's assertion in Defendants' brief that the search was comprehensive.

[6] http://www.ice.gov/contact/inv/.
[7] http://www.ice.gov/contact/ero/.
[8] http://www.ice.gov/about/offices/leadership/opla/counsel.htm.

The foregoing deficiencies undermine the sufficiency of Defendants' declaration. *See Morley*, 508 F.3d at 1122 (finding declaration insufficient to carry agency's burden on summary judgment due to failure to provide information about search strategies, search terms used, or how the search was conducted). Defendants contend that they conducted a comprehensive search. Defs. Br. at 8. Neither saying a search is comprehensive nor contending a second, voluntarily conducted search is reasonable (after remanding AIC's case for additional processing) will automatically make Defendants' search adequate or reasonable. Only a detailed declaration addressing what the agency did during that search will suffice. Accordingly, Defendants have failed to meet their burden to show that they conducted an adequate search, and their motion for summary judgment should be denied.

B. Countervailing Evidence Further Demonstrates that Defendants Did Not Conduct an Adequate Search.

Even if the government's affidavits were detailed, nonconclusory and submitted in good faith, "the requester may nonetheless produce *countervailing evidence*, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Morley*, 508 F.3d at 1116 (emphasis added) (internal quotation omitted).

ICE's policies on access to counsel have been a longstanding concern for immigration lawyers across the country. Compl. ¶4. This topic has been the subject of meetings between immigration advocacy organizations and ICE in field offices throughout the country as well as correspondence between those entities. Werlin Decl., ¶ 5. Defendants, however, have only identified limited correspondence relating to such meetings despite the fact that many such meetings have occurred between those entities over the years. Illustrative examples of such meetings include:

- Liaison Meeting Minutes of October 30, 2009 between AILA and ICE discussing whether ICE will discuss a detainee's case with counsel if a G-28 [entry of appearance] is

not yet signed and whether ICE must notify counsel before transferring his or her client to another detention facility. Declaration of Robert Deasy ("Deasy Decl."), Ex. A.

- Liaison Meeting Minutes of March 25, 2010 between AILA and ICE discussing the right to counsel and the need for signed G-28 forms to reach one's client. Deasy Decl., Ex. B.

- Liaison Meeting Minutes of November 17, 2011 between AILA and ICE discussing the rights, procedures, and remedies of a noncitizen's right of counsel in relation to the issuance of an NTA. Deasy Decl., Ex. C.

Besides these examples, Defendants' production also has failed to identify or produce relevant correspondence between ICE and immigration advocacy organizations. Illustrative examples of such correspondence include:

- May 2008 correspondence between Julia Mass and Monica Ramirez of the American Civil Liberties Union and the Field Office Director of the San Francisco Field Office regarding ACLU's concerns about noncitizens' right to counsel after an ICE enforcement action . Declaration of Julia Mass ("Mass Decl."), Exs. A-B.

- An August 8, 2011 letter from Ben Johnson of AIC and Crystal Williams of the American Immigration Lawyers Association (AILA) to Director John Morton of ICE regarding restrictions of non-citizens' access to counsel while being detained by ICE or interacting with ICE.[9] Declaration of Benjamin Johnson ("Johnson Decl."), Exs. A-B.

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[9] The November 17, 2011 Meeting Minutes and the August 8, 2011 letter were created after AIC's initial March 14, 2011, FOIA request. Based on ICE's February 29, 2012 letter, which remanded AIC's case for "processing and re-tasking to the appropriate agency/office(s) to obtain any responsive records," it appears that ICE conducted additional searches after AIC made its October 27, 2011, appeal, by which time these documents would have existed. *See* Defs. 12-9 at 1; *see also* Defs. 12-11, ¶ 1 (detailing the dates of ICE's rolling productions from August 2012 through November 2012). An agency may establish a reasonable cut-off date for searching records pursuant to a FOIA request, consistent with its obligation to conduct a reasonably thorough search. *McGhee v. Cent. Intelligence Agency*, 697 F.2d 1095, 1104 (D.C. Cir. 1983). Courts in this jurisdiction have frequently upheld date-of-search cut-off dates to be reasonable. *See, e.g.*, *Public Citizen v. Department of State*, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (rejecting the State Department's date-of-request cut-off date as unreasonable and noting that the agency could apply a date-of-search cut-off date "with minimal administrative hassle"); *Edmonds Institute v. Dep't of Interior*, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (finding the agency's use of a date-of-search rather than a date-of-document-release cut-off date to be reasonable); *cf. Vento v. IRS*, 714 F. Supp. 2d 137, 144-45 (D.D.C. 2010) (finding the IRS's use of a date-of-request cut-off date to be reasonable where the agency had initiated its search for responsive records within five days of the FOIA request).

