UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, Plaintiff, -v- U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	21 Civ. 2443 (JSR)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Defendant U.S. Immigration & Customs Enforcement ("Defendant" or "ICE"), by its attorney, Audrey Strauss, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This action concerns a Freedom of Information Act ("FOIA") request by plaintiff Brennan Center for Justice at New York University School of Law ("Plaintiff" or "Brennan"), for records related to five Homeland Security Investigations ("HSI") handbooks identified by Plaintiff. ICE properly responded to Plaintiff's FOIA request for these law enforcement records, searching for and releasing responsive records after redacting or withholding only information pursuant to applicable FOIA exemptions. The declaration accompanying this motion firmly establishes that ICE conducted searches reasonably calculated to locate all responsive documents. In addition, the declaration and *Vaughn* index provided by ICE provide sufficiently detailed descriptions of the withholdings for the Court to conclude that ICE properly withheld information reflecting internal deliberations and attorney-client communications protected from disclosure pursuant to FOIA exemption 5, as well as information that would divulge law enforcement sensitive techniques and procedures, protected from disclosure pursuant to FOIA exemption 7.

Thus, the Court should grant summary judgment in favor of Defendant ICE on the grounds that: (1) ICE's searches were reasonable and adequate and (2) ICE has appropriately withheld and/or redacted documents pursuant to valid and applicable FOIA exemptions.

BACKGROUND

A. Plaintiff's FOIA Request

On November 3, 2012, Plaintiff submitted a FOIA request to ICE. *See* ECF No-1-1 (the "Request"). The two-part Request sought certain HSI handbooks, as well as guidance materials pertaining to the requested handbooks:

> 1) The following HSI Special Agent Handbooks, as identified in the Index to the Special Agent Manual, in the version most recently finalized for agency use:
> a. Counterterrorism & Criminal Exploitation Investigations Handbook
> b. Human Smuggling & Trafficking Investigations Handbook
> c. Narcotics and Transnational Organized Crime Rewards Program Handbook
> d. National Security Investigations Handbook
> e. Investigative Methods Handbook. []
>
> 2) Any memoranda or training materials issued from January 21, 2017 to the date of this request that purport to explain the policies behind, or guide agents in implementation of, the documents above.

See ECF No-1-1.

B. Plaintiff's Complaint and Parties' Narrowing of the Action

On March 19, 2021, Plaintiff filed this action against ICE alleging that ICE improperly withheld records responsive to the Request. *See* ECF No. 1. On May 26, 2021, in response to the Request, ICE sent 270 pages of responsive records to Plaintiff. *See* Declaration of Fernando Pineiro ("Pinerio Decl.") ¶ 25. As a result of discussions between counsel for the parties, and as so ordered by the Court, ICE re-released 110 pages of records on August 9, 2021, with the re-release applying a discretionary waiver of certain exemptions and lifting certain withholdings. *Id.* ¶¶ 27-29. The parties then conferred further and narrowed the scope of the dispute to two issues, which are the subject of this motion: (1) the sufficiency of the search, and (2) redactions in twelve

sections of the HSI National Security Investigations Handbook, which were withheld pursuant to Exemptions (b)(5) and (b)(7)(E). *Id.* ¶¶ 5-6, 28.[1]

ARGUMENT

Summary judgment is the preferred procedural vehicle by which most FOIA claims are resolved. *N.Y. Times v. U.S. Dep't of Justice*, 101 F. Supp. 3d 310, 317 (S.D.N.Y. 2015); *see also Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) ("In resolving summary judgment motions in [] FOIA case[s], a district court proceeds primarily by affidavits in lieu of other documentary or testimonial evidence"); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).[2] Summary judgment is warranted if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The moving party bears the burden of showing that it is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmoving party, however, may not rely solely on "conclusory allegations or unsubstantiated speculation" to defeat a motion for summary judgment. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812 (footnote omitted). In this case, ICE has met its burden of establishing the reasonableness of its searches and the propriety of its claimed exemptions.

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[1] Plaintiff has stated that it is not challenging the redactions outside of those twelve sections of the HSI National Security Investigations Handbook. The *Vaughn* index therefore only addresses those identified 12 sections. *Id.* ¶ 6 n.1.

[2] Defendant has not submitted a Local Rule 56.1 statement. "The general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment, and Local Civil Rule 56.1 statements are not required." *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (internal quotations marks and alterations omitted).

