UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TECHSERVE ALLIANCE, F/K/A NATIONAL ASSOCIATION OF COMPUTER CONSULTANT BUSINESSES,	)	
Plaintiff,	)	Civil Action No. 10-0353(HKK)
v.	)	
JANET NAPOLITANO SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff TechServe Alliance ("TechServe") hereby moves for summary judgment.

On March 14, 2010, TechServe brought an action against Defendants Janet Napolitano, Secretary, U.S. Department of Homeland Security and Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services ("USCIS") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, challenging USCIS's failure to respond to a FOIA request submitted almost a year earlier, on April 15, 2009. During the pendency of this litigation USCIS has produced documents, but has improperly withheld the majority of relevant documents in full. USCIS's action are contrary to "the strong policy of the FOIA [ ] that the public is entitled to know what its government is doing and why." *Public Citizen v. OMB*, 598 F.3d 865 (D.C. Cir. 2010) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)).

In support of this motion, TechServe respectfully submits the attached memorandum of points and authorities.

Dated July 26, 2010

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff TechServe Alliance ("TechServe"), respectfully submits this Memorandum of law in opposition to Defendants' motion for summary judgment and in support of its cross-motion for summary judgment.

INTRODUCTION

On January 21, 2009, President Obama issued a Presidential Memorandum noting the importance of transparency in government. "A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, 'sunlight is said to be the best of disinfectants.'" Presidential Documents, Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government (January 21, 2009) (74 Fed. Reg. 4685, January 26, 2009), *available at* http://www.whitehouse.gov/open. The Presidential Memorandum states that FOIA "should be administered with a clear presumption; in the face of

doubt, openness prevails." *Id.* Information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." *Id.* Further, "[all agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." *Id.*

On March 19, 2009, the Attorney General, reiterated these principles when he issued new FOIA guidelines for all executive agencies. *See* Attorney General, Eric Holder, "Memorandum for Heads of Executive Departments and Agencies" (March 19, 2009), available *at* http://www.justice.gov/ag/foia-memo-march2009.pdf. The Attorney General's Memorandum provides that "an agency should not withhold information simply because it may do so legally," "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption," and "encourage[s] agencies to make discretionary disclosures of information." Moreover, the Memorandum reiterates both FOIA and DHS regulations regarding FOIA requests and instructs agencies to "consider whether it can make partial disclosure" and "[e]ven if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure." *Id.*; *see also* 5 USC § 552(B); 6 CFR § 5.6(c)(3).

The D.C. Circuit also recently reaffirmed FOIA's commitment to openness:

> Finally, the documents at issue here lie at the core of what FOIA seeks to expose to public scrutiny. They explain how a powerful agency performing a central role in the functioning of the federal government carries out its responsibilities and interacts with other government agencies. As we have explained, 'the strong policy of the FOIA [is] that the public is entitled to know what its government is doing and why.'

Public Citizen v. OMB, 598 F.3d 865 (D.C. Cir. 2010) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)).

Despite the Obama Administration's commitment to openness, this brief is being filed only days after an investigation conducted by the Associated Press concluded that for at least a year, since July 2009, the Department of Homeland Security ("DHS") has detoured hundreds of FOIA requests to senior political advisors for highly unusual scrutiny and delayed disclosures deemed to politically sensitive. *See* Ted Bridis, "AP IMPACT: A political filter for info requests" (July 21, 2010), *available at* http://hosted.ap.org/dynamic/stories/U/US_ FREEDOM_OF_INFORMATION_ABRIDGED?SITE=ORROS&SECTION=HOME&TEMPLATE=DEFAULT. Recently revealed records note that DHS's delays in responding to FOIA requests were so long that the agency feared being sued for constructive denial, which is what happened in this case. This type of obfuscatory conduct should be a relic of the past.

Defendants' search and production of documents were insufficient. Nearly every document of note was withheld in full pursuant to three purported exemptions to the FOIA: 1) exemption (b)(2) regarding records that are related solely to the internal personnel rules and practices of an agency; 2) exemption (b)(5) regarding inter-agency or intra-agency memorandums or communications which would not be available by law to a party other than a party in litigation with the agency; and 3) exemption (b)(7) regarding protection of records or information for law enforcement purposes which would disclose techniques and procedures for law enforcement investigations or prosecutions.[1] The Vaughn index's boilerplate and conclusory responses fail to provide a reasoned explanation as to how the cited exemptions apply to the

[1] TechServe is not challenging the redactions of personnel information made pursuant to exemption 6.

requested information, and make it virtually impossible for TechServe to test the legitimacy of the withholdings.

