UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, Plaintiff, - against - U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	Case No. 21-cv 02443

PLAINTIFF BRENNAN CENTER FOR JUSTICE'S MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Brennan Center for Justice at New York University School of Law ("Brennan Center" or "Plaintiff"), by and through its undersigned attorneys, respectfully submits this memorandum of law in support of its cross-motion for summary judgment against Defendant U.S. Immigration and Customs Enforcement ("ICE" or "Defendant"). It also submits this memorandum in opposition to ICE's motion for summary judgment.[1]

I. PRELIMINARY STATEMENT

This Freedom of Information Act ("FOIA") lawsuit challenges the withholding by Defendant ICE of 15 pages from the Homeland Security Investigations ("HSI") *National Security Investigations Handbook* (the "*NSI Handbook*") responsive to a request submitted by Plaintiff (the "Request"). These improper withholdings were made pursuant to FOIA Exemptions (b)(5) ("Exemption 5") and (b)(7)(E) ("Exemption 7(E)"). Plaintiff also challenges the inadequate searches run by ICE in response to Part 2 of the Request ("Part 2"), for trainings or memoranda that explain or purport to explain the policies behind four HSI handbooks.[2]

These Handbooks provide "a uniform source of national policies, procedures, responsibilities, guidelines, and controls to be followed" by HSI special agents in the particular area of focus. In other words, the policies and practices contained in the HSI Handbooks outline the limits on how HSI may leverage its power in pursuing its broad mandate. The HSI Handbooks, memoranda, and training material sought by the Request are essential for public oversight of an investigative agency with a wide-ranging mandate and a checkered history when it comes to the rights of the public.

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[1] This memorandum does not purport to represent the position, if any, of New York University School of Law.

[2] These are: the *NSI Handbook, Counterterrorism & Criminal Exploitation Investigations Handbook, Human Smuggling & Trafficking Investigations Handbook, and the Narcotics and Transnational Organized Crime Rewards Program Handbook* (collectively, the "HSI Handbooks" or "Handbooks").

Plaintiff has diligently reviewed the materials and narrowed the issues for challenge in this case to the most critical. *First*, Plaintiff challenges the inadequate searches run by ICE in response to Part 2. These searches were unreasonably narrowed by ICE's artificially strained reading of Part 2. Although Plaintiff alerted Defendant to this fact, ICE refused to run further searches. *Second*, neither the deliberative process privilege nor the attorney-client privilege applies to Section 12.7 of the *NSI Handbook* under Exemption 5, because, as a statement of final policy, the redacted material is not predecisional, it is the agency's working law, and because there are no indications that the information was made or maintained in confidentiality. *Third*, Exemption 7(E) does not apply to the contested redactions in the *NSI Handbook*, because the *NSI Handbook* constitutes guidelines and ICE's boilerplate assertions that disclosure would create a risk of circumvention of law are insufficient to justify their withholdings. *Finally*, because there are only 15 pages from a single handbook at issue, *in camera* review is an efficient and cost-effective way to address this matter.

II. FACTUAL & PROCEDURAL BACKGROUND

A. Brennan Center's FOIA Request

On November 3, 2020, Plaintiff Brennan Center submitted a FOIA request to ICE. *See* Declaration of Rachel Levinson-Waldman in Support of Plaintiff's Motion for Summary Judgment ("Levinson-Waldman Decl."), Ex. A. The Request sought certain HSI handbooks (collectively, the "HSI Handbooks" or "Handbooks") along with materials that explained or implemented the policies contained in the HSI 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.

Id. For HSI programs, these Handbooks provide "a single source of national policies, procedures, responsibilities, guidelines, and controls to be followed" by HSI special agents ("SAs"). *See* Declaration of Mary Pat Dwyer in Support of Plaintiff's Motion for Summary Judgment ("Dwyer Decl.") Exs. A & B (collecting Handbook forewords). These Handbooks are developed by the HSI Policy Unit, which is "responsible for coordinating the development and issuance of HSI Policy." *See id.* Each of these Handbooks sets forth critical final policies and guidance that act as guardrails on HSI conduct. Dwyer Decl. ¶ 4.

The HSI Handbooks, memoranda, and training material sought by the Request are essential for ensuring transparency of the conduct of an investigative agency with an expansive mandate and a historically questionable approach to the rights of citizens and non-citizens. *Id.* The policies and practices contained in the HSI handbooks outline how HSI may leverage techniques in pursuing its broad mandate. *Id.* How HSI policy permits SAs to pursue investigations implicates the rights of Americans. *Id.* Thus, this information is of the highest order of importance for government transparency and public interest. *Id.*

B. Procedural Background

On December 16, 2020, ICE acknowledged the November 3, 2020 receipt of the Request. *See* Declaration of Nimra H. Azmi in Support of Plaintiff's Motion for Summary Judgment ("Azmi Decl.") ¶ 3, Ex. A. ICE failed to timely issue a determination or release productions. *Id.* ¶ 4.