I. Defendants Conducted Adequate Searches

A. Applicable Legal Standards

"In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate." *Long*, 692 F.3d at 190 (quoting *Carney*, 19 F.3d at 812. A search is judged by the efforts the agency undertook, not by its results. *See Grand Cent. P'ship*, 166 F.3d at 489. In other words, the agency must simply demonstrate that its search was "reasonably calculated to discover the requested documents." *Id.*; *see also N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 124 (2d Cir. 2014) ("The adequacy of a search is not measured by its results, but rather by its method."). The search "need not be perfect, but rather need only be reasonable," *Grand Cent. P'ship*, 166 F.3d at 489, because "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000). Provided it is properly designed, an agency's search may be reasonable even if it does not return every responsive document. *See Adamowicz v. I.R.S.*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008). "If an agency demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on this issue." *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002).

Moreover, "[t]here is no requirement that an agency search every record system." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Rather, an agency must only search those "files likely to contain responsive materials (if such records exist)." *Id.* In short, an agency is not expected to "take extraordinary measures to find the requested records, but only to conduct a search reasonably designed to identify and locate responsive documents." *Garcia*, 181 F. Supp. 2d at 368 (internal quotation marks omitted).

An agency may satisfy its burden of demonstrating an adequate search through "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search." *Carney*, 19 F.3d at 812 (footnote omitted).[3] Such declarations may be made by the individuals supervising each agency's search, rather than by each individual who participated. *Carney*, 19 F.3d at 814. Where an agency's declaration demonstrates that it has conducted a reasonable search, "the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993); *see also Carney*, 19 F.3d at 812. "[P]urely speculative claims about the existence and discoverability of other documents" are insufficient to overcome the good faith presumption. *Carney*, 19 F.3d at 813. Thus, a court may award summary judgment if the affidavits provided by the agency are "adequate on their face." *Id.* at 812.[4]

B. ICE's Searches for Responsive Records Were Reasonable and Adequate

ICE's searches were reasonable and adequate. Based on its review of Plaintiff's Request, ICE determined that HSI was the agency component reasonably likely to have responsive records.

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[3] To describe a reasonable search, a declaration should explain "the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials . . . were searched." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003) (citation and internal quotation marks omitted). The declaration need not "set forth with meticulous documentation the details of an epic search." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

[4] Based on statements made by plaintiff's counsel during an August 17, 2021 call with the Court, ICE understands that plaintiff intends to request in camera review of the twelve sections of the HSI National Security Investigations Handbook. However, *in camera* review is "the exception, not the rule," and "the propriety of such review is a matter entrusted to the district court's discretion." *Local 3, Int'l Brotherhood of Elec. Workers, AFLCIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir. 1988). "*In camera* review is appropriate where the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld. Only if the government's affidavits make it effectively impossible for the court to conduct *de novo* review of the applicability of FOIA exemptions is *in camera* review necessary." *Associated Press v. United States Dep't of Justice*, 549 F.3d 62, 67 (2d Cir. 2008) (internal citations omitted).

Pineiro Decl. ¶¶ 31, 37. Accordingly, on December 16, 2020, ICE FOIA tasked HSI to conduct a comprehensive search for records and to provide all records located during that search to the ICE FOIA Office for review and processing. Pineiro Decl. ¶ 31. An HSI Information and Disclosure Unit ("IDU") FOIA POC determined that the HSI National Program Manager ("NPM") / Supervisory Special Agent ("SSA") from the HSI Office of Policy, Planning and Records Management ("PPRM") should be tasked to conduct a search for responsive records. *Id.* ¶ 34. Based on the Request, and the NPM/SSA's knowledge of the databases and record keeping in PPRM, the NPM/SSA searched HSI Net for records responsive to the Request. HSI Net is the intranet portal that HSI uses to centralize access to information; to collaborate on projects; to organize information by divisions, offices and units; and to collect and be a central repository for all official HSI documents and policies. *Id.* ¶ 36. Specifically, NPM/SSA searched for each handbook identified in the Request, as well as for any updated versions of the handbooks and any additional responsive records and located two hundred and forty-five pages of records responsive to the Request, which were provided to the ICE FOIA Office on December 28, 2020. *Id.* ¶ 36. Those records were not produced to Plaintiff pre-suit. *Id.* ¶ 21.

Following the filing of this FOIA lawsuit and after a litigation review, it was determined that additional searches for responsive records should be conducted. The ICE FOIA Office determined that HSI should be re-tasked to conduct a search for records responsive to part 2 of the Request, if any. *Id.* ¶ 37. The HSI IDU tasked the HSI Transnational Organized Crime ("TOC") Division, National Security Investigations Division ("NSID"), and the Undercover Operations Unit ("UOU"), to conduct searches for records responsive to part 2 of the Request. *Id.* ¶ 38.

