UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Immigration Council, **Plaintiff,** **v.** **U.S. Department of Homeland Security, et al.,** **Defendants.**	**Civil Action No. 11-1971 (JEB)**

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

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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 Citizenship and Immigration Services ("USCIS") motion to dismiss and for summary judgment.

I. 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 USCIS concerning individuals' access to legal counsel during their interactions with USCIS. AIC submitted its FOIA request to USCIS on March 14, 2011. Having received no substantive response to its request for over seven months (and after filing an administrative appeal in August 2011), AIC commenced this action on November 8, 2011, seeking declaratory and injunctive relief requiring Defendants to produce documents responsive to AIC's request.

In February 2012, Defendants finally released 2,040 pages of records related to AIC's FOIA request. Although some of these records were released in full and some were released in part, the majority of the records (1,169 pages) were withheld in full.

Defendants now move for summary judgment, relying on a declaration from Ms. Jill Eggleston, the Assistant Center Director in the Freedom of Information and Privacy Act Unit, National Records Center, United States Citizenship and Immigration Services. Ms. Eggleston's declaration outlines what Defendants contend is a reasonable and adequate search for records responsive to AIC's FOIA request. This declaration, however, is deficient under D.C. Circuit case law because it describes neither the scope of the search Defendants undertook nor the search methods they employed.

Defendants also produced a *Vaughn* index that describes documents withheld and that purports to explain the applicability of certain FOIA exemptions justifying the withholding of

these documents. Defendants have construed these exemptions far too broadly, however. The *Vaughn* index affirmatively shows that many of the records Defendants have withheld are not subject to exemptions; with respect to other records, the *Vaughn* index does not adequately establish the applicability of the exemptions claimed.

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.[1]

II. ARGUMENT

A. 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

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1 Defendants also move to dismiss AIC's Administrative Procedure Act ("APA") claim. At the time of filing the complaint in this action on November 8, 2011, Defendants had not substantively responded to AIC's March 14, 2011, FOIA request nor had they responded to AIC's August 11, 2011, administrative appeal in violation of the APA. At this time, however, AIC agrees to withdraw its APA claim (Second Cause of Action).

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. 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).

B. The Court Should Deny Defendants' Motion For Summary Judgment.

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

Defendants have failed to demonstrate that their search was adequate. Ms. Eggleston's declaration is nonspecific and conclusory and therefore fails to sustain the agency's burden of proof for summary judgment. Additionally, countervailing evidence affirmatively demonstrates

that Defendants' search was inadequate. Because Defendants have not met their burden under Fed. R. Civ. P. 56, the 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).

To support a motion for summary judgment in a FOIA case, any affidavit provided by an agency must be "reasonably detailed" 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. 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). 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 needed 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 v. U.S. Customs Serv.*, 71 F.3d 885, 891 (D.C. Cir. 1995) (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 the U.S. Attorney's search because agency did not describe the search's mechanics and relied on a conclusory statement from one office that no responsive records existed), *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 the structure of the agency's file system and did not justify its decision not to search all databases), *with 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), *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 20-22, 24 (D.D.C. 2011) (finding the search adequate because detailed information was released about how and by whom the search was conducted), *and 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 the search adequate because the declaration specified what files were searched, why those files were searched, the search terms employed, and the search method used). 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).

Ms. Eggleston's declaration fails to satisfy the D.C. Circuit's standard for specificity and thus does not demonstrate that the government's search was adequate. The declaration generally explains the roles of the five offices within USCIS identified as potentially having responsive records, namely Service Center Operations ("SCOPS"); Office of Policy and Strategy ("OP&S"); Field Operations Directorate ("FOD"); Refugee, Asylum, International Operations ("RAIO"); and the Office of Chief Counsel ("OCC"). Declaration of Jill A. Eggleston ¶¶ 14-18 ("Eggleston Decl."). Ms. Eggleston states that USCIS's Significant Interest Group ("SIG") team sent staffing requests to those identified offices and requested that "each program office's staff search their records, including electronic records, for any responsive records" to AIC's FOIA request. Eggleston Decl. ¶¶ 11, 13. She also notes that if the program's offices were "aware of other office components that may have responsive records, to direct SIG staff to those offices." Eggleston Decl. ¶ 13. Ms. Eggleston's declaration states that these requests were disseminated to various components within the offices of RAIO and OCC but fails to identify these components. *See* Eggleston Decl. ¶¶ 17-18. In response, OP&S, FOD, RAIO, and OCC collectively identified and provided records to the SIG team that were responsive to AIC's FOIA requests. Eggleston Decl. ¶¶ 15-18. SCOPS, in response to USCIS's staffing request, merely responded "that it had no responsive documents." Eggleston Decl. ¶ 14.