None of the above described documents were produced by Defendants or identified in Defendants' summary *Vaughn* Index. The Law Declaration also is devoid of reasons as to why these documents were not found, whether these field offices were even searched, or whether such a search would be fruitless.

Additionally, Defendants failed to disclose other responsive records. Some of those records are referred to in the documents that Defendants produced. Some illustrative examples include:

- 2012FOIA8229.000725-735, 735: Headquarters Enforcement Operation Plan refers to four attachments A-D that accompany this plan.

- 2012FOIA8229.000817-819: Email dated February 18, 2009 refers to talking points related to an AILA Liaison meeting that occurred on December 12, 2007 as well as a draft response to a question regarding right to counsel.

- 2012FOIA8229.000822: Email dated October 3, 2008 refers to a policy regarding OI's cessation of questioning on removability "where attorneys have legitimately requested access to their clients."

- 2012FOIA8229.000830-833, 830-31: Email dated March 18, 2009 refers to advice provided to DRO and OI regarding access to counsel and refers to documents related to the Lopez settlement and the subsequent INS Commissioner Instruction memos.

- 2012FOIA8229.000841: Email dated March 19, 2009 refers to "clearly established policy/guidelines" related to talking points for an AILA Conference.

- 2012FOIA8229.000916-17: Email dated October 4, 2008 regarding access to counsel after raids at work sites "where attorneys have legitimately requested access to their clients" that refers to updating a PowerPoint related to this topic.

Defendants have failed to produce to AIC the documents, policies, guidelines, or final versions referenced in the above produced documents. FOIA, however, obligates an agency to pursue further search upon discovering a record that "clearly indicates the existence of [other] relevant

documents." *See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 110 (D.D.C. 2002). Defendants have failed to fulfill that obligation.

Further, Defendants' own website provides additional countervailing evidence. Defendants failed to identify an (1) "ICE Detainee Transfer Memorandum," which addresses the minimization of transfers outside of a geographic area of responsibility when a detainee has an attorney of record in that area and (2) "Performance Based National Detention Standards," which addresses the general guidelines about access to counsel.[10] These documents are publicly available on ICE's website. *See* Werlin Decl., ¶ 6 & Exs. A-B. Defendants also failed to produce their Detention and Removal Operations Policy and Procedure Manual ("DROPPM"), which provides guidance about non-citizens' right to counsel.[11] Defendants have produced a redacted version of this 629-page manual in another FOIA matter;[12] yet, despite this manual's discussion of noncitizens' right to counsel, they did not produce it in response to AIC's FOIA request.

An agency's failure to turn up a particular document in a search does not make the search inadequate per se. *See, e.g.*, *Ancient Coin Collector's Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). However, Defendants' failure to identify and produce so many known and responsive documents strongly undermines their assertion that they conducted a "comprehensive" search.[13] The countervailing evidence thus further strengthens AIC's

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[10] http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf; http://www.ice.gov/detention-standards/2011/.

[11] The right to counsel is discussed on the following pages: 241, 260, 284, 292, 323-24, 360, 363-65, 377-79, 432, 574, and 577.

[12] http://www.legalactioncenter.org/sites/default/files/docs/lac/3-27-06_Detention_and_Deportation_Officer%27s_Field_Manual.pdf.

[13] AIC's request for records "include[d] all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations,

argument that Defendants' motion for summary judgment should be denied. *See Valencia-Lucena*, 180 F.3d at 326 (stating that summary judgment is inappropriate if "a review of the record raises substantial doubt, particularly in view of well-defined requests and positive indications of overlooked materials" (internal citation and quotation omitted)); *Friends of Blackwater v. U.S. Dep't of the Interior*, 391 F. Supp. 2d 115, 121 (D.D.C. 2005) (concluding that failure to provide search terms and failure to produce documents originating from agency that turned up in related searches by other bureaus rendered search inadequate).

III. Defendants Have Improperly Withheld Documents.

FOIA requires federal agencies to disclose records responsive to a request "unless the documents fall within enumerated exemptions." *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water User Protective Ass'n*, 532 U.S. 1, 7 (2001) (citing 5 U.S.C. § 552(b)). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* at 8 (quotation omitted). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Id.* at 8 (quotation omitted).

"An agency withholding responsive documents from a FOIA release bears the burden of proving the applicability of claimed exemptions," *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). Where, as here, the agency seeks to establish the applicability of FOIA exemptions through a declaration and *Vaughn* index, these materials must "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [not be] controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Defenders of Wildlife v.*

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instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training manuals, and studies." Defs. 12-3 at 1 n.1.