1. The TOC Search

The TOC Division has ownership of and directly utilizes and implements the HSI Human Smuggling and Trafficking Investigations Handbook ("HSTIH"), which was requested in part one

of the Request, and would be the division most likely to have any memoranda, guidance, and training materials that pertain to the HSTIH, should they exist. *Id.* ¶ 41. Upon receipt of the Request, the TOC POC tasked the Human Smuggling Unit ("HSU") and the Human Trafficking Unit ("HTU") to search for records responsive to part 2 of the Request. *Id.* Within HTU, the HTU Section Chief was tasked to perform the search. *Id.* ¶ 43. Based on the Request, and the HTU Section Chief's knowledge of the databases and record keeping in HTU, the HTU Section Chief conducted a search of his computer files and folders, as well as the HTU shared drive files and folders which are utilized in the oversight and management of the unit, utilizing the file explorer search function. Additionally, the HTU Section Chief also conducted a search of Outlook utilizing the Microsoft Outlook search function for email folders and files utilized in the oversight and management of the unit. The HTU Section Chief utilized the search term "Human Smuggling and Trafficking Handbook" to locate any responsive records to part 2 of the Request that pertained to this particular handbook. The search yielded no records responsive to the request. *Id.* ¶ 44.

The HSU is the other unit within the TOC Division most likely to have records pertaining to the HSTIH. *Id.* ¶ 44 n.12. The search was tasked to the HSU Section Chief. *Id.* ¶ 46. Based on the Request, and the HSU Section Chief's knowledge of the databases and record keeping in HSU, the HSU Section Chief conducted a manual and search function search of the HSU shared drive. The HSU Section Chief utilized the search terms "handbook" and "guidance" to locate any responsive records to part two of the Request that pertained to this particular handbook. The search yielded no records responsive to the request. *Id.* ¶ 47.

2. The NSID Search

The NSID has ownership of and directly utilizes and implements the HSI National Security Investigations Handbook ("NSIH") and the Counterterrorism and Criminal Exploitation Investigations Handbook ("CTCEIH"), two of the handbooks requested in part one of the Request,

and would be the division most likely to have memoranda, guidance, and training materials regarding the NSIH and CTCEIH, should they exist. *Id.* ¶ 49. Upon NSID's receipt of the Request, the NSID Program Manager was tasked to perform a search for records pertaining to the NSIH. *Id.* Based on the Request, and the NSID Program Manager's knowledge of the databases and record keeping in NSID, the NSID Program Manager conducted a search of the NSID shared drive, using the search function utilizing the search terms: "Handbook," "HB," "Training," "NSID Training," and "NSID Handbook" for any records responsive for part 2 of the Request that pertained to the NSIH. *Id.* ¶ 50.

The Counterterrorism and Criminal Exploitation Unit ("CTCEU") directly utilizes and implements the CTCEIH and would be the unit within the NSID most likely to have memoranda, guidance, and training materials pertaining to the CTCEIH. *Id.* ¶¶ 53. Upon CTCEU's receipt of the Request, the CTCEU Criminal Analyst was tasked to perform a search. *Id.* ¶ 52. Based on the Request, and the CTCEU Criminal Analyst's knowledge of the databases and record keeping in CTCEU, the CTCEU Criminal Analyst conducted a search of his computer files and folders, as well as the CTCEU program shared drive for records responsive to part two of the Request. The search was conducted using the search terms: "CTCEU Handbook," "Training Memo," "CTCEU Policy," and "CTCEU Guidance." *Id.* ¶ 53. The NSID and CTCEU's searches yielded fifteen pages of records responsive to part 2 of the Request. *Id.* ¶ 54.

3. The UOU Search

The UOU has ownership of and directly implements and utilizes the Narcotics and Transnational Organized Crime Rewards Program Handbook ("NTOCRPH"), one of the handbooks requested in part one of the Request, and would be the division most likely to have memoranda, guidance, and training materials pertaining to the NTOCRPH, should they exist. *Id.*