The Eggleston declaration fails to satisfy the D.C. Circuit's specificity requirement. First, the declaration does not state that Ms. Eggleston is personally aware of the search procedures used within each office that received AIC's FOIA request or, more specifically, the actual searches performed by those offices after receipt of AIC's FOIA request. In fact, there is

nothing in the declaration to support Defendants' contention that "[e]ach agency subdivision then conducted a meticulous search for responsive records." *See* Defs.' Br. at 8.

Second, Ms. Eggleston's declaration is legally insufficient because it fails to explain why offices other than SCOPS, OP&S, FOD, RAIO, and OCC would not have responsive records. For example, Ms. Eggleston failed to explain why the Fraud Detection and National Security Directorate ("FDNS") would not have responsive documents. As noted on USCIS's publicly available website, FDNS is charged with ensuring that "immigration benefits are not granted to individuals who pose a threat to national security or public safety, or who seek to defraud our immigration system," and to accomplish this, FDNS conducts worksite investigations.[2] In a 2009 meeting between USCIS and the American Immigration Lawyers Association ("AILA"), USCIS addressed FDNS's policy with respect to contacting counsel prior to an investigation and counsel's participation during a worksite interview. Declaration of Beth Werlin ("Werlin Decl."), Ex. B. Not only did USCIS fail to turn over a publicly available document describing this discussion, *see infra* at 12, but more importantly, this document indicates that FDNS likely has additional written guidance, memoranda, manuals, or other instructions regarding access to counsel.

Third, other than noting that RAIO and OCC sent the request to their "respective components" (without identifying what the components are), Ms. Eggleston's declaration fails to provide any information regarding the system of recordkeeping, the scope of the searches undertaken by these "respective components," what files were searched and why, the search

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2 *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=66965ddca7977210VgnVCM100000082ca60aRCRD&vgnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD.

terms employed, the search methods used, who conducted the searches within each office, which components were searched, and why additional searches would have been futile.

Fourth, neither AIC nor this Court has any way of knowing whether SCOPS's service centers; FOD's regional, district, field, or field support offices; or RAIO's overseas field offices or domestic asylum offices were engaged in searching for records responsive to AIC's FOIA request.[3] SCOPS merely replied that it had no responsive documents without any further information. Eggleston Decl. ¶ 14. There is no indication of any follow-up from Ms. Eggleston or anyone else or any indication as to what search was done to determine that there were no responsive documents. FOD only stated that AIC's FOIA request "was disseminated within FOD for a search for responsive documents," Eggleston Decl. ¶ 16, but the declaration does not indicate to whom or to what other office components it was disseminated. Likewise, the declaration states that "RAIO disseminated the FOIA response to multiple internal RAIO components," Eggleston Decl. ¶ 17, but does not state to which components it was sent. This information is necessary for AIC and the Court to determine if other components should have also been included in the search.

This lack of specificity about the searches within these offices is particularly troubling given the dearth of records from the field released in February 2012. The vast majority of records Defendants identified and/or released came from USCIS leadership and headquarters offices. However, USCIS has over 150 regional and local offices nationwide and overseas, and many of these offices regularly interact with applicants for immigration benefits and their

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3 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. Citizenship and Immigration Services (USCIS), whether issued or maintained by USCIS Headquarters offices, regional offices, district offices, field offices and/or any other organizational structure." Werlin Decl. Ex. A at 1.

attorneys. Werlin Decl. at ¶ 3. As specifically noted on USCIS's website, FOD includes four regional offices, 26 district offices (providing oversight, direction and support to the field offices and field support offices), and 87 field offices and field support offices that "deliver immigration benefit services directly to applicants and petitioners."[4] Likewise, RAIO has 28 overseas field offices and eight domestic asylum offices as noted on USCIS's website.[5]