The public's interest in these documents is manifest. The H-1B program, administered by the United States Citizenship and Immigration Services ("USCIS"), allows U.S. businesses to temporarily employ foreign workers, such as scientists, engineers, and computer programmers, in occupations that require expertise in specialized fields. Since 2008, USCIS has implemented new, more stringent procedures for review and processing applications. Yet, USCIS has kept secret the rules and guidelines related to the review process. Relying on these secret materials, the Administration has sought to obtain substantially more detailed information from applicants, dramatically increased the frequency of unannounced worksite inspections, and issued field guidance to agency adjudicators instructing them to issue requests for evidence ("RFE") and Notices of Intent to Deny or Revoke in cases in which an adjudicator becomes aware of potential violations or non-compliance with the H1-B program. Without disclosure of the records sought here, the public will remain uninformed as to how to comply with the government's heightened scrutiny.

Given the presumption of disclosure, Defendants' one-year delay and subsequent production of mostly blank pages during this litigation is untenable. At a minimum, FOIA compels the partial disclosure of segregable sections of the requested material. It is time for this Court to examine the documents *in camera* and to order disclosure of those as to which Defendants have not carried their burden.

Because Defendants' have failed to demonstrate that blanket secrecy is warranted, its motion for summary judgment should be rejected. Specifically, the Court should order Defendants to conduct an exhaustive search that includes documents up to April 5, 2010, release

any records that it cannot adequately show are exempt, or, alternatively, compel Defendants to support its withholdings in far greater detail (by supplemental, public declarations, more robust Vaughn indices, and *in camera* review) to allow this Court to discharge its duty to review the withholdings *de novo*.[2]

BACKGROUND

TechServe is a not-for-profit corporation under Internal Revenue Code § 501(c)(6) and is a "small entity," as that term is used in the Regulatory Flexibility Act. TechServe is a national trade association with a membership of approximately 325 U.S.-based information technology ("IT") staffing and solutions companies. The majority of its member companies are small businesses within meaning of the Small Business Act. *See e.g.,* 13 C.F.R. § 121.201 at NAICS Code 561320. TechServe member companies enter into contracts with clients to provide highly skilled IT professionals to clients that need IT services.

TechServe member companies regularly petition USCIS under the H-1B visa program. The H-1B visa program allows TechServe member companies access to highly qualified IT professionals to meet the needs of their clients. The H-1B program is critical to the businesses of TechServe members.

The Immigration and Nationality Act ("INA") § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the admission into the United States of temporary workers sought by petitioning employers to perform services in a specialty occupation. The procedures and restrictions on the admission of so-called "H-1B" workers are set forth in INA § 214, 8 U.S.C. § 1184. DHS regulations (8 C.F.R. § 214(h)) and of the Department of Labor regulations

[2] TechServe also specifically reserves the right to request discovery regarding the adequacy of the Defendants' FOIA responses to the extent Defendants are unwilling or unable to address those inadequacies through the measures described above.

(20 C.F.R. Part 655) implement this statutory authority. U.S. businesses rely on the "H-1B" program, administered by USCIS, to temporarily employ foreign workers in occupations that require expertise in specialized fields.

Following a September 2008 "H-1B Benefit Fraud & Compliance Assessment" ("BFCA") by USCIS, *see* http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf, in which a sampling of cases was allegedly found to include instances of fraud and/or technical violations in connection with the filing of H-1B petitions, USCIS adopted new, more stringent procedures for review and adjudication. The RFE became a primary vehicle by which USCIS sought to obtain substantially more detailed information from a petitioner. After the issuance of the "H-1B Benefit Fraud & Compliance Assessment," USCIS adjudicators also began to use an H-1B Petition Fraud Referral Sheet ("Fraud Referral Sheet"). USCIS has claimed that this Fraud Referral Sheet is exempt from FOIA. On April 8, 2009, USCIS published a notice in the Federal Register announcing its submission of a form entitled "Compliance Review Worksheet" to the Office of Management and Budget ("OMB") for clearance. 66 Fed. Reg. 15999 (April 8, 2009). The notice, which explained that the form would be used to record the results of on-site inspections of businesses, sought comments from the public. Yet the form itself was not attached to the notice or made available to the public for examination. Thus, this whole process has been shrouded in secrecy.