¶ 55. Upon UOU's receipt of the Request, the Section Chiefs of its two sections, the Confidential Informant and Investigative Services Section ("CIIS") and the Covert Operations and Programs Section ("COPS"), were tasked to conduct searches. *Id.* ¶ 56. Based on the Request, and the COPS Acting Section Chief's knowledge of the databases and record keeping in COPS, the COPS Acting Section Chief conducted a manual and file explorer search of files and folders created pertaining to the supervision, oversight, and management of COPS, located in his home drive. Additionally, the Acting Section Chief conducted a manual and search function search of Microsoft Outlook of subfolders created pertaining to the supervision, oversight, and management of COPS. The COPS Acting Section Chief utilized the search terms: "DoS," "NRP," "TOCRP," "Rewards Program," and "DoS Rewards Program." Additionally, the COPS Acting Section Chief also conducted a manual review of the NTOCRPH. The COPS search yielded thirteen pages of records responsive to part 2 of the Request. *Id.* ¶ 57. Based on the Request, and the CIIS Section Chief's knowledge of the databases and record keeping in CIIS, the CIIS Section Chief conducted a manual and file explorer search of files and folders created pertaining to the supervision, oversight, and management of CIIS, located in his home drive. Additionally, the Section Chief conducted a manual and search function search of Microsoft Outlook of subfolders created pertaining to the supervision, oversight, and management of CIIS. The CIIS Section Chief used the search terms: "Narcotics and Organized Crime," "NRP," "Narcotics Rewards Program," "TOCRP," "TOC Program Rewards," and "Rewards Program." The CIIS search yielded two pages of records responsive to the Request, which were duplicate of the records already identified. *Id.* ¶ 58.

4. Additional Searches Undertaken as Part of the Conferral Process with Plaintiff

Based on the inquiries made by Plaintiff regarding the twenty-one documents referenced in the handbooks provided in the May 2021 production, and without conceding that the initial searches were inadequate, in an effort to confer with Plaintiff and resolve any outstanding issues, HSI IDU was again contacted on June 28, 2021, to conduct an additional search for any updated versions of the documents that fell within the timeframe delineated in the request. *Id.* ¶¶ 26, 60. The NPM/SSA again searched HSI Net for records responsive to the Request. Specifically, the NPM/SSA searched for the twenty-one documents referenced in Plaintiff's June 25, 2021 email to determine whether there were any updated versions of the documents. No updated versions of the twenty-one documents falling within the timeframe delineated in the Request were located. *Id.* ¶ 60.

In addition to the search discussed above, the ICE Office of Policy also conducted a search, as some of the documents referenced were ICE-wide policies. Without conceding that the initial searches were inadequate, in an effort to confer with Plaintiff and resolve any outstanding issues, ICE Policy was contacted on June 28, 2021, to conduct an additional search for any updated versions of the documents that fell within the timeframe delineated in the request. *Id.* ¶ 61. More specifically, a Management and Program Analyst ("MPA") conducted a search for any updated records. *Id.* ¶ 62. Based on the MPA's knowledge of the databases and record keeping in ICE Policy, a search of the Internal ICE Policy Manual ("IPM") database was conducted. The IPM provides a natural language search engine that contains current ICE-wide management and operational policies. Based on experience and knowledge of Policy practices and activities, a search was conducted of this database as the most reasonably likely place for responsive records to be found, if any. The search of the IPM did not yield any updated versions of the ICE-wide

policies included in the twenty-one documents identified by the Plaintiff, falling within the timeframe delineated in the Request. *Id.*

Plaintiff also identified a general statement in the HSI National Security Investigations Handbook, which stated that the ICE Office of Principal Legal Advisor ("OPLA") National Security Legal Division ("NSLD") provides "trainings," as well as other assistance to HSI and ICE. *Id.* ¶ 26. Without conceding that the search for records was inadequate or that the NSLD materials would be responsive to the request, NSLD conducted a search which yielded no records responsive to the request. *Id.* ¶¶ 26, 63. Specifically, on June 30, 2021, ICE FOIA tasked NSLD to conduct a search for records responsive to part 2 of the Request. *Id.* ¶ 63. Upon receipt of the tasking, the NSLD POC tasked fourteen Associate Legal Advisors ("ALAs") within NSLD most likely to have records responsive to the Request, should they exist. *Id.* ¶ 66. Nine of the ALAs had no involvement with the subject matter of the Request and therefore a search of their records would not be reasonably calculated to uncover any relevant documents. The remaining five ALAs conducted searches for records responsive to part 2 of the request, with each ALA searching their personal computer files, and Outlook, as well as the NSLD shared drive using the following search terms: "National Security Investigations Handbook," "National Security Investigations HB," "NSI HB," "HSI HB 13-03," "HSI SA HB 13-03," "SA HB 13-03," "HB 13-03," "13-03," "Memorandum," "Memo," "Training." The search yielded no records responsive to the Request. *Id.* ¶ 66.

* * *

Based on the foregoing and as attested in the Pineiro Declaration, ICE conducted reasonable and adequate searches, and therefore its motion for summary judgment as to the sufficiency of its search should be granted.