Defendants contend that they interpreted AIC's FOIA request "as seeking any internal guidance, memoranda, operational field manuals and other instructions to staff that focused on USCIS policies and procedures related to the ability of attorneys to participate during their clients' interactions with USCIS during the agency adjudication process for immigration benefits." Eggleston Decl. ¶ 11. Such an interpretation improperly narrowed AIC's request. First, the request asked for records that might fall outside the context of interactions during the "adjudication process."[6] Moreover, AIC requested not only records related to the attorney's ability to participate, but also records related to *USCIS's obligation* to notify attorneys of their intention to question their clients. Werlin Decl. Ex. A at 3 ("Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 on file of USCIS's intention to question their clients.").

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4 *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=79383f437a18a210VgnVCM100000082ca60aRCRD&vgnextchannel=79383f437a18a210VgnVCM100000082ca60aRCRD.

5 *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e88514c0cee47210VgnVCM100000082ca60aRCRD&vgnextchannel=e88514c0cee47210VgnVCM100000082ca60aRCRD.

6 AIC's request asked for records related to "interactions" and "appearances," but did not limit such interactions and appearances to those involving adjudication of applications. Werlin Decl. Ex. A, at 1.

The foregoing deficiencies undermine the sufficiency of Defendants' declaration. *See Morley*, 508 F.3d at 1122 (finding declaration insufficient to carry the agency's burden on summary judgment due to failure to provide information about search strategies, search terms used, or how the search was conducted). USCIS contends that it conducted a "meticulous search" and expended an extraordinary amount "of time and resources … compiling and reviewing all responsive documents provided to the SIG team," Defs.' Br. at 8; Eggleston Decl. ¶ 19, but saying that does not render USCIS's search adequate. 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).

USCIS's policies on access to counsel have been a longstanding concern for immigration lawyers across the country. Compl. ¶¶ 2-4. This topic has been the subject of meetings between immigration advocacy organizations and USCIS in field offices throughout the country. Werlin Decl. at ¶ 4; *see* Declaration of Matthew Farr ("Farr Declaration") at ¶¶ 2 & 4; Declaration of Elise Fialkowski ("Fialkowski Decl.") at ¶¶ 2 & 4. Defendants, however, have identified meetings between immigration advocacy organizations in only one USCIS field office despite

the fact that such meetings have occurred between the two groups in multiple field offices over the years.[7] Illustrative examples of similar meetings at other locations include:

- Orlando Liaison Meeting Minutes of December 4, 2009 between AILA and USCIS discussing whether an attorney may ask questions to an information officer.

- Philadelphia Liaison Meeting Minutes of September 29, 2010, between AILA and USCIS discussing where an attorney may sit during an interview.

Farr Decl. Ex. A at 3; Fialkowski Decl. Ex. A at 8. None of these documents were produced or identified on the *Vaughn* index. Defendants' declaration and *Vaughn* index are utterly devoid of reasons why only one office's meeting minutes were identified, whether a search of other field offices was performed, or whether any such search would be fruitless.

Further, Defendants' own website and the evidence they submitted in this case provide additional countervailing evidence. First, Defendants failed to identify a "Questions and Answers" summary from a meeting between USCIS and AILA in October 2009 that discusses the right to counsel during worksite investigations by USCIS officers and is publicly available on USCIS's website. Werlin Decl., Ex. B at pp. 10-12. Second, Defendants' *Vaughn* index indicates that USCIS withheld "draft procedures manual for reasonable fear process." Defs.' Br., Ex. H at 6 (pp. 105-106). In attempting to explain why the exemption applies, Defendants state,

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[7] Defendants' *Vaughn* index identifies meeting minutes between the American Immigration Lawyers Association ("AILA") and USCIS at the HAR location (believed to be Hartford, Connecticut). *See* Defs.' Br., Ex. H at 116-17, 119 and 122 (FOIA response pp. 1995-97, 2001-02, 2024, 2037). AIC disputes the bases for the Defendants' use of the (b)(5) exemption and contends that the Defendants' application of the (b)(5) exemption under the deliberative process privilege was unwarranted and inapplicable as fully briefed below on pages 13-24 of this brief.