Mark B. Roberts, CEO of what was formerly known as NACCB, submitted a FOIA request on April 15, 2009, to USCIS seeking records relating to the BFCA, the fraud referral process, the Fraud Referral Sheet, and other documents relating to the H1-B visa process. *See* Exhibit A attached to the Eggleston Decl. On April 22, 2009, USCIS acknowledged receipt of the request. *See* Exhibit B attached to the Eggleston Decl. USCIS's April 22, 2009 letter made

no reference to appeal rights nor did it indicate whether or when any documents would be released to NACCB. Thus TechServe was forced to file this lawsuit on March 4, 2010, when Defendants failed to respond to TechServe's request and gave no indication to TechServe as to when it could expect to receive a substantive response.

On March 30, 2010 and April 5, 2010, USCIS produced documents to TechServe. *See* Exhibits D and F attached to the Eggleston Decl. On June 22, 2010, USCIS referred TechServe to a non-government website, www.imminfo.com, for an additional document. *See* Exhibit G attached to the Eggleston Decl. On June 24, 2010 the Department of Labor produced documents USCIS had referred to it.

ARGUMENT

I. Defendants' Search and Production Was Insufficient, and Defendants' Should Be Compelled to Supplement Their Search

According to Defendants, on April 24, 2009, Ms. Holt, a paralegal, emailed the FOIA request to various offices she determined were likely to have that relevant documents. Eggleston Decl. ¶ 15. She emailed the request to USCIS's National Security and Records Verification Directorate ("NSRV"), Service Center Operations ("SCOPS"), and the Office of Policy and Strategy ("OPS"). *Id.* NRSV determined that the Fraud Detection and National Security Division ("FDNS") would have responsive documents and forwarded the FOIA request to FDNS. *Id.* ¶ 16. On or about May 12, 2009, FDNS forwarded documents to Ms. Holt. *Id.* ¶ 17. On or about May 29, 2009, SCOPS forwarded documents to Ms. Holt. *Id.* ¶ 18. Then, almost a year later, on March 23, 2010, OPS informed Ms. Holt it did not have any responsive documents. *Id.* ¶ 23. Thus, according to Defendants, all of USCIS's responsive documents to the request were gathered by the end of May 2009. But it was not until March 22, 2010, that Defendants claim the FOIA request "came due for processing." *Id.* ¶ 23.

When the request came "due," the paralegal responsible for the response emailed the program offices to confirm that all responsive documents had been provided, and the offices responded that they did not have additional documents. *Id.* ¶ 20-28. The paralegal also advised that she did not have documents related to categories eight and nine of the request, concerning communications from the Department of Labor and Department of State "from January 1, 2000 to the present." *Id.* ¶ 20. A program office then forwarded Ms. Holt documents that were responsive to request eight, including the only post-April 15, 2009 dated documents that were produced. *See Id.* ¶ 29-31. Ms. Holt determined 48 pages were responsive and referred 42 pages to DOL. *Id.* ¶¶ 29-30.

TechServe then finally received documents pursuant to its FOIA request on March 30, 2010. USCIS produced the pages it had gathered by May 29, 2009, except for 74 pages it referred to DHS's Office of Inspector General on March 24, 2010. *Id.* ¶¶ 15-28. USCIS disclosed 1052 pages, which consisted of 286 documents in full, 71 documents in part, and 695 blank pages.

On April 5, 2010, USCIS produced 48 pages, 42 of which contained no information and stated at the top "Referred to: Department of Labor," two pages in full, three pages in part, and withheld one page. On June 24, 2010, the Department of Labor produced, in part, the 42 documents.

Defendants' production or (lack thereof) should be looked at with skepticism, as should its decision to withhold documents in full. For example, two documents (Nos. 1 and 2 on the Vaughn Index)[3] that were withheld in full under Exemption 2 and 7(e) are publicly available on

[3] It is unclear from the Vaughn Index, but document No. 19 may be the same as document No. 2 because they have the same title and are both undated.

the internet. Indeed, document No. 2 was attached to TechServe's FOIA request. *See* Exhibit A attached to the Eggleston Decl. Thus Defendants' decision to withhold these documents as pre-decisional is disingenuous and casts doubt on all of the agency's choices to withhold documents.

The spotty and insufficient search conducted by the agency is illustrated in paragraph 31 of the Eggleston Declaration. The agency was unable to find the final version of one if its own documents, "Department of Homeland Security, Office of Inspector General, Review of the USCIS Benefit Fraud Referral Process (Redacted)," April 2008, and instead pointed TechServe to a non-government website, www.imminfo.com, a website of immigration law firm, where it was available. Eggleston Decl. ¶ 31.[4]

The failure to mention or produce a document USCIS Director Mayorkas identified in a November 10, 2009 letter to Senator Charles Grassley, an October 31, 2008 guidance memorandum titled "H-1B Anti-Fraud Initiatives – Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment" (hereinafter "October 31, 2008 Memorandum"), provides an additional example of Defendants' deficient search and production. *See* AILA Infonet Doc. No. 09120161, *available at* http://www.ailanet.org. Yet, here, Defendants withheld in full both the draft and undated versions (Nos. 9-12, 27) of the document.