Plaintiff sued on March 19, 2021, alleging that ICE's unlawful withholding of documents responsive to the Request violated FOIA. *See id.* ¶ 5; ECF No. 1. On April 12, 2021, this Court ordered ICE to release its production by July 15, 2021. *See* ECF No. 13; Azmi Decl. ¶ 6.

On May 28, 2021, ICE issued its first "final response" to Plaintiff's Request. ICE withheld 189 pages in part under Exemption 5 and Exemption 7(E); it withheld one page in full pursuant to Exemption 7(E); and released 80 pages in full. *See* Azmi Decl., Ex. B. On June 25, 2021, Plaintiff's counsel sent an email to ICE delineating "places throughout the production where the exemptions are overbroad or where, potentially, the search has been under-inclusive." *See id.* ¶ 8; Ex. C. Plaintiff alerted ICE that there were additional areas of information to which it was entitled and redactions it contested. *Id.* Plaintiff requested a *Vaughn* Index to review the appropriateness of the redactions. *Id.* On July 2, 2021, ICE refused to provide a *Vaughn* Index. *Id.* On July 15, 2021, Plaintiff sent ICE a copy of an HSI training related to human trafficking. *See id.* ¶ 9; Ex. D. This training, which was not earlier produced, illustrated that ICE's search for documents responsive to the second part of the Request ("Part 2") had not been reasonably designed to capture all responsive documents. Dwyer Decl. ¶ 27.

At a July 16, 2021 conference, this Court ordered ICE to release its final production by August 9, 2021. Azmi Decl. ¶ 11. On an August 5 telephone call, ICE's counsel reported that ICE had construed Part 2 as seeking only memoranda or training materials that *directly* referenced the Handbooks requested in Part 1 and had run its searches accordingly. *Id.* ¶ 12. Plaintiff's counsel informed ICE that this was an artificially constrained reading of the Request. *Id.* ICE's counsel confirmed that the agency would not run the requested broader search. *Id.*

On August 9, 2021, ICE sent its second "final response" to Plaintiff's Request. *Id.* ¶ 13; Ex. E. ICE had reprocessed 110 responsive pages and lifted certain withholdings. *Id.* ICE fully released 32 pages and withheld 78 pages pursuant to FOIA Exemptions 5 and 7(E). *Id.*

On August 13, after review of the re-released production, Plaintiff's counsel asked whether ICE would run the search again pursuant to how Plaintiff intended, drafted, and construed Part 2.

Id. ¶ 14; Ex. F. ICE's counsel replied, "ICE is not willing to run any additional searches at this time – ICE's position is that they searched for materials that directly related to the handbooks requested, which is what you asked for." *Id.* On August 16, Plaintiff's counsel informed ICE of the narrow subset of redactions from the *NSI Handbook* that it intended to challenge and encouraged ICE to reconsider its redactions. *Id.* ¶ 15. ICE did not do so. *Id.*

Plaintiff now challenges ICE's inadequate search and its Exemption 5 and 7(E) redactions across 15 pages of the *NSI Handbook*. *See* Azmi Decl. ¶ 16; Ex. H (collecting pages).

III. ARGUMENT

ICE failed to fulfill its obligations under FOIA because it ran inadequate searches in response to Part 2 of the Request and applied Exemptions 5 and 7(E) inappropriately to redactions in the *NSI Handbook*. Accordingly, ICE's Motion for Summary Judgment, ECF No. 16 ("Def.'s MSJ"), should be denied and Plaintiff's Cross-Motion should be granted.

A. Legal Standard

The core purpose of FOIA is to "promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (citation and internal quotation marks omitted). FOIA "strongly favors a policy of disclosure" and mandates that the government release "records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). As the Second Circuit has found, FOIA "adopts as its most basic premise a policy strongly favoring . . . disclosure of information in the possession of federal agencies." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999). An agency has a "duty to construe . . . FOIA request[s] liberally." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In keeping with FOIA's goal of advancing open government and acting as an antidote

to corruption, FOIA exemptions must be narrowly construed, with all doubt resolved in favor of disclosure. *See also Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

An agency decision to withhold documents under FOIA receives no deference and district courts review such decisions *de novo*. *See id.* at 147. The defending agency bears the burden of demonstrating that any withheld records are exempt from disclosure and that it conducted an adequate search for responsive records. *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). An agency is obliged to show with "reasonable specificity" that withheld information falls within a FOIA exemption; conclusory or speculative assertions are insufficient. *Halpern*, 181 F.3d at 293. An agency affidavit only receives a good faith presumption if it is detailed and nonconclusory. *See, e.g.*, *id.* at 295. Summary judgment will be granted if the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See Freedom of Press Found. v. Dep't of Justice*, 493 F. Supp. 3d 251, 259 (S.D.N.Y. 2020) (quoting Fed. R. Civ. P. 56(a)).