"[t]his is an Agency draft document that is a draft portion of the USCIS 2003 edition of the manual for reasonable fear process. The exempted portions, totaling 2 pages, deal with agency draft proposals for instructions to staff on dealing with represented aliens during a credible/reasonable fear asylee interview." *Id.* This statement suggests that USCIS's 2003 edition of the manual for the reasonable fear process (and perhaps earlier and later editions as well) set forth its policies with respect to attorney representation during the asylum process. USCIS has failed to turn over any versions of this manual.[8]

Defendants' failure to identify and produce such documents undermines their claim to have conducted an adequate search.[9] The above countervailing evidence further bolsters AIC's 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 the failure to provide search terms and the failure to produce documents originating from the agency that turned up in related searches by other bureaus rendered the search inadequate).

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8 Under FOIA, an agency is obligated 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).

9 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, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training manuals, and studies." Werlin Decl. Ex. A at 1, n.1.

2. Defendants Have Improperly Withheld Records Under FOIA Exemption (b)(5).

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 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Id.* at 8 (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)).

Defendants withheld over 1,000 pages of documents responsive to AIC's FOIA request, in whole or in part, under 5 U.S.C. § 552(b)(5) ("Exemption (b)(5)"), which permits an agency 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).

"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), and 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.*, --- F. Supp. 2d ---, No.11-604, 2012 WL 251914, at *5 (D.D.C. Jan. 27, 2012) (quoting *Fed. Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980)). 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. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (internal quotation omitted). Conclusory claims that simply reiterate the statutory standards for exemptions are not enough to sustain a summary judgment motion. *See id.* 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).

Ms. Eggleston's declaration and Defendants' *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 the Court and AIC with sufficiently detailed information to allow proper evaluation of 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 privilege applies. *Coastal States*, 617 F.2d at 861. The majority of entries in Defendants' *Vaughn* index provide nothing but a bare description of the document withheld and a rote recitation of the privilege claimed. Defendants generally make no effort to explain why or how the privilege is applicable to particular documents. This minimal information is insufficient to carry Defendants' burden, and the Court should deny their motion with respect to Exemption (b)(5) on that ground alone. *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*, 2012 WL 251914, at *6 (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)

Although Defendants' *Vaughn* index is insufficient as a whole, AIC will focus in more detail on certain selected documents and will demonstrate that Exemption (b)(5) does not properly apply to them. AIC specifically contests the applicability of the exemption to the following documents (collectively, "Index Documents," and individually, "Index Doc. #" by number):

1. PowerPoint presentations titled "USCIS Adjudicator Interaction with Private Attorneys and Representatives," (revisions dated Oct. 2008, Dec. 2009, Jan. 2010), Defs.' Ex. H (Dkt. No. 16-7) at 1-2, 6-7, 104, 108 (FOIA response pp. 8-56, 119-218, 1923-28, 1949-54) ("PowerPoint Presentations"), withheld under attorney-client, work-product, and deliberative-process privileges.

2. Document titled "Representation of an Applicant for Admission to the U.S. as a Refugee During an Eligibility Hearing," Nov. 9, 1992, Defs.' Ex. H at 2, 13, 63 (FOIA response pp. 63-66, 470-73, 1503-04) ("Refugee Representation Memorandum"), withheld under attorney-client, work-product, and deliberative-process privileges.[10]

[10] Defendants' *Vaughn* index and brief are inconsistent in their assertions of particular privileges to this document and others. *Compare* Defs.' Ex H at 2, 13-14 (asserting work-

3. Email between USCIS staff discussing internal procedures when attorneys have double N-400 appointments, Defs.' Ex. H at 102 (FOIA response pp. 1908-15, 1916-18) ("N-400 Internal Procedures E-Mails"), withheld under work-product and deliberative-process privileges.

4. Undated interoffice memorandum from USCIS Legislative Counsel to USCIS Chief Counsel regarding contact by members of USCIS's Fraud Detection and National Security Division with individuals represented by counsel, Defs.' Ex. H at 90-91 (FOIA response pp. 1785-87, 1806-08) ("FDNS Interoffice Memorandum), withheld under deliberative-process privilege.