Moreover, other than one document, No. 22, there is a complete dearth of documents produced or identified in the Vaughn Index concerning the fraud referral process after the December 12, 2008 date of the Fraud Referral Sheet. Presumably any post-December 12, 2008 documents concerning the "fraud referral process" or post-September 2008 BCFA-related

[4] The final public version is dated April 2008. But the agency withheld the October 2007 draft version (No. 15) in full pursuant to Exemption 5, claiming it was "pre-decisional." The entire document or portions of it may no longer be pre-decisional if they were adopted in the April 2008 final version. *See* Section III below.

documents would not be pre-decisional and could be released. The lack of documents is also curious considering that the agency produced post-2008 documents, but only in response to category eight. In addition, Defendants produced no documents responsive to item IX on the FOIA request, seeking certain communications to and from the Department of State.

On its face, the search and production thus appears incomplete and spotty. Defendants should be compelled to conduct an exhaustive search for the requested documents and justify their withholdings.

Moreover, Defendants should be compelled to supplement the request. The D.C. Circuit has not adopted a bright-line rule that a FOIA request's cut off date is the date of the request. The standard in the D.C. Circuit is the reasonableness of the agency's conduct according to the particular facts of the case. *McGehee v. CIA*, 697 F.2d 1095, 1105 (D.C. Cir. 1983). A significant factor in considering the reasonableness of a cut-off date is whether the agency gives the requester notice of that date. *Id.* A cut-off date establishes the agency's obligations to identify responsive documents, and it puts the requester on notice, so that the requester may submit subsequent requests for records outside the scope of the initial request. *Id.* Limiting a search by applying a cut-off date, without providing notice of the date to the requester, renders the search unreasonable. *See id.* The significance of a date-of-search cut-off is most evident when the subject of the request is a matter involving ongoing agency activity, such that records are still being created after the request is made. Indeed, if the agency has a large backlog of pending requests, many additional records responsive to a particular request might be created before that request even reaches the front of the agency's processing queue. *Public Citizen v. Dep't of State*, 276 F.3d 634, 643-44 (D.C. Cir. 2002). At least one court has required an agency to conduct a supplemental search, using the date of that search as the cut-off date, when the

agency did not provide the FOIA requester with notice of the initial cut-off date. *Judicial Watch v. DOE*, 310 F.Supp.2d 271 (D.D.C. 2004), *aff'd in relevant part rev'd on other grounds*, 412 F.3d 125 (D.C. Cir. 2005).

Here, different program offices conducted searches for responsive documents in April-May 2009, and the documents were collected. *Id.* ¶ 15-20. Although the request was issued in April 2009, it was not until March 22, 2010, the FOIA response "came due for processing according to its approximate order of receipt and relative position in the queue." *Id.* ¶ 20. But USCIS's responsive documents had already been collected prior to the end of May 2009. *See Id.* ¶¶ 20-28. Only upon realizing that no documents had been gathered responsive to category eight did Ms. Holt obtain post-April 15, 2009 documents. *See Id.* ¶ 29-31.

The court should require USCIS to supplement its search. TechServe did not have notice as to the cut-off date, either by letter to TechServe or by agency regulation. The date of the conducted search should not be the cut-off date when an agency does not provide notice of the cut-off date and then delays production of documents until a year later. If the responsive documents that had already been found by the agency in April-May 2009 had been produced before March 2010 or if TechServe had had notice, TechServe could have followed up with supplemental requests to augment its request. Indeed, the agency itself did not have a cut-off date, and only produced fraud referral documents from before April 2009, but produced Department of Labor-related documents until and including 2010. The cut-off date of the request should be uniform within the agency for a FOIA response to be considered "reasonable." Accordingly, the Court should require USCIS to search for and produce documents prior to its last search and production on April 5, 2010.