Summary judgment for an agency should not be granted "where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory." *Nat'l Day Laborer Org. Network v. U.S. ICE*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012) (internal quotation marks omitted). A plaintiff can defeat an agency's summary judgment by raising "tangible evidence" that the agency's search was incomplete. *Carney*, 19 F.3d at 812. A district court that deems a FOIA search inadequate may direct the defendant agency to conduct additional searches. *See, e.g.*, *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 112.

B. Because ICE's Construction of Part 2 of the Request Was Artificially Narrow, Its Search Was Inadequate.

Because ICE artificially restricted its searches for documents responsive to Part 2 of the Request to trainings and memoranda that specifically referenced one of the handbooks mentioned in Part 1 along with other, limiting terms, ICE's searches were inappropriately narrow and therefore inadequate. *See* Dwyer Decl. ¶¶ 25-27; Levinson-Waldman Decl. ¶ 7. Informed that its search misconstrued and narrowed Plaintiff's request, ICE refused twice to conduct a further search. Azmi Decl. ¶¶ 12, 14. As such, ICE should be ordered to conduct new searches in line with how Plaintiff drafted Part 2.

To meet its summary judgment obligations, an agency's declaration "must describe a search that was 'reasonably calculated to discover requested documents.'" *Immigrant Def. Project v. U.S. ICE*, 208 F. Supp. 3d 520, 526-27 (S.D.N.Y. 2016) (quoting *Grand Cent. P'ship*, 166 F.3d at 489). The agency must "construe FOIA requests liberally." The agency must also show that its search was "reasonably calculated to uncover all relevant documents." *Bloomberg L.P.*, 649 F. Supp. 2d at 271. At a minimum, an agency needs to present evidence that it has searched all files "likely to contain relevant documents." *Selgjekaj v. Exec. Off. for United States Att'ys*, No. 20-cv-2145 (CRC), 2021 WL 3472437, at *3 (D.D.C. Aug. 6, 2021). Failure to do so creates an issue of material fact as to the search's adequacy. *Id.* (internal citations removed).

ICE failed to run adequate searches since its searches for documents responsive to Part 2 used search terms designed to capture only documents that referenced the Handbooks directly or contained other similarly narrow phrases like "CTCEU Guidance". *See, e.g.*, Declaration of Fernando Pineiro in Support of ICE's Motion for Summary Judgment, ECF No. 17 ("Pineiro Decl.") ¶ 53. *See also* Azmi Decl., Ex. F (email from ICE's counsel stating, "ICE's position is that they searched for materials that directly related to the handbooks requested, which is what you

asked for."). Here, Plaintiff drafted Part 2 to seek materials that explained or implemented the policies contained *in* the Handbooks, but did not limit its Request to materials explicitly mentioning the Handbooks. Levinson-Waldman Decl. ¶ 7. But as the Pineiro Declaration demonstrates, ICE construed Part 2 too narrowly. The search by the Section Chief of the Human Smuggling Unit was limited to documents that mentioned the handbook by name or contained the phrase "handbook" and "guidance" (and yet, oddly, not even "training" or "guideline"). Pineiro Decl. ¶ 47.[3] The searches for materials providing training on or implementing the NSI Handbook too mostly consisted of terms explicitly referencing the NSI Handbook. Pineiro Decl. ¶ 50, 66. For the Office of Principal Legal Advisor's ("OPLA") search, the Pineiro Declaration asserts that a search for terms that included "Memorandum," "Memo," and "Training" "yielded no records responsive to the Request." *Id.* ¶ 66. The Pineiro Declaration does not state whether the search yielded any records nor how ICE determined which records were responsive. Moreover, these results lead to the somewhat absurd conclusion that HSI simply does not train its special agents about the topics covered in the NSI Handbook.

These searches inappropriately restricted Part 2 to documents that explicitly referenced relatively narrow phrases like "handbook" or "guidance". *See, e.g.*, Pineiro Decl. ¶¶ 47, 50, 66. Even where ICE ran broader searches, it did so in limited locations unlikely to house most responsive documents. *See* Pineiro Decl. ¶¶ 57-58 (describing running searches solely in the Outlook and home drives of two employees). Thus, ICE restricted its search in a manner not reflective of the intent or drafting of the Request. *See* Levinson-Waldman Decl. ¶ 7. An agency

[3] The search run by the Human Trafficking Unit utilized one term: "Human Smuggling and Trafficking Handbook." Pineiro Decl. ¶ 44. The search for trainings and memoranda explaining the Counterterrorism and Criminal Exploitation Investigations Handbook ("CTCEIH"), were likewise narrow, with the following terms used: "CTCEU Handbook," "Training Memo," "CTCEU Policy," and "CTCEU Guidance." Pineiro Decl. ¶ 53.

must read a request "as drafted, not as either agency officials or [the requester] might wish it was drafted." *ACLU v. U.S. Dep't of Justice*, 90 F. Supp. 3d 201, 214 (S.D.N.Y. 2015) (quoting *Miller v. CIA*, 730 F.2d 773, 776-77 (D.C. Cir. 1984)).