5. Internal USCIS policy on interviews and interview techniques, Defs.' Ex. H at 114-15 (FOIA response pp. 1987-89) ("Interview Techniques Policy"), withheld under deliberative-process privilege.

6. Policy guidance titled "Important information for applicants and petitioners know your rights—protect yourself from imposters," Defs.' Ex. at 65 (FOIA response pp. 1521-25) ("'Know Your Rights' Policy Guide"), withheld under deliberative-process privilege.

7. Emails among USCIS staff "discussing procedures to handle situations that arise when attorneys get belligerent," Defs.' Ex. H at 77 (FOIA response p. 1673), withheld under work-product and deliberative-process privileges, and "E-mail regarding

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product privilege over Refugee Representation Memorandum) *with id.* at 63-64 (asserting deliberative-process privilege over same document) *and* Defs.' Br. 22-25 (asserting all three privileges over same document). Although AIC addresses each privilege asserted, whether contained in the *Vaughn* index or the brief alone, the Court should disregard claims of privilege Defendants did not make in the *Vaughn* index. *See Simon v. Dep't of Justice*, 980 F.2d 782, 784 (D.C. Cir. 1992) (rejecting agency's "post hoc rationalization" for withholding a document, which was not cited "in its *Vaughn* index or its affidavits").

field interaction with attorneys and representatives dated 25 April between agency counsels," Defs. Ex. H at 89 (FOIA response p. 1779) (collectively, "Attorney Guidance E-Mails"), withheld under work-product and deliberative-process privileges.

8. Interoffice memorandum regarding "Access to USCIS spaces," Aug. 3, 2009, Defs.' Ex. H at 95-96 (FOIA response pp. 1849-50) ("Access to USCIS Spaces Memorandum"), withheld under deliberative-process privilege.

9. Emails among USCIS staff discussing "internal agency policies on advance parole requests," Mar. 27, 2007, Defs.' Ex. H at 98-99 (FOIA response 1894-96, 1897-99) ("Advance Parole Requests E-Mails"), withheld under work-product and deliberative-process privileges.

10. Emails among USCIS staff discussing AILA conference, Defs.' Ex. H at 99-102 (FOIA response pp. 1889-92, 1900-06) ("AILA Conference E-Mails"), withheld under deliberative-process and work-product privileges.

11. Emails among USCIS staff discussing "a situation that occurred during an AILA meeting," Mar. 5, 2008, Defs.' Ex. H at 115-16 (FOIA response pp. 1991-92) ("AILA Incident E-Mails"), withheld in part under deliberative-process and work product privileges.

12. Email among USCIS staff discussing "internal procedures regarding the reception window at a field office," Mar. 26, 2009, Defs.' Ex. H at 104 (FOIA response p. 1929) ("Field Office Reception Window E-Mails"), withheld under deliberative-process and work-product privileges.

13. Letter "given to an officer being selected to participate in the I-485 program and assigned duties," Defs.' Ex. H at 113-14 (FOIA response pp. 1981-83) ("I-485 Program Letter"), withheld under deliberative-process privilege.

14. AILA/HAR CIS Liaison Minutes of meetings held on May 27, 2009, Dec. 1, 2009, and Oct. 27, 2010, Defs.' Ex. H at 116-17, 119, 122 (FOIA response pp. 1995-97, 2001-02, 2024, 2037) ("AILA Liaison Meeting Minutes"), withheld under deliberative-process privilege.

15. Memorandum entitled "Role of Consultants in the Credible Fear Interview," dated November 14, 1997, Defs.' Ex. H at 5 (FOIA response pp. 103-04) ("Credible Fear Interview Memorandum"), withheld under deliberative process privilege.

a. Deliberative-Process Privilege

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). "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) (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). In order 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 (citing *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991)).

"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.* (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)). 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 (citing *Coastal States*, 617 F.2d at 868).