II. Defendants Have Not Met Their Burden of Justifying Any Withholdings

President Obama affirmed that FOIA "is the most prominent expression of a profound national commitment to ensuring an open Government." Barack Obama, Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) ("disclosure, not secrecy, is the dominant objective of" FOIA"). FOIA reflects the "strong policy" that "the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v Dep't of Energy,* 617 F.2d 854, 868 (D.C. Cir. 1980). Because it was designed "to open agency action to the light of public scrutiny," *Dep't Air Force v. Rose,* 425 U.S. 352, 361 (1976) (citation omitted), FOIA requires agency records to be disclosed unless they are subject to one of the limited exemptions provided in 5 U.S.C. § 552(b). These exemptions are construed narrowly and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173 (1991). To discharge this burden, "the agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Nat'l Cable Television Ass'n, Inc. v. FCC,* 479 F.2d 183, 186 (D.C. Cir. 1973). The court gives no deference to the agency's reasoning for withholding the information and must decide *de novo* whether the exception applies. 5 U.S.C. § 552(a)(4)(B); *see also Mead Data Cent., Inc. v. U.S. Dep't of the Air Force,* 566 F.2d 242, 251 (D.C. Cir. 1977) ("[T]he agency's opinions carry no more weight than those of any other litigant in an adversarial contest before a court."). If the government does not "carry its burden of convincing the court that one of the statutory exemptions apply," the requested records must be disclosed. *Goldberg v. U.S. Dep't of State,* 818 F.2d 71, 76 (D.C. Cir. 1987).

Detailed declarations and specific Vaughn indices are essential because they force the government to analyze carefully its withholdings, permits "the trial court to fulfill its duty," and, ultimately, allows "the adversary system to operate." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) (internal quotation marks omitted). Moreover, summary judgment is inappropriate where, as here, the agency's evidentiary showing leaves material doubt about its search, segregability analysis or withholdings. *See, e.g., Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (summary judgment inappropriate when agency's insufficient evidentiary showing failed to give "reasonably detailed explanations why any withheld documents fall within an exemption").

Given the presumption of disclosure and Defendants' insufficient explanations in its Vaughn Index, Defendants have not met their burden here.

III. Defendants Submissions Are Insufficient to Support Withholding the Records Under Exemption 5

It is well-established that an agency cannot rely on the deliberative process privilege "to develop a body of 'secret law,' used by it in the discharge of its regulatory duties . . . ." *Coastal States,* 617 F.2d at 867 (explaining that an agency is not permitted to withhold records "routinely used by agency staff as guidance" and "retained and referred to as precedent" because they constitute "a body of secret law which [the agency] is actually applying in its dealings with the public but which it is attempting to protect behind a label"); *Pies v. U.S. I.R.S.,* 668 F.2d 1350, 1353 (D.C. Cir. 1981) (documents that "reflect the working law of the agency," including "statements of policies" "do not fall within the protection of Exemption 5"); *Schwartz v. IRS,* 511 F.2d 1303, 1305 (D.C. Cir. 1975) (internal memoranda are not protected "if they represent policies, statements or interpretations of law that the agency has actually adopted"); *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("The fact that [the records] are nominally non-

binding is no reason for treating them as something other than considered statements of the agency's legal position.").

Moreover, to be considered pre-decisional, the material must "precede, in temporal sequence, the 'decision' to which it relates." *General Elec. Co. v. Johnson*, 2006 WL 2616187, at *4 (D.D.C. 2006) (quoting *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998)). "Accordingly, to approve exemption of a document as pre-decisional, a court must be able to pinpoint an agency decision or policy to which the document contributed." ' *Id.*; *see also Hall v. U.S. Dept. of Justice*, 552 F.Supp.2d 23, 29 (D.D.C. 2008) ("to assert the deliberative process privilege, the agency must establish the deliberative process involved, and the role played by the documents in issue in the course of that process."); *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F.Supp.2d 252, 259 (D.D.C. 2004) (agency must "pinpoint an agency decision or policy to which the document contributed or identify a decisionmaking process to which a document contributed"); *Wilderness Society v. United States Dep't of the Interior*, 344 F.Supp.2d 1, 12 (D.D.C. 2004) (ordering disclosure because agency failed to identify a specific, final agency decision). Accordingly, the agency must describe the documents with enough specificity so that the elements of the privilege can be identified. The agency bears the burden of demonstrating the final policy or decision that was reached at the end of the particular deliberative process that the document plays into. *General Elec. Co.*, 2006 WL 2616187, at *4.

Here, it is often unclear as to what decision or policy the documents contributed. The government states that the withheld records "reflect USCIS's internal deliberations regarding the H-1B program, the Benefit Fraud and Compliance Assessment, and efforts to develop and formulate process and policy changes to be undertaken in response to the BCFA report to reduce fraud." Mot. at 16. The Vaughn Index does not delineate which documents relate to which

deliberation, or provide for more specific decisions or policies the documents contributed to other than to the "program" or to an unspecified "process and policy change" or the "fraud referral process and related mattes for the H1-B program." It is hard to discern from these descriptions whether post-decision documents are being withheld in full as pre-decisional documents. For example, documents 21 and 22 are email communications from August-December 2008 "regarding changes to the processing of fraud matters involving the H1-B program" and "the development of the new processes," but it is unclear whether those documents are being withheld as "pre-decisional" to the September BCFA, the October memorandum, the December Fraud Referral Sheet, or another policy, which would change the analysis as to whether they were pre-decisional.