Courts have regularly found that these kinds of restrictions, self-imposed by an agency, can render its searches inadequate. For example, in *ACLU v. U.S. Dep't of Justice*, the court held that where plaintiff's FOIA request sought records "addressing or interpreting," but defendant Department of Justice searched only for records "governing," defendant DOJ had improperly limited its search. 90 F. Supp. 3d at 214 (ordering defendant "to conduct a new search that comports with the actual terms…of the ACLU's request"). Similarly here, ICE claimed that Part 2 of Plaintiff's Request was limited by Part 1, and read into Part 2 a requirement that it explicitly reference phrases associated with the titles of Handbooks in Part 1. *See* Azmi Decl. ¶ 14. ICE's improperly limited reading is contrary to its FOIA obligations.

Even if it can be argued that ICE's reading of Part 2 was potentially reasonable, ICE is still duty-bound to construe the Request liberally. In *Conservation Force v. Ashe*, 979 F. Supp. 2d 90 (D.D.C. 2013), the court found that even if defendant's "narrow reading" was "reasonable," the interpretation contravened the agency's duty "to construe a FOIA request liberally." *Id.* at 101 (quoting *Nation Magazine*, 71 F.3d at 890). "Any fair construction of Plaintiff's FOIA request cannot foreclose the possibility that Plaintiff wants the whole record, even if the language also mentions a subset of that category of documents." *Id.* at 102. These principles apply here. The reference to the Handbooks in Part 2 does not limit the Request. The Request could have been drafted that way, but was not. Levinson-Waldman Decl. ¶ 7. Put another way, while documents mentioning the Handbooks may be responsive to Part 2, that is not the exclusive universe of potentially responsive materials. An agency search thus limited is not reasonably calculated to

reach the most responsive documents. *See Conservation Force*, 979 F. Supp. 2d at 102 ("[A]ssuming that the FOIA request is subject to both of these reasonable readings, the Service had a duty under the FOIA to select the interpretation that would likely yield the greatest number of responsive documents.").

Moreover, an agency cannot "ignore positive indications of overlooked materials." *Friends of Blackwater v. U.S. Dep't of Interior*, 391 F. Supp. 2d 115, 119-21 (D.D.C. 2005) (internal quotation omitted). But that is precisely what ICE did here. Plaintiff pointed ICE to a document called the *Human Smuggling / Human Trafficking Investigations Lesson Plan HSI Special Agent Training*, which included examples of additional trainings. Azmi Decl. ¶ 10. *See also* Dwyer Decl. ¶ 27. Plaintiff considered these materials directly responsive to how it had drafted Part 2. Dwyer Decl. ¶ 27. Nonetheless, ICE improperly doubled down on its reading of Part 2 as *only* calling for documents that explicitly referenced the Handbooks and refused to conduct additional searches. Azmi Decl. ¶ 10. *See Halpern*, 181 F.3d at 288 ("The agency is obliged to pursue any 'clear and certain' lead it cannot in good faith ignore."). ICE's construction of Part 2 was not "reasonably calculated to uncover all relevant documents," *Bloomberg*, 649 F. Supp. 2d at 271, and, as such, summary judgment is inappropriate, *Pinson v. U.S. Dep't of Justice*, 80 F. Supp. 3d 211, 217 (D.D.C. 2015).

The comparatively broader search terms[4] utilized by the COPS ("Covert Operations and Programs Section") Acting Section Chief for Part 2 underscore the improper narrowness of the search terms used by other sections. *See, e.g.*, Pineiro Decl. ¶¶ 5, 44, 47.[5] ICE's declaration does

[4] Search terms utilized were: "DoS," "NRP," "TOCRP," "Rewards Program," "DoS Rewards Program," "Narcotics and Organized Crime," "Narcotics Rewards Program," "TOC Program Rewards," and "Rewards Program." Pineiro Decl. ¶ 57.

[5] However, because ICE inexplicably limited this search to the COPS Acting Section Chief's and CIIS ("Confidential Informant and Investigative Services") Section Chief'shome drives and

not explain why the COPS search encompassed substantive subject matters but the others did not. It is therefore inadequate. *See James Madison Project v. Dep't of State*, 235 F. Supp. 3d 161, 169 (D.D.C. 2017) (finding declaration inadequate where it failed to explain differing search methodologies used by different components).

C. Exemption 5 Does Not Apply to ICE's Redaction of Section 12.7.

ICE asserts that the deliberative process and the attorney-client privileges under Exemption 5 apply to the whole of Section 12.7, which concerns National Security Letters ("NSLs").[6] *See* Def.'s MSJ at 13-15. ICE is wrong.

FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Courts have construed Exemption 5 to "encompass traditional common-law privileges against disclosure, including the work-product doctrine, and executive, deliberative process and attorney-client privileges." *Nat'l Council of La Raza*, 411 F.3d at 356.