In order 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 assert the deliberative process privilege over all of the documents listed in the index above. To carry their burden of establishing the applicability of the privilege, 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 (quoting *Coastal States*, 617 F.2d at 868). Further, Defendants must show that each document withheld 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' assertions of the deliberative-process privilege are conclusory in every respect, and consequently Defendants fail to carry their burden. Defendants broadly claim in their brief that the documents withheld under the privilege are "pre-decisional and deliberative because they reflect the give-and-take of the wide array of agency communications prior to issuing the AFM and policy guidance on the role of representatives in USCIS proceedings." Defs.' Br. 25. This generic, blanket description—which purports to cover hundreds of pages of documents—is insufficient to establish the applicability of the exemption. *See, e.g.*, *Coastal States*, 617 F.2d at 861.

More specifically, the *Vaughn* index is replete with entries that fail to specify that the document withheld is connected to a decision-making process in any way. For example, Defendants withheld in full the Access to USCIS Spaces Memorandum (Index. Doc. #8). Defendants claim that this memorandum is an "[i]nternal agency memorandum for procedures on accessing internal USCIS office spaces" and that it "outlines limitations on non-agency personnel accessing USCIS office spaces." Defs.' Ex. H at 96. As described, this memorandum sets forth a local district office's policy with respect to use of its office spaces. Defendants do not aver that it is predecisional, or even that it is in any way related to a "decision." To the contrary, Defendants describe it as the local office's final policy on the matter. As such, it does not satisfy the standard for withholding under the deliberative-process privilege.

The same is true of the FDNS Interoffice Memorandum (Index Doc. #4), the Interview Techniques Policy (Index Doc. #5), the I-485 Program Letter (Index Doc. #13), and the AILA Liaison Meeting Minutes (Index Doc. #14). Defendants' description of each of these withheld

documents makes no reference to a decision under consideration, and thus Defendants fail to demonstrate that they are "predecisional." *See* Defs.' Ex. H at 90-91, 113-17, 119, 122.

Defendants also assert the privilege over numerous emails and the PowerPoint Presentations. 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, Defendants describe little more than communications "discussing" procedures and policies. *See*, *e.g.*, the N-400 Internal Procedures E-Mails (Index Doc. #3); Attorney Guidance E-Mails (Index Doc. #7); Advance Parole Requests E-Mails (Index Doc. #9); AILA Conference E-Mails (Index Doc. #10); Field Office Reception Window E-Mails (Index Doc. #12). Defendants do not articulate whether these "discussions" related in any way to decisions on new or revised policies or procedures as opposed to providing explanation of existing policies and procedures. As such, Defendants have not established that these documents are exempt from disclosure. The same is true with respect to the PowerPoint Presentations (Index Doc. #1), which Defendants describe as covering "internal practices, techniques, and procedures used by the Agency and partner agencies." *See* Defs.' Ex. H at 2, 7, 104, 108. Because this document contains a description of existing agency policies and practices and is not related to decision-making on new practices, it is neither predecisional nor deliberative. *See Public Citizen*, 598 F.3d at 876.

Defendants also claim the deliberative process privilege for a *final* policy statement—the Credible Fear Interview Memorandum (Index Doc. #15). Final policy statements, however, are by definition not predecisional, and they cannot be subject to the deliberative-process privilege. *See, e.g., id.* at 875. Defendants characterize the Credible Fear Interview Memorandum as containing "proposed" guidance that was developed prior to issuance of "formal" guidance.

Defs.' Ex. H at 5. However, AIC located on Westlaw a memorandum with the same name and date. *See* Werlin Decl. Ex. C ("Role of Consultants in Credible Fear Interview" (Nov. 14, 1997)).[11] Assuming that it is the same document, Defendants' characterization of it is plainly inaccurate. The memo specifies that it "provide[s] additional guidance on the role of consultants during the credible fear interview in the context of expedited removal;" it does not in any way suggest that this "additional guidance" is "proposed" or otherwise provisional. *See id.* at 1. Moreover, while the memorandum does explain that "further" guidance will be issued, it does not indicate that the future guidance will supplant, rather than supplement, the current guidance.[12] Because the Credible Fear Interview Memorandum itself demonstrates that it is a statement of final agency policy, Defendants should have released it in full. *See Coastal States*, 617 F.2d at 865 ("[A]n agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'").