In any event, if an agency "chooses expressly to adopt or incorporate by reference an intra-agency memorandum" in a final policy, that memorandum loses its Exemption 5 protection. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *see also Public Citizen v. OMB*, 598 F.3d 865 (D.C. Cir. 2010) ("although it might well be difficult to determine at what point OMB's recommendations about the suitability of a particular piece of proposed legislation have been sufficiently adopted to qualify as 'working law,' we face no such difficulty here. Documents reflecting OMB's formal or informal policy on how it carries out its responsibilities fit comfortably within the working law framework."); *Safecard Servs, Inc. v. SEC,* 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("[I]f, in explaining its collective decision, the Commission expressly adopts or incorporates any element of a Commissioner's or a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional."); *Coastal States Gas Corp.*, 617 F.2d at 866 (document ceases being exempt "if it is adopted, formally or informally, as the agency position on an issue or is

being used by the agency in its dealings with the public."). For example, even if documents like Nos. 21 and 22 were pre-decisional at the time, they should be produced because they are not "pre-decisional" now.

Thus, the documents Defendants withheld that include the agency's statement of policies or reflect the agency's adopted policies should be produced. Presumably this would include withheld documents such as the various interoffice memoranda or agency manuals and documents like the October 31, 2008 memorandum that was not released or referred to on the Vaughn Index. Even if the withheld records do contain some pre-decisional, deliberative information, that information still would not be exempt from disclosure because it was incorporated into the agency's final policy. Accordingly, draft documents and email discussions that were adopted or incorporated by reference in the September 2008 BFCA, Fraud Referral Sheet, or the October 31, 2008 Memorandum should be produced. This could include, for example, document Nos. 9-12 and 27 (relating to the October 31, 2008 Internal Guidance), Nos. 17, 21-22 (August-December 2008 emails "regarding changes to the fraud referral sheet"), and Nos. 3-5, 8 (drafts of or relating to the BFCA).

Finally, even if the records contain some information that is exempt under the deliberative process privilege that information would be segregable from other sections of the record. Under FOIA, agencies must release "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see Mead Data Cent., Inc. v. U.S. Dep't of the Air Force,* 566 F.2d 242, 260 (D.C. Cir. 1977) ("[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). An agency's conclusory assertion that it has satisfied the segregability requirement is inadequate; the agency must provide sufficient details for the district court to make a *de novo* finding on

segregability. *See Mead Data Cent., Inc. v. U.S. Dep't of the Air Force,* 566 F.2d 242, 261 (D.C. Cir. 1977); *see also Krikorian v. Dep't of State,* 984 F.2d 461, 467 (D.C. Cir. 1993).

Here, Ms. Eggleston simply stated in her declaration that Ms. Holt, a paralegal, withheld documents in full "after a line-by-line review and determination that there were no reasonably segregable portions of these documents that were appropriate for release." Eggleston. Decl. ¶ 26. This explanation is insufficient to determine whether these documents were properly withheld in full. *See, e.g., Schiller v. NLRB*, 964 F.2d 1205,1029 (D.C. Cir. 1992) (remanding case because agency failed to "correlate the claimed exemptions to particular passages in the [exempt] memos.").

IV. Defendants Submissions Are Insufficient to Support Withholding the Records Under Exemptions 2(high) and 7

Several documents were withheld in full under the "high" (b)(2) exemption which exempts from production documents that would risk circumvention of a legal requirement and exemption 7, which protects law enforcement information where disclosure "could reasonably be expected to risk circumvention of the law." Some of the information requested by TechServe and withheld in full relates to procedures used by the agency in determining whether to issue an RFE in response to a benefits application or petition. This arises primarily in the adjudicative process and is a tool to ensure that adequate documentation establishing eligibility for immigration benefits is provided. *See* 8 C.F.R. § 103.2(b)(8)(iii). The information gathered from RFEs issued will insure that benefits are only granted to applicants who are entitled to those benefits.

Although the government has an interest in avoiding fraud, an agency cannot withhold documents based on the mere claim that disclosure could result in circumvention of the law by permitting fraud to occur. *See Hawkes v. Internal Revenue Serv.*, 507 F.2d 418, 483-85 (6th Cir.