Section 12.7 is not rightfully withheld under either the deliberative process privilege or the attorney client privilege because that section, and the *NSI Handbook* generally, is the agency's working law, *Brennan Center for Justice v. Dep't of Justice*, 697 F.3d 184, 194-95 (2d Cir. 2012), and because ICE's vague and boilerplate justifications in its *Vaughn* Index and Pineiro Declaration (ECF No. 17), *see Vaughn* Index at 26; Pineiro Decl. ¶ 71, are insufficient to show that Exemption 5 applies. *See, e.g.*, *N.Y. Times Co. v. Dep't of Health & Human Servs.*, 513 F. Supp. 3d 337, 354 (S.D.N.Y. 2021), *appeal filed*, No. 21-211 (2d Cir. Feb. 3, 2021).

Outlooks and did not include any shared drives or servers—unlike the other sections' searches—that search too was inadequate. Pineiro Decl. ¶¶ 57-58.

[6] Chapter 12 of the *NSI Handbook* is titled "Joint Terrorism Task Force Participation." National Security Letters are warrantless administrative subpoenas used to obtain a wide variety of customer information from banks, communications companies, consumer credit companies, and more. Dwyer Decl. ¶ 24.

1. ICE Has Failed to Show that the Deliberative Process Privilege Applies to Section 12.7.

ICE has not demonstrated that the deliberative process privilege applies to Section 12.7's redactions because the *NSI Handbook* is a final document and represents the agency's working law. The *NSI Handbook* Foreword presents its purpose as "establish[ing] policy and procedures" for HSI and "provid[ing] guidance governing investigations conducted by SAs…." *See* Dwyer Decl., Ex. B. Moreover, ICE has failed to show that the deliberative process privilege applies, because neither the *Vaughn* Index nor the Pineiro Declaration establishes that the *NSI Handbook*—or any of its sections—were drafted to help the agency reach a final, policy-level decision.

Exemption 5's deliberative process privilege only protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Knight First Amend. Inst. at Columbia Univ. v. Dep't of Homeland Sec.*, 407 F. Supp. 3d 334, 343 (S.D.N.Y. 2019) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)), *appeal filed*, No. 20-3837 (2d Cir. Nov. 12, 2020). "[T]he privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Grand Cent. P'ship*, 166 F.3d at 482 (citation omitted).

For the deliberative process privilege to apply, a document must be both predecisional, meaning that it was "prepared to assist an agency decisionmaker in arriving at his decision," and deliberative, meaning that it was "related to the process by which policies are formulated." *Knight First Amend. Inst.*, 407 F. Supp. 3d at 343 (citing *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991)). In deciding whether a document is "predecisional," the court assesses "whether the document actually helped officers within an agency make a specific policy decision." *Nat'l Immigration*

Project of Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 868 F. Supp. 2d 284, 292 (S.D.N.Y. 2012) (Rakoff, J.).

By contrast, whether a document is "deliberative" turns on whether it "contains considerations of a policy's merits, rather than mere facts or articulations of existing policy, which might also pertain to an agency's decision." *Id.* In determining whether a document is "deliberative," courts must evaluate whether the document "(i) formed an essential link in a specified consultative process, (ii) reflects the personal opinions of the writer rather than the policy of the agency, and (iii) if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id.* (cleaned up). *See also Freedom of Press Found.*, 493 F. Supp. 3d at 261 ("Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, lest the exemption be allowed to eviscerate FOIA's purpose of avoiding secret law.") (citation and internal quotation marks omitted). ICE's position that the deliberative process privilege supports its redactions in Section 12.7 of the *NSI Handbook* is flawed for several independent reasons.

First, ICE's *Vaughn* index fails to properly establish that the withheld records "originated to facilitate an identifiable final agency decision, and are therefore predecisional." *See Brennan Ctr.*, 697 F.3d at 202 (citation and internal quotation marks omitted). Rather, ICE merely states that the deliberative process privilege applies because the redacted material of Section 12.7 concerns "internal legal guidance, considerations, recommendations, and analysis of legal authorities regarding the use of national security letters, provided by [OPLA] to their clients HSI SAs." *Vaughn* Index at 26. *See also* Def.'s MSJ at 16. These general averments regarding "considerations" and "recommendations" fail to "pinpoint the specific agency decision[s] to which the document correlates." *See LatinoJustice PRLDEF v. U.S. Dep't of Homeland Sec.*, No. 19-CV-

3438 (BCM), 2021 WL 1721801, at *9 (S.D.N.Y. Apr. 29, 2021). Moreover, the *Vaughn* Index never claims that these are draft materials or personal opinions. Rather, it perfunctorily asserts that Exemption 5 applies to protect the integrity of the "deliberative or decision-making process," *id.*, and that the advice was conveyed to "aid[] HSI SAs in the determination of the appropriate use of National Security Letters," *see* Def.'s MSJ at 16 (quoting Pineiro Decl. ¶ 71). This is not enough.