II. ICE's Assertions of Exemptions are Justified

As reflected in the accompanying *Vaughn* index and declaration, *see* Pineiro Decl. & Exhibit 1, ICE relied on FOIA Exemptions 5 and 7(E) to withhold portions of sixteen pages across twelve sections of the HSI National Security Investigations Handbook. Specifically, ICE relied on Exemption 5 to withhold information containing internal legal guidance, considerations, recommendations and analysis of legal authorities regarding the use of National Security Letters covered under both the attorney-client and deliberative process privileges. ICE also relied on Exemption 7(E) to protect from disclosure law enforcement information regarding classified systems, internal database case codes, databases and channels utilized in national security, and categories of information included in these channels, databases and systems, as well as the interface between certain databases and other systems and databases utilized in national security investigations and how that interface occurs. These withholdings were consistent with FOIA.

"Upon request, FOIA mandates disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (citations omitted). While FOIA is intended to promote government transparency, the FOIA exemptions are "intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA thus balances "the public's right to know and the government's legitimate interest in keeping certain information confidential." *Assoc. Press v. U.S. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008) (internal quotation marks omitted).

As with the government's search for records, the factual basis for an agency's withholdings is typically put forward in declarations by agency personnel, and the court will decide questions about exemptions on motions for summary judgment. *See, e.g.*, *Carney*, 19 F.3d at 812; *Assadi v. U.S. Dep't of State*, No. 12 Civ. 1111 (LLS), 2014 WL 4704840, at *2 (S.D.N.Y. Sept. 22, 2014).

"Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812 (footnote omitted). An agency's declarations in support of its determination are "accorded a presumption of good faith." *Id.* (quotation marks omitted). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citation and internal quotation marks omitted).

A. ICE Has Properly Asserted FOIA Exemption 5

1. Legal Standard

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "'Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, [the deliberative process] privilege) are protected from disclosure under Exemption 5.'" *Tigue v. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (quoting *Grand Cent. P'ship*, 166 F.3d at 481). This exemption aims to "protect[] the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (FOIA Exemption 5 applies to documents normally privileged in the civil discovery process). As courts have repeatedly explained, the relevant harm is to the process of agency decision-making, not a harm to a particular decision, and the injury arises where officials' privileged discussions are subject to disclosure such that officials are "forced to operate in a fishbowl." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988).

Exemption 5 encompasses the attorney-client privilege. *See, e.g., Sears*, 421 U.S. at 154-155; *Tigue*, 312 F.3d at 76. The purpose of the attorney-client privilege "is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration of justice." *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (internal quotation marks omitted). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). Indeed, "the traditional rationale for the attorney-client privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law . . . be encouraged to seek out and receive fully informed legal advice." *County of Erie*, 473 F.3d at 419 (internal quotation and citation omitted). To invoke the attorney-client privilege, a party must demonstrate that there was: "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Id*.

Exemption 5 also encompasses the deliberative process privilege. An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship*, 166 F.3d at 482 (internal citations omitted). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *Sears*, 421 U.S. at 151 n.18. So long as the document was prepared to assist agency decisionmaking on a specific issue, it is predecisional. *Id.*

"A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotations omitted). In

determining whether a document is deliberative, courts inquire whether it "formed an important, if not essential, link in [the agency's] consultative process," whether it reflects the opinions of the author rather than the policy of the agency, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]." *Id.* at 483; *accord Hopkins*, 929 F.2d at 84. The privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

Legal advice, no less than other types of advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356-57 (2d Cir. 2005) (final OLC advice memorandum protected by deliberative process privilege absent express adoption).

In addition to being predecisional and deliberative, pursuant to 5 U.S.C. § 552(a)(8)(A), "[a]n agency shall [] withhold information under this section only if [] (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law."

2. Application

Here, ICE properly applied Exemption 5 to protect from disclosure one section of the HSI National Security Handbook that reflects both legal advice and internal deliberations of the government undertaken to aid in decision making. *See* Exhibit 1 (discussing Section 12.7); Pinerio Decl. ¶¶ 70-72.