1974) (rejecting INS argument that disclosing audit manuals would enable those filing returns to commit tax fraud; disclosure would not aid in evasion of tax laws, to the contrary, disclosure could enhance a company's ability to prepare for an audit, and any tax return could still be audited). Similarly, in *Don Ray Drive-A-Way Co. v. Skinner*, 785 F. Supp. 198, 200 (D.D.C. 1992), the court rejected the Federal Highway Administration's argument that withholding safety rating information could lead to carriers being barred from certain federal programs because the release would allow circumvention of the law, reasoning that a "person should not have to guess why he is being punished…[s]hrouding a process in secrecy and thereby keeping the carriers guessing as to why, when, and where they will be banned from certain activities is not an acceptable solution…."

Here, the disclosure of the guidance will not reveal how to avoid an audit or fraud investigation. Investigations can be initiated regardless of whether a RFE is issued. Disclosure of guidance for issuance of RFEs will not help individuals avoid fraud investigations or risk circumvention of the law; indeed, release of the guidance will facilitate efficient preparation of evidence included in a petition. For example, it is clear from the face of the Fraud Referral Sheet, which Defendants withheld in full, that the information being collected on the sheet by the government cannot be used by petitioners to "tailor their immigration applications and their conduct" to circumvent the law. Information concerning the petitioner's gross annual income and number of employees, *see* Fraud Referral Sheet attached to Exhibit A to the Eggleston Decl., cannot be "tailored" to circumvent the law by the release of this document because those company characteristics are immutable.

USCIS also withheld documents concerning the development and the implementation of the new fraud referral procedures following the BCFA because they would "disclose substantial

internal practices, techniques, and procedures used by the Agency and its partner Agencies." Recently, in *Public Citizen v. OMB*, 598 F.3d 865 (D.C. Cir. 2010), the D.C. Circuit rejected a similar argument. First, to qualify for exemption 2, the documents need to relate "solely to the internal personnel rules and practices of an agency." *Id.* at 870-71 (citing § 552(b)(2)). For exemption 2 to apply, the documents would have to relate predominantly to the internal practices of USCIS itself, not of other agencies or the government as a whole. *See id.* Thus documents and memoranda (or the portions thereof) concerning practices, techniques, and procedures "used by…its partner Agencies" could not be exempt. Concerning USCIS's purely internal documents, the mere fact that the documents were intended for internal agency use and have never been circulated outside the agency cannot alone render them "predominantly internal" and protected under exemption 2. *See id.* at 817) (citing *Morley v. CIA*, 508 F.3d 1108, 1125 (D.C. Cir. 2007) ("[Exemption 2] does not shield information on the sole basis that it is designed for internal agency use.") (internal quotation marks omitted). "Otherwise, agencies could effectively avoid disclosure of any manner of information simply by stamping it 'for internal use only.'" *Id.*

Second, the D.C. Circuit found that OMB's documents did not qualify for exemption 2 protection because, like here, the agency documents had "significant external effects." *Public Citizen*, 598 F.3d at 874; *see also Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073-75 (D.C. Cir. 1981) (affirming *Jordan* and reasoning that "The guidelines on prosecutorial discretion are instructions to agency personnel (e.g., prosecutors) on how to regulate members of the public. Knowledge of those regulations may be as significant to members of the public as is knowledge of statutory sentencing provisions."); *Jordan v. United States Department of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (ordering the release of prosecutorial guidelines used by United States Attorneys because they fell outside the statutory

exemption for documents 'related solely to the internal personnel rules and practices of an agency,' and have a 'definite impact on the public.'"). Similarly, the documents at issue here would also have "significant external effects" on members of the public, and like the prosecutorial guidelines in *Jordan* would be used to adjudicate H1-B petitions and "regulate members of the public." Presumably this would include information concerning guidance and training manuals used regarding the issuance of RFEs in light of the BFCA and related memoranda.

Thus Defendants' failed to meet their burden of justifying why they have withheld this information as it is primarily an adjudicative - not law enforcement - tool, and its disclosure would not allow applicants to circumvent the law. Exemptions 2 and 7 do not permit shrouding the process in secrecy.

VI. The Court Should Review the Documents *in Camera*

TechServe urges the Court to conduct an *in camera* review of the withheld documents. *See* 5 U.S.C. § 552(a)(4)(B) (permitting *in camera* review); *Carter v. Dep't of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987) (criteria for *in camera* review is "Whether the district judge believes that an *in camera* inspection is needed in order to make a responsible de novo determination on the claims of exemption."). If the Court concludes that Defendants have met their burden of demonstrating that the withheld records contain some exempt material, TechServe requests that the Court conduct an *in camera* review of the withheld records to determine what segregable material they contain. It is highly unlikely that 659 pages of documents warrant a blanket denial.