Nor do these vague assertions show that the redacted portion of Section 12.7 "bear[s] on the formulation or execution of policy-oriented judgment." *Id.* (citation omitted). Far from advising on the establishment of high-level policy issues, Section 12.7 sets forth final agency policy for HSI special agents to apply on the appropriate use of NSLs in their everyday, individual cases.[7] *Freedom of Press Found.*, 493 F. Supp. 3d at 262-63, is instructive. There, the court declined to apply Exemption 5 to a final slideshow instructing staff members on internal guidelines relating to authorization decisions, because "although the guidance in the slides may assist with future decision-making applying the policy to specific scenarios, the policy itself and management's expectations concerning its application have already been determined." *Id. See also Leadership Conf. on C.R. v. Gonzales*, 404 F. Supp. 2d 246, 255 (D.D.C. 2005) (holding that training manual was not covered by deliberative process privilege because it had been "adopted as guidance," was "substantively final," and did not show requisite "give and take"). Section 12.7 of the *NSI Handbook* is similarly a final document that encapsulates ICE's policies and expectations to offer guidance to assist special agents with decision-making on NSLs in specific cases.

[7] ICE argues that Section 12.7 deliberates on how best to implement agency policy and is thus a "quintessentially deliberative document." *See* Def.'s MSJ at 16. But ICE's reliance on *Ctr. for Biological Diversity v. U.S. Army Corps. Of Engineers*, 405 F. Supp. 3d 127, 140 (D.D.C. 2019) is misplaced. The documents in *Ctr. for Biological Diversity* were drafts, emails, and communications. 405 F. Supp. 3d at 141. 12.7 is a final statement on agency policy. Moreover, U.S. Army Corps. of Engineers had identified with specificity the high-level policy at issue and deliberative process involved. *Id.* at 141-42. ICE has simply not done that here.

Second, because Section 12.7 effectively sets forth policy for special agents to apply on the appropriate utilization of NSLs, it constitutes ICE's working law and is thus not exemptible under Exemption 5. "If an agency's memorandum or other document has become its 'effective law and policy,'" it must be disclosed as the agency's "'working law…much the same as it would be if expressly adopted or incorporated by reference into a nonexempt document.'" *Brennan Ctr.*, 697 F.3d at 199 (quoting *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153, 161-62 (1975)).

Because Section 12.7 describes existing policy and "reflect[s] [the agency's] formal or informal policy on how it carries out its responsibilities," it "fit[s] comfortably within the working law framework." *Knight First Amend. Inst.*, 407 F. Supp. 3d at 344 (quoting *Brennan Ctr.*, 697 F.3d at 201). The *NSI Handbook* generally asserts that it establishes "policy and procedure." *See* Dwyer Decl., Ex. B. And the *Vaughn* Index suggests that Section 12.7 sets forth how ICE wants its agents to use NSLs. *See Vaughn* Index at 25-26. These policies and formal guidance are, by definition, ICE's "working law." ICE's barebones assertions cannot overcome this obvious, common sense conclusion. As such, Section 12.7 cannot be fully withheld under Exemption 5.[8] *See ACLU v. Nat'l Sec. Agency*, No. 13 Civ. 09198 (KMW) (JCF), 2017 WL 1155910, at *13 (S.D.N.Y. Mar. 27, 2017) (finding that "formal training materials or reference materials (such as handbooks . . . or manuals) . . . reflect working law"), *aff'd*, 925 F.3d 576 (2d Cir. 2019). Moreover, disclosure under FOIA of material that "embod[ies] the agency's effective law and policy" is crucial to avoid the creation of "secret law"—which is precisely what ICE's withholding of Section 12.7 threatens to do here. *See Freedom of Press Found.*, 493 F. Supp. 3d at 261 (citation omitted).

[8] It is not necessary for disclosure that the redacted materials "reflect the final programmatic decisions of the program officers who request them. It is enough that they represent [the agency's] final legal position." *Knight First Amend. Inst.*, 407 F. Supp. 3d at 345-46 (citation omitted).

2. ICE Has Not Demonstrated That the Attorney-Client Privilege Applies to Section 12.7.

ICE has not shown that the attorney-client privilege applies to Section 12.7, because it offers no suggestion that the *NSI Handbook* generally and Section 12.7 in particular were created and maintained in confidence. Moreover, the attorney-client privilege does not apply because the *NSI Handbook* represents ICE's final position and policy and the agency's working law.

"The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011). As in other contexts, for the privilege to apply pursuant to Exemption 5, it is "vital" that "the communications between client and attorney were made in confidence and have been maintained in confidence." *Brennan Ctr.*, 697 F.3d at 207 (quoting *Mejia*, 655 F.3d at 134). The Second Circuit has held that "the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy." *Nat'l Council of La Raza*, 411 F.3d at 360. "[P]urely factual passages" are not "covered by the attorney-client privilege." *ACLU v. Nat'l Sec. Agency*, 15 Civ. 9317 (AKH), 2017 WL 4326524, at *11 (S.D.N.Y. Sept. 27, 2017).