As the declaration and the *Vaughn* index illustrate, the redactions are proper under the attorney client privilege. Specifically, the withheld information in Section 12.7 contains legal advice and guidance from OPLA to their clients, HSI SAs. *See* Pineiro Decl. ¶ 72 (this section of the National Security Investigations Handbook was "created as a result of, and with information

obtained through discussions between attorneys and their clients, including agency policymakers and law enforcement and/or operational personnel responsible for development and implementing policy regarding national security investigations . . . . This privilege applies to facts that are divulged to the attorney and encompass the opinion given by the attorney based upon, and thus reflecting, those facts."). More specifically, the exemption was applied to information that "discloses internal legal guidance, considerations, recommendations, and analysis of legal authorities provided by the OPLA to their clients HSI SAs regarding the appropriate process and use of National Security Letters in the course of national security investigations." *Id.* ¶ 71. Courts have routinely upheld attorney-client redactions where the *Vaughn* index and accompanying declarations contain similar information. *New York Times*, 2019 WL 2994288, at *4.

ICE also properly applied the deliberative process privilege, which protects internal deliberations of the government by exempting recommendations, analyses, and discussions undertaken to aid agency decision making. Here, Section 12.7 of the document is deliberative because it reflects internal deliberations that were undertaken to aid "HSI SAs in the determination of the appropriate use of National Security Letters, during the course of national security investigations." Pinerio Decl. ¶ 71. Specially, the information contains recommendations regarding best practices for the "appropriate process and use of National Security Letters in the course of national security investigations." *Id.* A document deliberating the best way to implement agency policy is a quintessentially deliberative document. *See Ctr. for Biological Diversity v. United States Army Corps. Of Engineers*, 405 F. Supp. 3d 127, 140 (D.D.C. 2019) (permitting withholding of document relating to "agency's approach to implement" policy measures). The need to protect internal deliberations is particularly important in situations where the decision may be the subject of public scrutiny, as would be the case relating to ICE information sharing. The

deliberative process privilege aims to "protect[] the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84. Here, the declaration, which is "accorded a presumption of good faith." *Carney*, 19 F.3d at 812 (quotation marks omitted), establishes that release would "discourage the expression of candid opinions" and result "in a chilling effect" on communications. Pinerio Decl. ¶ 71.

As courts have repeatedly explained, the relevant harm is to the process of agency decision-making, not a harm to a particular decision, and the injury arises where officials' privileged discussions are subject to disclosure such that they are "forced to operate in a fishbowl." *Wolfe*, 839 F.2d at 773. Here, such a chilling effect would impact ICE's decision-making processes and ability to have internal discussions and consultations while crafting proposals. *See New York Times Co. v. U.S. Dep't of State*, No. 19 Civ. 645 (JSR), 2019 WL 2994288, at *3 (finding reasonably foreseeable harm in relation to deliberative materials that discussed, *inter alia*, an agency's "road map of [the agency's] thinking on policy matters"); *Cause of Action Institute v. Dep't of Justice*, 330 F. Supp. 3d 336, 355 (D.D.C. 2018) (agency's declaration "explained the manner in which disclosure would stifle 'full and frank' communication," and "[n]o more is required on this front").

Therefore, the government has sufficiently demonstrated that Exemption 5 applies to these documents.

B. ICE Has Properly Asserted FOIA Exemption 7(e)

1. Legal Standard

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" where disclosure would result in one of six enumerated harms set forth in 5 U.S.C. § 552(b)(7)(A)-(F). "[T]he government has the burden of proving the existence of a compilation of information for the purpose of law enforcement." *Ferguson v. FBI*, 957 F.2d 1059,

1070 (2d Cir. 1992). To show that information is "compiled for law enforcement purposes," the government need only demonstrate a "nexus between the agency's activity . . . and its law enforcement duties." *Keys v. Dep't of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987). "Exemption 7 uses the term 'law enforcement' to describe 'the act of enforcing the law, both civil and criminal.'" *Sack v. Dep't of Def.*, 823 F.3d 687, 694 (D.C. Cir. 2016). "The term 'compiled' in exemption 7 is broad; it requires only that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption." *New York Times Co. v. United States Dep't of Just.*, 390 F. Supp. 3d 499, 514 (S.D.N.Y. 2019) (internal citation omitted).

Here, ICE withheld information under Exemption 7(E), which permits the withholding of information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The Second Circuit has interpreted Exemption 7(E) to contain "two alternative clauses," one covering "techniques and procedures," and the other addressing "guidelines." *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 680-81 (2d Cir. 2010). The first clause of Exemption 7(E) provides categorical protection to information that would disclose law enforcement "techniques and procedures," without requiring any showing of harm as a result of disclosure. 5 U.S.C. § 552(b)(7)(E).[5] "[T]he qualifying phrase ('if such

[5] Notwithstanding the lack of a need to make such a showing, courts have recognized that the risk of harm in revealing such techniques, which are "not generally known to the public," is well established. *See Bishop v. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 391 (S.D.N.Y. 2014) (noting applicability where "the disclosure of additional details could reduce . . . effectiveness" of techniques).

disclosure could reasonably be expected to risk circumvention of the law') modifies only 'guidelines' and not 'techniques and procedures.'" *Allard*, 626 F.3d at 681.