Defendants' submissions should leave the Court in a state of unease that justifies *in camera* review. *See Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (a trial judge may

order *in camera* review "on the basis of an uneasiness or doubt he wants satisfied before he takes responsibility for a de novo determination."). Defendants have failed to produce post-2008 documents regarding the referral process, they have withheld documents in the public domain, and were unable to find a final version of one of their own documents and had to point TechServe to an immigration law firm website to find it.

Moreover, the strong public interest in this matter counsels in favor of *in camera* review. There is a "greater call for *in camera* inspection" in "cases that involve a strong public interest in disclosure." *Allen v. CIA*, 636 F.2d 1287, 1299 (D.C. Cir. 1980), *overruled on other grounds*, 721 F.2d 828 (D.C. Cir. 1983). Since Defendants possess exclusive access to the disputed records and TechServe cannot know the precise content of the documents they seek, *in camera* review by the Court constitutes the only opportunity for independent scrutiny of the subject records.

CONCLUSION

For the reasons set forth above, TechServe respectfully requests that this Court deny Defendants' motion for summary judgment and order the relief requested.

Dated July 26, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TECHSERVE ALLIANCE, F/K/A NATIONAL ASSOCIATION OF COMPUTER CONSULTANT BUSINESSES,	)	
Plaintiff,	)	Civil Action No. 10-0353(HKK)
v.	)	
JANET NAPOLITANO SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Civil Rule 7(h), Plaintiff Techserve Alliance ("Techserve"), respectfully submits this Statement of Material Facts Not in Genuine Dispute and responds to Defendants' Statement of Material Facts.

As to Defendants' Statement of Material Facts Not in Genuine Dispute, Plaintiff responds as follows:

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Disputed to the extent that Techserve has insufficient information to know whether the offices listed are the only offices where relevant documents would "reasonably likely to be located."

6. Disputed to the extent that Plaintiff has insufficient information to know whether "NSRV determined that any responsive documents would be located within FDNS because FDNS was the only division that handled immigration fraud matters."

7. Undisputed, except that Plaintiff has insufficient information to know whether Mr. Pratt contacted "relevant offices" within USCIS and FDNS and/or whether he asked for "any documentation that appropriately addressed the request."

8. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

9. Undisputed.

10. It is undisputed that OPS indicated that it did not have any records. Plaintiff has insufficient information to determine whether "Plaintiff's FOIA request fell outside of its purview, as operational matters of this nature would be handled by SCOPS and FDNS."

11. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

12. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

13. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

14. Undisputed, except for the conclusion that "there were no reasonably segregable portions of these documents that were appropriate for release."

15. Undisputed, except Plaintiff has insufficient information to determine whether "this referral [to OIG] should have been handled as a consultation."

16. It is undisputed that the Agency sent Plaintiff a letter on March 30, 2010. To clarify the Defendants' characterization, the Agency disclosed 1052 pages, which consisted of 286 documents in full, 71 documents in part, and 695 blank pages.

17. Undisputed, except to the extent that the documents are characterized as "responsive."

18. It is undisputed that only one page was withheld in full by NRC, except Plaintiff has insufficient information to confirm the "determination that there were no reasonably segregable portions of the document appropriate for release." Plaintiff also has insufficient information to determine whether the document "could be released in part." Defendants' characterization that "two pages would be released in full and three pages could be released in part," is inaccurate; one page was released in full (page 7), and four pages were released with redactions (pages 8, 19, 23, 24).

19. It is disputed that the Agency made "a release of five pages of responsive, non-exempt documents." Defendants' characterization of the release is inaccurate; the Agency released 48 pages, 42 of which contained no information and stated at the top "Referred to: Department of Labor," one page was withheld in full (page 24), one page was released in full (page 7) and four pages were released with redactions (pages 8, 19, 23, 24).

20. Undisputed, except Plaintiff has insufficient information to determine whether "the draft was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5)."

21. Undisputed.

22. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

23. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

24. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

25. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

26. Plaintiff disputes the characterization that "DOL released all 42 pages." Plaintiff received 48 pages, and most pages were only partially released.

27. Disputed to the extent that Defendants did not release all of the relevant and responsive information that Plaintiff was entitled to under the FOIA.

28. It is undisputed that the ETA at DOL is responsible for administering labor certification applications filed by U.S. employers seeking to employ foreign workers. The rest of the paragraph is immaterial.

Dated July 26, 2010

Respectfully submitted,

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