ICE's *Vaughn* Index, Pineiro Declaration, and Motion for Summary Judgment are each devoid of averments that the *NSI Handbook* or Section 12.7 were made and maintained in confidence. For that reason alone, the attorney-client privilege does not apply. While the *NSI Handbook*'s Foreword states that it contains information that may be "protected from disclosure in civil discovery pursuant to the law enforcement privilege", it does not invoke the attorney-client privilege. *See* Dwyer Decl., Ex. B. By contrast, where courts have found the attorney-client privilege applicable, they have relied on explicit markings of "privileged" and "attorney-client communication" as well as declaration assertions that the at-issue documents were intended to be

and were kept confidential. *See, e.g.*, *Knight First Amend. Inst.*, 407 F. Supp. 3d at 347. The lack of indication of attorney-client confidentiality on the *NSI Handbook*'s face or in the Pineiro Declaration and *Vaughn* Index only underscores the privilege's inapplicability.

Moreover, because, as discussed above, the *NSI Handbook* and Section 12.7 set forth the agency's final position and policy on NSLs, they cannot be withheld and shielded from public review by the attorney-client privilege. *See Nat'l Council of La Raza*, 411 F.3d at 360. Here, the material is incorporated into a self-described statement and condensation of ICE's final policy. As such, the shelter provided by the attorney-client privilege is no longer needed. Moreover, the Pineiro Declaration indicates that at least in part, the agency has applied the attorney-client privilege to "facts that are divulged to the attorney." Pineiro Decl. ¶ 72. Such "purely factual passages" are not protected by the privilege. *See ACLU v. Nat'l Sec. Agency*, 2017 WL 4326524, at *11. For this reason too the attorney-client privilege does not apply.

3. ICE's Boilerplate Assertions Are Insufficient to Show that the Deliberative Process or Attorney-Client Privileges Apply.

The Pineiro Declaration and ICE's *Vaughn* index offer only vague, boilerplate assertions of Section 12.7's deliberative or privileged nature. This is not enough. *See, e.g.*, *Knight First Amend. Inst.*, 407 F. Supp. 3d at 345 (finding that Exemption 5 did not apply because "the relevant *Vaughn* entry does not detail the record's deliberative nature beyond boilerplate justifications").

When asserting either the attorney-client privilege or the deliberative process privilege, an agency's claim of a "generic, across-the-board" "chilling effect" (*see Vaughn* Index at 26) on the agency's interactions and communications "does not sufficiently explain how a *particular* Exemption 5 withholding would harm the agency's deliberative process." *See Nat. Res. Def. Council v. U.S. EPA*, No. 17-CV-5928 (JMF), 2019 WL 3338266, at *1 (S.D.N.Y. July 25, 2019) (internal citations omitted) (rejecting agency's assertions that "[r]elease of the withheld

information would discourage open and frank discussion" and would "have a chilling effect on the Agency's decision-making processes" warranted application of Exemption 5). Because ICE has offered nothing beyond generic articulations of harm in the form of a chilling effect and has failed to show how release of these particular withholdings would damage the deliberative process of frank discussion, it has not shown that Exemption 5 applies to Section 12.7.

D. ICE Has Failed to Demonstrate that Exemption 7(E) Applies to the Withheld Records.[9]

The *NSI Handbook* establishes "policy and procedures" and "provides guidance" for HSI. *See* Dwyer Decl., Ex. B. As such, it is a collection of guidelines and policies—not techniques.[10] Accordingly, ICE must adequately demonstrate that disclosure of the redacted material would risk circumvention of law. But ICE's proffered evidence falls far short of carrying these burdens.

Exemption 7(E) covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information…would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b) (7)(E). It only exempts investigative techniques not generally known to the public. *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985).

As an initial matter, to the extent that certain redacted and challenged sections of the *NSI Handbook* contain "mere descriptions of codified law and policy," even if they offer

[9] Separately, and without conceding that Exemption 7(E) was properly applied or that ICE has carried its burden of showing the exemption's applicability, Plaintiff does not challenge the 7(E) redactions as they pertain to Sections 6.3, 7.2, and 7.4, which relate to ICE database and systems, as set forth in the Dwyer Declaration ¶ 12.

[10] To that end, the released portions of the NSI Handbook, including its table of contents, underscore that the materials provided are intended to guide agents to take action in accordance with established policy. *See* Dwyer Decl., Ex. C.

"interpretation and application," they are not records or information compiled for law enforcement purposes protected under Exemption 7(E). *Knight First Amend. Inst.*, 407 F. Supp. 3d at 333 (holding that "to be compiled for law enforcement purposes" information must "describe 'proactive steps' for preventing criminal activity and maintaining security" (citation omitted)).

1. The Withheld Records Are Guidelines Under Exemption 7(E).

Because the *NSI Handbook* establishes "policy and procedures" and "provides guidance", *see* Dwyer Decl., Ex. B, for HSI, it is best characterized as a collection of guidelines—not techniques. ICE's rote recitations cannot overcome this obvious fact.