Moreover, even where documents are subject to the deliberative-process privilege, an agency must release "those portions of predecisional and deliberative documents that contain factual information that does not inevitably reveal the government's deliberations." *Public Citizen*, 598 F. 3d at 876 (internal citation and quotation omitted). Aside from the assertion that

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11 The prior disclosure of the Credible Fear Interview Memorandum establishes an independent basis to reject Defendants' assertion that it is privileged. "[M]aterials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Because the Credible Fear Interview Memorandum is public available (on Westlaw, and presumably elsewhere), it is no longer subject to any exemption and must be released. *See id.*

12 Notably, the memorandum's characterization of its guidance as "additional" indicates that there was earlier guidance. Defendants did not produce any such earlier guidance, however, nor did they produce any subsequent guidance despite the memo's reference to further guidance to be issued "shortly."

they performed a "line-by-line examination" of the responsive documents, Eggleston Decl. at 7, Defendants have offered no basis to conclude that they have released segregable, nonexempt portions of the documents. Indeed, given that the putative line-by-line examination resulted in withholding of facially nonprivileged information, the Court should conclude that Defendants have asserted the deliberative process privilege overbroadly.

For example, the "Know Your Rights" Policy Guide (Index Doc. #6), contains factual information that is not protected. According to the *Vaughn* index, it lists "the names of attorneys that are NOT eligible to represent clients before USCIS." Defs. Ex. H at 65. Such a list comprises facts, not policy (much less pre decisional policy) and thus is not privileged.[13]

In short, according to Defendants' own descriptions, the deliberative-process privilege is facially inapplicable to all of the documents discussed above.

b. Attorney Work-Product

The work-product privilege 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

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[13] Defendants attempt to justify withholding this document under the deliberative-process privilege simply on the basis that the information in it is outdated. *See* Defs. Ex. H. at 65. Defendants cite no authority for the notion that an "outdated" document is subject to the privilege on this basis alone. Nor could they, for whether or not a document is current has nothing to do with the privilege at all.

litigation was a real possibility' at the time the document was prepared, and that this belief was "'objectively reasonable.'" *Judicial Watch*, 2012 WL 251914, at *7 (quoting *Lutheran Soc. Servs.*, 186 F.3d at 968). 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 to be narrowly construed and applied, the D.C. Circuit has repeatedly emphasized the limits of the work-product doctrine in the agency context: If agencies were permitted "'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 (quoting *Coastal States*, 617 F.2d at 865). Particularly relevant here, 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*, 2012 WL 251914, at *11 (quoting *SafeCard Servs., Inc. v. Secs. & Exch. Comm'n*, 926 F.2d 1197, 1203 (D.C.Cir. 1991)).

Defendants assert the work-product privilege with respect to the PowerPoint Presentations (Index Doc. #1), the Refugee Representation Memorandum (Index Doc. #2), the N-400 Internal Procedures E-Mails (Index Doc. #3), the Attorney Guidance E-Mails (Index Doc. 7), the Advance Parole Requests E-Mails (Index Doc. #9), the AILA Conference E-Mails (Index Doc. #10), the AILA Incident E-mails (Index Doc. #11), and the Field Office Reception Window E-Mails (Index Doc. #12). They contend generally that these documents "contain legal opinions on the development of USCIS policy and procedures for administrative hearings," and "were prepared with administrative litigation in mind." Defs.' Br. 22. But these broad assertions, and

the very limited information provided in the *Vaughn* index, are insufficient to establish the applicability of the work-product privilege.

First, Defendants' *Vaughn* index provides no explanation whatsoever of the putative applicability of the work-product privilege to the following documents: the N-400 Internal Procedures E-Mails (Index Doc. #3), the Attorney Guidance E-Mails (Index Doc. #7), the Advance Parole Requests E-Mails (Index Doc. #9), the AILA Conference E-Mails (Index Doc #10), the AILA Incident E-Mails (Index Doc. #11), and the Field Office Reception Window E-Mails (Index Doc. #12). It merely describes these documents in general terms as emails among USCIS staff and then parrots the basic attributes of the privilege. This information is facially inadequate to carry Defendants' burden. *See Senate of P.R.*, 823 F.2d at 585.