U.S. Border Patrol, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (internal quotation omitted); *see Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995) (stating that the purpose of declaration and *Vaughn* index is to "establish a detailed factual basis for application of the claimed FOIA exemptions to" each withheld document). Conclusory claims simply reiterating the statutory standards for exemptions are insufficient to sustain a summary judgment motion. *See Defenders of Wildlife*, 623 F. Supp. 2d at 90-91.

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

Although Defendants' *Vaughn* index is insufficient as a whole and should be rejected by this Court on that ground alone, as detailed below in Section III.A., AIC specifically contests the applicability of the exemptions to the following documents (collectively, "Index Documents," and individually, "Index Doc. #" by number):

- Index Doc # 1: 2010 Draft Worksite Operations Plan for Great Lakes Naval Station withheld under Exemption (b)(5) for deliberative process, Exemption (b)(6), Exemption (b)(7)(c), Exemption (b)(7)(e) (2012FOIA8229.000623-57).

- Index Doc # 2: Email from Daniel Ragsdale of March 18, 2009 regarding AILA Conference withheld under Exemption (b)(5) without additional detail (2012FOIA8229.000782-83).

- Index Doc # 3: Email of March 18, 2009 regarding AILA Conference withheld under Exemption (b)(5) for deliberative process and attorney-client privilege (2012FOIA8229.000788-89).

- Index Doc # 4: Email of July 24, 2008 regarding litigation cases or enforcement operations withheld under Exemption (b)(5) for deliberative process, attorney-client privilege and attorney-work product; Exemption (b)(6) and Exemption (b)(7)(c) (2012FOIA8829.000798-800).

- Index Doc # 5: Email to Daniel Ragsdale of February 18, 2008 regarding AS Prep question withheld under Exemption (b)(5) for deliberative process (2012FOIA8229.000817-20).

- Index Doc # 6: Documents withheld as "Non-responsive duplicate" (2012FOIA8229.000433-36, .000784-85, .000791-93, .000796-97, .000856-58)

- Index Doc # 7: Email of March 16, 2010 regarding Cobb County SO_Letter withheld under Exemption (b)(5) for deliberative process (2012FOIA8229.000876-79).

- Index Doc # 8: Document withheld as "Referred to DOJ" (2012FOIA8229.000909-12)

- Index Doc # 9: Email of September 9, 2008 regarding worksite issues withheld under Exemption (b)(5) for deliberative process and attorney-client privilege (2012FOIA8229.000913-15).

- Index Doc # 10: Emails and drafts regarding NGO questions withheld under Exemption (b)(5) for deliberative process, attorney-client privilege and attorney-work product, Exemption (b)(6) and Exemption (b)(7)(c) (2012FOIA8229.000963-64).

- Index Doc # 11: Email regarding specific litigation or enforcement operation withheld under Exemption (b)(5) for deliberative process, attorney-client privilege and attorney-work product, Exemption (b)(6), and Exemption (b)(7)(c) (2012FOIA8229.000965-66).

- Index Doc # 12: Enforcement Operations Plan withheld under Exemption (b)(7)(e) (2012FOIA8229.000985-1018).

- Index Doc # 13: Email regarding specific litigation or enforcement operation withheld under Exemption (b)(5) for attorney work product, Exemption (b)(6), and Exemption (b)(7)(c) (2012FOIA8229.001020-21).

- Index Doc # 14: Litigation report or attorney notes regarding a particular litigation withheld under Exemption (b)(5) for attorney-work product, Exemption (b)(6), and Exemption (b)(7)(c) (2012FOIA8229.001022).

- Index Doc # 15: Document withheld under Exemption (b)(6) and Exemption (b)(7)(c) (2012FOIA8229.001023-84).

- Index Doc # 16: Document marked as "Non-responsive FOIA." (2012FOIA8229.00582-83)

A. Defendants' Summary *Vaughn* Index Is Inadequate and Insufficient as a Whole.

No set formula exists for a *Vaughn* index, but the touchstone is whether "the requester and the trial judge [are] able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Davin*, 60 F.3d at 1050 (internal quotation omitted). The defining requirement of a *Vaughn* index is specificity. *Wiener*, 943 F.2d at 979. "Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987). The descriptive accuracy of a *Vaughn* index should not be "sacrificed to the niceties of a particular classification scheme." *Id.* at 225.

Defendants' summary *Vaughn* index does just that. It sacrifices any descriptive accuracy in favor of a limited and woefully inadequate summary *Vaughn* index. The Law Declaration contends that Defendants' 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." Law Decl. ¶ 36. However, such a contention is disingenuous given that AIC agreed to narrow the withheld documents (both in whole and in part) that would remain at issue before this Court by entering into a stipulation with Defendants regarding the withheld documents that AIC would not challenge. Defs. Mot. Summ. J., ECF No. 12-11 (*hereinafter* "Defs. 12-11"). AIC does not contend that Defendants' *Vaughn* index is insufficient because it

did not provide *Vaughn* entries for all the produced documents; rather, AIC contends that Defendants should have (and failed to) provide individual entries for the withheld documents that remain at issue.