Courts "set[] a relatively low bar for the agency to justify withholding" under Exemption 7(E). *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). An agency does not have "a highly specific burden of showing how the law will be circumvented," but only must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009) (quotation marks and alterations omitted).

The phrase "techniques and procedures" refers to "how law enforcement officials go about investigating a crime," such as a decision by an investigative agency to focus on particular targets that it regards as more likely than others to commit crimes. *Allard*, 626 F.3d at 682. While Exemption 7(E) generally covers only "investigatory records that disclose investigative techniques and procedures not generally known to the public," *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985), "even commonly known procedures may be protected from disclosure if the disclosure could reduce or nullify their effectiveness." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004); *see also Bishop*, 45 F. Supp. 3d at 391. Where disclosure would reduce or nullify the effectiveness of investigative techniques and procedures, Exemption 7(E) provides "categorical protection," which means that it does not require any "demonstration of harm or balancing of interests." *Keys v. Dep't of Homeland Sec.*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (internal quotation marks omitted).

Physical and informational security are included in the scope of law enforcement techniques and procedures. *See, e.g.*, *Ford v. DOJ*, 208 F. Supp. 3d 237, 253-54 (D.D.C. 2016) (protecting information concerning the FBI's IT systems as well as information concerning

location of surveillance cameras protecting banks from on-site criminal activity). Courts have upheld the use of Exemption 7(E) to justify the withholding of law enforcement sensitive codes, numbers, and internal URLs. *See, e.g.*, *Bishop*, 45 F. Supp. 3d at 388-89 (reasoning that redaction was proper because a "motivated individual" could decipher the true import of the coded information if sufficient exemplars were made public through FOIA, and collecting cases similarly applying Exemption 7(E)); *Rojas-Vega v. United States Immig. & Customs Enf't*, 302 F. Supp. 3d 300, 310 (D.D.C. 2018) (holding that Defendant properly invoked 7(E) for "internal URLs, case numbers, case categories, subject identification numbers, case identification numbers, and internal identifying codes and departure statuses"); *Parker v. U.S. Immig. & Customs Enf't*, 238 F. Supp. 3d 89, 100 (D.D.C. 2017) (holding that disclosure of "sensitive database and event codes, identification numbers, law enforcement systems URLs, internal website links, record identification numbers, event numbers, category codes, TECS codes, method codes, file numbers, . . . status codes, internal agency codes, case numbers, program codes, and system codes" "could reasonably be expected to create a risk of circumvention by revealing how ICE's databases work and rendering them more vulnerable to manipulation").

2. Application

On its face, Plaintiff's Request leaves little doubt that the "law enforcement purpose" threshold for the (b)(7) exemptions is met. The Secretary of Homeland Security is charged with the administrative and enforcement of laws relating to the immigration and naturalization of aliens, subject to certain exceptions. Pineiro Decl. ¶ 76; 8 U.S.C. § 1103. ICE is the largest investigative arm of the DHS and is responsible for enforcing the nation's immigration laws, and identifying and eliminating vulnerabilities within the nation's borders. Pineiro Decl. ¶ 74. The records and information at issue in this case arise from HSI, an ICE directorate with a law enforcement missions. *Id.* ¶¶ 31, 75-76. HSI uses its legal authority to investigate issues such as immigration

crime, human rights violations and human smuggling, smuggling of narcotics, weapons and other types of contraband, and financial crimes, cybercrime and export enforcement issue. *Id.* ¶ 76. The records and information located in response to the Request pertain to the investigations conducted pursuant to DHS's law enforcement authorities. *Id.* Therefore, the records and information located in response to the Request were compiled for law enforcement purposes and meet the threshold requirement of FOIA Exemption 7. *Id.*