Merely asserting that documents contain "legal opinions," Defs.' Br. 22, is insufficient to establish the essential elements of the work-product privilege—that, "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*." *Lutheran Soc. Servs.*, 186 F.3d at 968 (emphasis added). 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.* (quoting *Coastal States*, 617 F.2d at 863). If the rule were otherwise, vast amounts of policy and communication within agencies that have duties related to law enforcement and litigation—such as Defendants—could be hidden from the public. The courts of this circuit have roundly rejected that possibility. *See Judicial Watch*, 2012 WL 251914, at *11.

The only documents listed above with respect to which Defendants' *Vaughn* index offers any explanation are the PowerPoint Presentations (Index Doc. #1) and the Refugee Representation Memorandum (Index Doc. #2). But the explanations Defendants offer do not establish the applicability of the work-product privilege, and indeed, Defendants' own descriptions of these documents affirmatively show that they are not privileged. Defendants describe the PowerPoint Presentations as presentations "drafted by agency attorneys used to provide internal agency training on adjudicator interactions with private attorneys and representatives." Defs.' Ex. H at 1. Thus, these documents do not purport to analyze contested issues of law with an eye toward impending litigation. Rather, they appear to serve as an instructional tool to teach USCIS adjudicators (who are by definition not litigants) about "internal practices, techniques and procedures used . . . during administrative hearings" generally. *Id.* at 2. The mere fact that these documents were prepared by agency attorneys does not subject them to the work-product privilege. *See Senate of P.R.*, 823 F.2d at 587.

Defendants' justification for withholding the Refugee Representation Memorandum is equally inadequate. Defendants describe that document as "a legal memorandum prepared by then INS General Counsel . . . regarding when a person, applying abroad for admission to the United States as a refugee, is entitled to representation at the hearing to determine the applicant's admissibility." Defs.' Ex. H at 2 (FOIA response pp. 63-66). This description does not show

that the memorandum is 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*, 2012 WL 251914 at *11 (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

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) (quoting *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984)).

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 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). Importantly, when a communication originates with the attorney rather than the client, the communication is privileged only 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*, 2012 WL 251914, at *7.

Defendants assert the attorney-client privilege over the PowerPoint Presentations (Index Doc. #1) and the Refugee Representation Memorandum (Index Doc. #2), 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, Defendants simply state (again, in vague and conclusory terms) that "[i]n these communications (emails and presentations) attorneys are conveying impressions of USCIS immigration proceedings involving represented and unrepresented individuals and developing agency policy regarding the same." Defs.' Br. 23-24. This description demonstrates that these documents are not subject to the attorney-client privilege, because general communications between attorney and client—and even legal analyses and opinions on agency policies and processes—are not protected. *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 could show that the communications at issue rest 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*, 2012 WL 251914, at *6 (citing *Coastal States*, 617 F.2d at 863). Defendants' brief contains a cursory statement that these documents contain "confidential communications," Defs.' Br. 23, but Defendants provide no citation to the *Vaughn* index and no specific context or

factual support. "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." *Judicial Watch*, 2012 WL 251914, at *6 (citing *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977)).

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.

In sum, Defendants' *Vaughn* index is baldly insufficient to allow the Court to reasonably evaluate Defendants' assertions that Exemption (b)(5) justifies their withholding over 1,000 pages of responsive documents. Moreover, Defendants have failed to carry their burden of establishing the applicability of any privilege to the specific documents discussed above. The Court should deny Defendants' motion for summary judgment.[14]

III. 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.

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[14] Defendants also move to dismiss AIC's claims for injunctive and declaratory relief only with respect to the documents Defendants released in February 2012. While claims for injunctive relief with respect to documents released in full may be moot, Defendants have not released all non-exempt material responsive to AIC's requests. Therefore, AIC's claims regarding documents withheld in full or in part and that Defendants failed to conduct an adequate search are not moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2012, a copy of the foregoing Opposition to Defendant's Motion for Summary Judgment, Memorandum of Law, Statement of Facts and Order was served upon Defendants' counsel, via the Court's Electronic Filing System, as follows:

MARIAN L. BORUM
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