Here, Defendants have created several categorical groups of documents. The number of documents varies in each category and the number of exemptions asserted for each category varies. For example, the *Vaughn* index entry for the group, "Emails and draft discussions regarding NGO questions" asserts the three possible (b)(5) exemptions (i.e., deliberative process, attorney work product, and attorney-client relationship). Defs. Mot. Summ. J., ECF No. 12-10, at 3 (*hereinafter* "Defs. 12-10"). However, not all of those documents support every single (b)(5) exemption, and Defendants concede as much in their description when they state that "*some of these materials* are made up [of] attorney work product." *Id*. Defendants' decision to group documents that allegedly are exempt under the work-product privilege with documents that allegedly are exempt under another (b)(5) privilege prevents AIC from identifying the specific reasons for each document being withheld.[14] *See Wiener*, 943 F.2d at 979 ("The most obvious obstacle to effective advocacy is the . . . decision to state alternatively several possible reasons for withholding documents, without identifying the specific reason or reasons for withholding each particular document."). The Law Declaration provides no clarification on particular documents and also uses categorical groups for the bases of Defendants' exemptions. Thus, AIC has "little or no meaningful opportunity" to seek the release of particular documents. *See Davin*, 60 F.3d at 1051 (holding that the *Vaughn* index provided "no information about

[14] Moreover, ICE's annotations on the documents do not necessarily provide clarification. For example, Index Doc. # 2, an email, is redacted on the face of the document as exempt under (b)(5). Based on Defendants' index, AIC has no way to know what privilege Defendants are asserting under (b)(5) or the specific reason for that redaction because the categorical entry covers all three exemptions for the group of documents as a whole.

particular documents that might be useful in evaluating the propriety of the decision to withhold").

Further, Defendants' summary *Vaughn* index fails to provide explanations for all the documents that they redacted. For example, pages within Index Doc. # 6 are redacted as a "non-responsive duplicate," but Defendants provide no explanation for why they are non-responsive and do not cross reference the documents that they duplicate. Thus, AIC has no way to determine whether that assertion is accurate. Likewise, Index Doc. # 8 is redacted as "referred to DOJ" but Defendants have not provided any *Vaughn* entry for this redaction. Index Docs. # 8, 10, 11, and 13 were fully redacted and there is no identifying information. Finally, Index Doc. # 16 (which is a representative document) was redacted as "non-responsive FOIA," but Defendants provide no explanation for that redaction and these documents do not appear to be associated with the documents that precede or follow them. Thus, AIC cannot derive from the index "a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Davin*, 60 F.3d at 1050 (internal quotation omitted).

Defendants' summary *Vaughn* index has "unnecessarily compromised" the adversarial process as Defendants have not disclosed all that they could, and the index neither provides AIC with "a meaningful opportunity to contest," nor the district court "an adequate foundation to review," the soundness of their withholdings. *See Wiener*, 943 F.2d at 977-79. Because Defendants' *Vaughn* index is inadequate, this Court should deny Defendants' motion for summary judgment on all of its asserted exemptions and require Defendants to provide a more detailed *Vaughn* index. *See Davin*, 60 F.3d at 1051 (reversing district court's grant of summary judgment because *Vaughn* index was deficient); *Wiener*, 943 F.2d at 979 (requiring FBI to revise its *Vaughn* index); *King*, 830 F.2d at 225 (concluding that *Vaughn* index was insufficient to

conduct a de novo review for Exemption 1 claims and remanding to district court for further proceedings).

B. Defendants Have Improperly Withheld Records Under Various FOIA Exemptions.

1. Inter- and Intra-Agency Exemption (b)(5)

Under 5 U.S.C. § 552(b)(5) ("Exemption (b)(5)"), an agency is permitted to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Courts have interpreted this exemption to include the attorney work-product privilege, the attorney-client privilege, and the executive deliberative-process privilege. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The proponent of any privilege under Exemption (b)(5) must "establish the claimed privilege with 'reasonable certainty.'" *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 153 (D.D.C. 2012) (quotation omitted).