ICE properly applied Exemption 7(E) to portions of twelve sections of the HSI National Security Handbook to protect from disclosure law enforcement sensitive information relating to classified systems, internal database case codes, databases and channels utilized in national security investigations, and the interface between certain databases and other systems and databases utilized in national security investigation. *See* Pinerio Decl. ¶¶ 77-101, Decl. Exhibit 1. In this case, the Pinerio Declaration establishes that the release of this redacted information could "reveal techniques and/or procedures for law enforcement investigations or prosecutions or disclose guidelines for law enforcement investigations or prosecutions which could reasonably be expected to risk circumvention of the law." Pinerio Decl. ¶ 78. Furthermore, the disclosure of this information could assist third parties to navigate, alter, and/or manipulate law enforcement databases were they to gain access to the system by providing specifics of how and where information can be accessed. *Id.* ¶ 79. ICE has determined that the withheld information, which is used for the purpose of indexing, storing, locating, and retrieving law enforcement sensitive and classified information, is not commonly known. *Id.* Release of this information could also be used to decipher the meaning of codes, navigate within the law enforcement system, and compromise the integrity of the data either by allowing for the deletion or alteration of information, thus placing law enforcement officers and the public at risk. *Id.* If the information were disclosed,

it would risk interference with national security investigations, as the knowledge of where information is located and how to navigate through the databases, channels, and systems would potentially allow bad actors to wrongfully get into these systems and learn specifics regarding individual national security investigations. *Id.* Disclosure could assist those seeking to violate or circumvent the law by taking proactive steps to counter operational and investigative actions taken by ICE during enforcement operations, potentially interfering with ongoing ICE investigations and operations. *Id.* Meanwhile, disclosure of this information, which is not readily known by the public, would also serve no public benefit and would not assist the public in understanding how the agency is executing its statutory responsibilities. *Id*.

Additionally, Exemption (b)(7)(E) was applied to information regarding how HSI SAs gather intelligence relating to national security investigations, specific investigatory techniques and steps, how classified information is further used and disseminated between law enforcement agencies, and the process for doing so, including database navigation information, interface between different databases, as well as how this process benefits law enforcement in highly classified reporting and investigations. *Id.* ¶ 81. The information, which contains specifics on the categories of information included in the databases, as well as how navigation within and between these databases occurs, is not commonly known. *Id*. Disclosure of this information could assist third parties to navigate, alter, and/or manipulate law enforcement databases were they to gain access to the system, by providing specifics of how and where information can be accessed. *Id.* ¶ 82. Should the information be disclosed, it would risk interference with national security investigations, as the knowledge of where information is located and how to navigate through the databases would potentially allow bad actors to wrongfully get into these systems and learn specifics regarding individual national security investigations. *Id.*

These twelve sections of the NSIH also contain enforcement techniques and guidelines that are not known to the public. *See e.g.*, *id.* ¶ 84 (Exemption (b)(7)(E) was applied to information regarding when and why HSI SAs should contact the U.S. Attorney's Office regarding the appropriate method of documenting investigatory reports, the release of which could reveal techniques and/or procedures for law enforcement investigations or prosecutions or disclose guidelines for law enforcement investigations or prosecutions which could reasonably be expected to risk circumvention of the law), ¶ 90 (Exemption (b)(7)(E) was applied to information that discloses the specific guidance, investigatory processes, investigatory considerations, techniques, and steps that HSI SAs will utilize when initiating a national security investigation, as well as internal database codes, databases utilized, and the interface between these databases). As the Pinerio Declaration establishes, the information includes specific categories of information contained in certain classified and non-classified platforms, and how it can be accessed during the course of national security investigations. *Id.* ¶¶ 84, 91. Disclosure of these techniques and practices in navigating the databases and what information is located within these databases, could assist bad actors seeking to violate or circumvent the law by taking proactive steps to counter operational and investigative actions taken by ICE during enforcement operations, as the information includes specifics on how HSI SAs document certain events and investigatory activity, including case specific events, and subject and/or target information in the national security investigatory process, as well as considerations regarding AUSA input on the appropriate methods of documenting investigatory reports, which are not commonly known. *Id.* ¶ 86.

Courts have found that requiring the production of this type of information, such as internal database codes, would plainly "disclose . . . procedures for law enforcement investigations." *Bishop*, 45 F. Supp. 3d at 389 (citing cases, and noting that "when faced with similar factual

scenarios, courts have regularly found redactions of this nature to be proper under Exemption 7(E).”). Like in *Bishop* and the cases cited therein, the government has sufficiently demonstrated that Exemption 7(E) applies to the twelve sections of the HSI National Security Handbook.

III. ICE Disclosed All Reasonably Segregable Material

FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). With respect to this requirement, an agency is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quotation marks omitted). Here, there is no basis to disturb the presumption that ICE has disclosed all reasonably segregable material in the documents at issue. ICE’s declarant explained that a “line-by- review was conducted to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied,” and with respect to the records that were released in part, “all information not exempted from disclosure pursuant to the FOIA exemptions specified above was correctly segregated and non-exempt portions were released.” Pinerio Decl. ¶¶ 103-04. The Court should conclude that ICE complied with its duty to disclose reasonably segregable material.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of ICE.

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