Mr. Law's declaration and Defendants' summary *Vaughn* index are insufficient to carry Defendants' burden of establishing the applicability of Exemption (b)(5) to most—if not all—of the documents withheld. As a preliminary matter, Defendants have utterly failed to provide AIC and this Court with sufficiently detailed information to evaluate properly their assertions of privilege. To carry their burden, Defendants must provide the reviewing court "sufficient information to allow [it] to make a reasoned determination" that the privilege applies. *Coastal States*, 617 F.2d at 861. Defendants' summary *Vaughn* index provides a rote recitation of the privilege claimed and, as discussed above, provides categorical descriptions for groups of documents. Defendants make absolutely no effort to explain why or how the privilege applies to particular documents. Specifically, they fail to provide AIC or this Court with most of the documents' issue dates, the authors and intended recipients, and references to the documents'

subject matter. Instead, Defendants provide a categorical title, a general description of the privilege, and a generalized description of the documents withheld. Typically, even providing basic information such as the issue date, the authors and intended recipients, references to the subject matter, and a parroting of the elements of the privilege is insufficient to carry Defendants' burden. *See, e.g.*, *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 584-85 (D.C. Cir. 1987) (holding that agency failed to establish applicability of Exemption (b)(5) where it generally provided "each document's issue date, its author and intended recipient, and the briefest of references to its subject matter"); *Judicial Watch*, 841 F. Supp. 2d at 154-55 (holding *Vaughn* index insufficient where it "simply parrot[ed] selected elements of the attorney-client privilege" and provided only brief, general descriptions of documents withheld); *see also Defenders of Wildlife*, 623 F. Supp. 2d at 89 (holding that the agency's *Vaughn* Index was insufficient because it did not provide specific explanations for why Exemption (b)(5) privileges applied). Here, the Defendants have provided even less information about the withheld documents, and this Court should deny their motion with respect to Exemption (b)(5) on that ground alone.

a. The Deliberative-Process Privilege Exemption

The deliberative-process privilege protects the integrity of the "decision making processes of government agencies" by protecting from disclosure certain internal communications directly related to agency decision-making. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). To justify nondisclosure under this privilege, agency communications must be both (1) predecisional and (2) deliberative. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011), *cert. denied* 132 S. Ct. 1026 (U.S. Jan. 9, 2012). "Predecisional" means that the communication is "antecedent to the adoption of an agency policy." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259 (D.D.C.

2004) (internal quotation omitted). To "approve exemption of a document as predecisional, a court must be able to pinpoint an agency decision or policy to which the document contributed," *Senate of P.R.*, 823 F.2d at 585 (internal citation and quotation omitted), or, at the least, "identify a decisionmaking process to which a document contributed," *Judicial Watch*, 297 F. Supp. 2d at 259 (internal citation omitted).

"Deliberative" means the communication "is one that is 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Id.* (internal quotation omitted). Crucially, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2009). To establish this element of the privilege, the agency must "identify the role of a contested document in a specific deliberative process." *Judicial Watch*, 297 F. Supp. 2d at 259 (internal citation omitted).

To carry its burden, an agency must provide specific information to establish each element of the privilege. "[W]here no factual support is provided for an *essential* element of the claimed privilege or shield, the label 'conclusory' is surely apt," and the agency has failed to carry its burden. *Senate of P.R.*, 823 F.2d at 585. Additionally, the deliberative-process privilege, "like all FOIA exemptions, must be construed as narrowly as consistent with efficient Government operation." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (internal citation and quotation omitted). Defendants must at the very least "establish 'what deliberative process is involved, and the role played by the documents in issue in the course of that process.'" *Senate of P.R.*, 823 F.2d at 585-86 (quotation omitted). Further, Defendants must show that each withheld document constitutes "a direct part of the deliberative process in that it

makes recommendations or expresses opinions on legal or policy matters" or "provide[s] candid or evaluative commentary." *Public Citizen*, 598 F.3d at 876.

Defendants assert the deliberative process privilege over Index Docs. # 1, 3, 4, 5, 7, 9, 10, and 11 listed above. Defendants' have failed to carry their burden as to their conclusory assertions of the deliberative-process privilege. First, the summary *Vaughn* index fails to specify how each withheld document is connected to a decision-making process. For example, Defendants withheld Index Docs. # 4, 9, and 11 and claim that these documents "were deliberative as to the next steps counsel would pursue in the case." Defs. 12-10 at 4. However, Defendants fail to identify any specific information regarding the cases or the types of decisions that were under consideration. Nor does Mr. Law's declaration provide such an explanation. *See* Law Decl. ¶¶ 37-38. In fact, because Defendants have categorically grouped documents likely related to different cases and enforcement plans together, this Court cannot even "identify [the] decisionmaking process to which [these] document[s] contributed" if one assumes they were in some way predecisional. *Judicial Watch*, 297 F. Supp. 2d at 259. To the contrary, Defendants have made any effort to identify what role (if any) these documents played in agency decision-making difficult, if not impossible. As such, Defendants have failed to satisfy the standard for withholding under the deliberative-process privilege.

Second, Defendants have not established that these documents are deliberative. A "document that does nothing more than explain an existing policy cannot be considered deliberative." *Public Citizen*, 598 F.3d at 876. Nonetheless, in asserting the deliberative-process privilege with respect to the emails, *see, e.g.*, Emails and draft discussions regarding NGO questions (Index Docs. # 3, 5, and 10), Defendants do not articulate whether these "discussions" related in any way to decisions on new or revised policies or procedures as opposed to explaining

current policies and procedures. In fact, Defendants describe emails and draft discussions regarding NGO questions as covering "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." Defs. 12-10 at 3. Based on the current description in the summary *Vaughn* index, AIC cannot discern whether these documents discuss existing policies and procedures or new ones. As such, Defendants have not established that such documents are exempt from disclosure under the deliberative-process privilege. *See Public Citizen*, 598 F.3d at 876.

b. Attorney Work-Product Protection

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

Consistent with the general principle that FOIA exemptions are narrowly construed and applied, the D.C. Circuit has emphasized repeatedly the limits of the work-product doctrine in the agency context: if agencies were allowed "to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Senate of P.R.*, 823 F.2d at 587 (internal

quotation omitted). Courts are "mindful of the fact that the prospect of future litigation touches virtually every object of a prosecutor's attention, and that the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with responsibilities for law enforcement." *Judicial Watch*, 841 F. Supp. 2d at 159 (internal quotation omitted).

Defendants assert the work-product privilege with respect to Index Docs. # 4, 10, 11, 13, and 14. Defendants contend that their attorney-work product exemptions are "textbook examples of attorney work product" that were withheld due to their creation "in contemplation of litigation, or, in most cases, in furtherance of ongoing litigation." Defs. Br. at 13. But these broad assertions, when coupled with the very limited information provided in the summary *Vaughn* index are insufficient to establish the applicability of the work-product privilege.

While an agency need not necessarily show that a document was prepared because of a particular claim or proceeding, it still must show that the document directly relates to anticipated litigation, that is, contested issues in administrative or judicial proceedings. *See Delaney, Migdail & Young, Chartered v. Internal Revenue Serv.*, 826 F.2d 124, 127 (D.C. Cir. 1987). Documents that analyze "types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome," for example, may be subject to the privilege. *Id.* Conversely, documents "containing mere neutral, objective analyses of agency regulations," setting forth the "agency's view of the law," or expressing agency policy, are not subject to the privilege, even if they relate to litigation in a general way. *See id.* (internal quotation omitted).

Here, Defendants' summary *Vaughn* index provides no explanation whatsoever of the putative applicability of the work-product privilege to Index Docs. # 4, 10, 11, 13, and 14. It merely describes these documents in general terms as discussions among ICE employees and

agency counsel or agency counsel and client. The *Vaughn* index then parrots the basic attributes of the privilege, conclusorily asserting that the documents were "drafted by attorneys in contemplation of litigation," drafted in "contemplation of legal action," or "prepared in contemplation of litigation." Defs. 12-10 at 3-4. Neither the *Vaughn* Index nor the Law declaration provides any further basis for these bare statements. *See* Law Decl. ¶ 39. Just because these documents were prepared by agency attorneys does not automatically make them work product. *See Senate of P.R.*, 823 F.2d at 587.

Likewise, there is no indication in these descriptions that litigation was anticipated or just a mere possibility. For example, Defendants assert that Index Doc. # 10 is subject to the work-product privilege, but elsewhere in the description Defendants note that these documents involved responses to questions related to NGO and existing agency policy. Defs. 12-10 at 3. This description does not show that these emails are anything other than a statement of the "agency's view of the law," and it is consequently insufficient to establish the applicability of the privilege. *Delaney*, 826 F.2d at 127; *see also Judicial Watch*, 841 F. Supp. 2d at 159 (holding that agency made insufficient showing to establish work-product privilege with respect to documents containing "discussions on litigation strategies").

As such, Defendants have failed to adequately justify that the work-product privilege is applicable to any of these documents.

c. Attorney-Client Privilege Protection

The attorney-client privilege "protects confidential communications from clients to their attorneys made for the purpose of securing legal advice," as well as "communications from attorneys to their clients if the communications rest on confidential information obtained from the client." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (internal quotation omitted).

Courts construe the privilege narrowly and recognize that it "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Coastal States*, 617 F.2d at 862-63 (quotation omitted). Importantly, when a communication originates with the attorney rather than the client, the communication will only be privileged if it is "based on confidential information provided by the client." *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (internal citation and quotation omitted).

Finally, a "fundamental prerequisite" of the attorney-client privilege is "confidentiality both at the time of the communication and maintained since." *Coastal States*, 617 F.2d at 863. Because FOIA places upon the agency the burden of establishing the applicability of an exemption, an agency cannot withhold records under the attorney-client privilege unless it offers specific support to establish each element of the privilege. *See, e.g.*, *Senate of P.R.*, 823 F.2d at 585; *see also Judicial Watch*, 841 F. Supp. 2d at 155.

Defendants assert the attorney-client privilege over Index Docs. # 3, 9, and 11, but they utterly fail to establish the necessary elements of the privilege with respect to these documents.

First, and most obviously, Defendants have failed to establish—or even allege—that these communications, which generally appear to originate with attorneys, "rest on confidential information obtained from the client." *Tax Analysts*, 117 F.3d at 618. Instead, the Defendants merely state (again, in vague and conclusory terms) that these documents consist of "employees seeking legal advice in response to a specific issue or is the analysis and recommendation of Agency counsel." Defs. Br. at 13-14. This description actually undermines Defendants' assertion of the attorney-client privilege because general communications between attorney and client—and even legal analyses and opinions on agency policies and processes—do not merit protection. *See Coastal States*, 617 F.2d at 863 (finding that the attorney-client privilege did not

apply to "neutral, objective analyses of agency regulations" that did not contain "private information concerning the agency").

Second, even if Defendants had shown that the communications rested on confidential information, they have failed to establish another essential element of the attorney-client privilege—"that the confidentiality of the communications at issue has been maintained." *Judicial Watch*, 841 F. Supp. 2d at 154 (citation omitted). Neither Defendants' brief nor its summary *Vaughn* index claims that these communications are still confidential. "FOIA places the burden on the agency to prove the applicability of a claimed privilege, and [the] Court is not free to assume that communications meet the confidentiality requirement." *Id.* (citation omitted).

Ultimately, Defendants' conclusory descriptions of the communications over which they assert the attorney-client privilege show nothing more than the bare fact of communication among attorneys and agency personnel. That is not enough to establish the applicability of the attorney-client privilege.

2. FOIA Exemption (b)(7)

Pursuant to 5 U.S.C. § 552(b)(7) ("Exemption (b)(7)"), an agency is permitted to withhold "records or information compiled for law enforcement purposes," but the extent of such withholding will depend on one of six situations. To meet the threshold requirement for withholding under Exemption (b)(7), the government must fulfill a two-part test in the D.C. Circuit. *King*, 830 F.2d at 229. First, an agency must "identify a particular individual or a particular incident as the object of its investigation and specify the connection between that individual or incident and a possible security risk or violation of federal law." *Id.* Second, an agency must show that a nexus exists and is "based on information sufficient to support at least a colorable claim of the connection's rationality." *Id.* The showing is an objective one. *Davin*, 60 F.3d at 1056.

Here, Defendants have failed to show that their Exemption (b)(7) claims meet the D.C. Circuit's two-part test. Rather, they rely on the conclusory Law Declaration, which states, "[A]ll the records responsive to Plaintiff's FOIA request were compiled for law enforcement purposes and meet the threshold requirement of FOIA Exemption (b)(7)." Law Decl. ¶ 47. Defendants' brief is no better and generally asserts that "ICE is a law enforcement agency and the records at issue were compiled for a law enforcement purpose." Defs. Br. at 17. Instead of detailing how the records qualify as "law enforcement" records, Defendants believe that their duties in law enforcement alone will be sufficient to meet the two-part test and justify the documents that they withheld. *King*, 830 F.2d at 229 (noting that FBI records were not "law enforcement records … simply by virtue of the function that the FBI serves"); *see* Law Decl. ¶ 47 ("ICE is the largest investigative arm of DHS, and is responsible for identifying and eliminating vulnerabilities within the nation's borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises.").

However, Mr. Law's failure to identify any particular individuals or particular incidents that were the object of investigation and failure to specify a connection between those and a possible security risk or violation of the law demonstrates that Defendants' assertions of Exemption (b)(7) are unfounded. *Black v. U.S. Dep't of Homeland Sec.*, 2012 WL 3155142, at *3 (D. Nev. Aug. 2, 2012) (internal quotation omitted) (determining that ICE's declaration failed to show "a rational nexus between the agency's law enforcement duties and the withheld documents"). Defendants' assertion that "[t]he records at issue in this case pertain to the access to counsel of individuals after they are in ICE custody, pursuant to the enforcement of Federal

Criminal and Immigration Laws," *see* Law Decl. ¶ 47,[15] does not satisfy the requirement that the agency explain the connection between an individual or incident and a possible security risk. The failure to satisfy the two-part test means that this Court has no basis to determine if these records were created according to Defendants' law enforcement duties and this Court should deny Defendants' motion for summary judgment for all of its assertions of Exemption (b)(7) for that reason alone.

a. FOIA Exemption (b)(7)(E)

Pursuant to 5 U.S.C. § 552(b)(7)(E) ("Exemption (b)(7)(E)"), an agency is permitted to withhold "records or information compiled for law enforcement purposes" if "such law enforcement records or information would disclose techniques or 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." Techniques that are routine and well-known to the public do not merit the exemption. *Davin*, 60 F.3d at 1064.

Here, Defendants claim that their Exemption (b)(7)(E) protects from disclosure "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." Defs. 12-10 at 1-2; *see* Index Docs. # 1 and 12. Defendants do not discuss the underlying investigations to show that they were conducted pursuant to their law enforcement duties, do not detail how the investigations were for law enforcement purposes, and do not establish a nexus between those duties and the withheld documents. *Black*, 2012 WL 3155142, at *3; *see* Law Decl. ¶¶ 53-57.

[15] Inexplicably, this assertion also narrows the scope of AIC's FOIA request – which was not limited to access to counsel following ICE's taking a person into custody. *See* Defs. 12-3.

Additionally, Defendants do not describe Exemption (b)(7)(E) for each document in individual *Vaughn* entries; instead, they apply Exemption (b)(7)(E) categorically to a number of unlisted documents entitled, "All documents containing commonly withheld techniques and procedures of law enforcement." Defs. 12-10 at 1. Thus, although AIC and this Court can identify Exemption (b)(7)(E) on the face of the document (*see, e.g.*, Index Doc. # 1), neither AIC nor this Court can determine what law enforcement technique or procedure is at issue or how this exemption applies. Rather, Defendants rely on a declaration that is vague and conclusory and a *Vaughn* index that obscures their withholdings. *Banks v. U.S. Dep't of Justice*, 813 F. Supp. 2d 132, 146 (D.D.C. 2011) ("[N]o agency can rely on a declaration written in vague terms or in a conclusory manner.") Thus, for those reasons, this Court should deny Defendants' assertion of Exemption (b)(7)(E).

C. Defendants Failed to Segregate Properly Exempt Information From Public Information.

Even if any of the above documents were subject to Defendants' exemptions, an agency must release "[a]ny reasonably segregable portion of a record…to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Public Citizen*, 598 F. 3d at 876 (noting that "factual information that does not inevitably reveal the government's deliberations" must be released even if other portions of the document are subject to Exemption (b)(5) (internal citation and quotation omitted)). In the D.C. Circuit, a document's non-exempt portions must be disclosed unless those portions "are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

Aside from the assertion that they "reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be

applied" and that "all information not exempted from disclosure … was correctly segregated and non-exempt portions released", Law Decl. ¶¶ 59-60, Defendants have offered no basis to conclude that they have released segregable, non-exempt portions of the documents. In fact, Index Doc. #15, which is not identified on the summary *Vaughn* index, only has Exemptions (b)(6) and (b)(7)(C) listed on the face of the document, but is withheld in full. Exemptions (b)(6) and (b)(7)(C) deal with invasion of privacy and involve personal information like names, medical information, and social security numbers. *See* 5 U.S.C. § 552(b)(6) (permitting 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)(7)(C) (permitting agencies to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expect to constitute an unwarranted invasion of personal privacy"); *Black*, 2012 WL 3155142, at *5 (concluding that government had not shown that disclosure of these documents would be unwarranted invasion of personal privacy); *Kubik v. U.S. Fed. Bureau of Prisons*, 2011 WL 2619538, at *11 (D. Or. July 1, 2011) (determining that even if government had shown that documents were compiled for law enforcement purposes, public interest in this information outweighed privacy interests), *subsequent determination* 2011 WL 4372188 (D. Or. Sept. 19, 2011).

Here, it seems unlikely that all portions of the documents were properly withheld. Because Defendants have not detailed the basis for applying the exemptions in their summary *Vaughn* index, it is difficult to assess whether the blanket withholdings are proper. *See Mead Data Central*, 566 F.2d at 261 (requiring Air Force to provide "a more detailed justification than the conclusory statements it has offered to date" if it determined that the non-exempt material

was not reasonably segregable). Despite Defendants' claim of a line-by-line review, this Court should determine (given the conclusory and summary nature of the *Vaughn* index and Mr. Law's declaration) that Defendants have failed to comply with FOIA's segregability requirement and asserted its exemptions too broadly.

CONCLUSION

Defendants failed to carry their burden of demonstrating that they conducted an adequate search and that the records identified in the *Vaughn* index are exempt from disclosure. Accordingly, AIC respectfully requests that the Court deny Defendants' motion to dismiss and for summary judgment.

Respectfully submitted,

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