In *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Security*, 626 F.3d 678, 682 (2d Cir. 2010) (Rakoff, J., sitting by designation), the Second Circuit distinguished between guidelines and techniques, noting that a guideline is "an indication or outline of future policy or conduct" and refers commonly to resource allocation, whereas "techniques and procedures" refer to how "law enforcement officials go about investigating a crime." And in *ACLU v. Dep't of Homeland Security*, the court held that material withheld under Exemption 7(E) must "truly embody a specialized, calculated technique or procedure" that is not "apparent to the public." 243 F. Supp. 3d 393, 404 (S.D.N.Y. 2017) (declining to apply Exemption 7(E) because CBP had not established that questions asked at border were a specialized, calculated technique).

ICE's *Vaughn* Index generically repeats, in most of the entries, that the release of the redacted information "could reveal techniques and/or procedures for law enforcement investigations or prosecutions or disclose guidelines for law enforcement investigations or prosecutions . . . ." *See, e.g.*, *Vaughn* Index at 11 (7.2), 17 (7.4), 19 (7.18), 19-20 (11.3), 20 (11.4), 21 (11.6), 22 (12.1), 23 (12.3, 12.4), 24 (12.5), 25 (12.7). This generic language does not even specify whether the redacted material is a "*guideline*[]" or a "*technique*[] *and/or procedure*[]". These equivocating assertions cannot override what the *NSI Handbook* is—a document collecting

established policy and guidelines—and not merely a manual of law enforcement techniques. *See Banks v. Dep't of Justice*, 813 F. Supp. 2d 132, 146 (D.D.C. 2011) (holding that "no agency can rely on a declaration written in vague terms or in a conclusory manner" and rejecting defendant agency's application of Exemption 7(E)).

For example, ICE has redacted a description of the chain of communication between agencies and units triggered in certain circumstances. *See Vaughn* Index at 11 ("Exemption (b)(7)(E) was applied to information [in Section 7.2] regarding when and why HSI SAs should contact the U.S. Attorney's Office regarding the appropriate method of documenting investigatory reports."). *See also Vaughn* Index at 21 (justifying the redaction, in Section 11.6, of information concerning "if, when, and how information sharing with other law enforcement and intelligence authorities should take place…"). Because this information signals when different government components may become involved in a case, it reflects the allocation of government resources and is therefore a guideline. For Section 7.4, the *Vaughn* Index asserts that "the specific process, investigatory techniques, guidance, and considerations applied by HSI SAs regarding how, when, and why to initiate a national security investigation are law enforcement techniques." *Vaughn Index* at 18. Even accounting for the cursory reference to "investigatory techniques"—which this Court may disregard for its vagueness—stripped down, this information is nothing more than guidance assisting the agency in deciding when to devote resources to an investigation. As such, this is squarely a guideline. Underscoring this point, ICE's briefing only discusses navigation of databases or access to URLs as investigative techniques, but offers no law supporting the argument that the kind of information above is an investigative technique. Def.'s MSJ at 20. Accordingly, the challenged withheld materials are properly considered guidelines.

2. ICE's Boilerplate Recitations Do Not Demonstrate A Risk of Circumvention of Law.

The boilerplate recitations in ICE's *Vaughn* Index and Pineiro Declaration offer conclusory conjectures that disclosure of the redacted materials would help those seeking to circumvent the law. However, rote recitations in a *Vaughn* index or declaration cannot meet an agency's burden under Exemption 7(E). *See, e.g., ACLU v. Off. of Dir. of Nat'l. Intelligence*, No. 10 Civ. 4419(RJS), 2011 WL 5563520, at *11 (S.D.N.Y. Nov. 15, 2011) (finding "generic assertion that disclosure could enable targets . . . to avoid detection or develop countermeasures to circumvent law enforcement efforts" insufficient to carry Exemption 7(E) burden) (citation and internal quotation marks omitted). Instead, "the government must demonstrate, by detailed affidavit or other evidence, that release would reasonably risk circumvention of the law." *ACLU v. Dep't of Justice*, 2014 WL 956303, at *7 (S.D.N.Y. Mar. 11, 2014) (quoting *Elec. Frontier Found. v. Dep't of Defense*, No. C 0905640 SI, 2012 WL 4364532, at *3 (N.D. Cal. Sept. 24, 2012)).

Many of the *Vaughn* Index entries and the Pineiro Declaration offer conclusory formulations that disclosure would "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…." *See Vaughn* Index at 13-14, 15, 17 (7.2), 17-18 (7.4), 19 (7.18); 20 (11.3; 11.4), 21 (11.6), 22 (12.1), 23 (12.2), 24 (12.4), 24-25 (12.5), 25 (12.7); Pineiro Decl. ¶¶ 86-89 (7.2), 92 (7.4) 93 (7.18), 94 (11.3), 95 (11.5), 96 (11.6), 97 (12.1), 98-99 (12.2), 100 (12.5), 101 (12.7). Even where the *Vaughn* Index attempts elaboration, it is high-level and superficial. *See, e.g., Vaughn* Index at 22 (Section 12.1); at 23 (Section 12.2); at 25 (Section 12.5).[11]

[11] *See, e.g., Vaughn* Index at 22 (Section 12.1: "Disclosure of these techniques and practices 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, based on knowledge of how HSI SAs designate and thereafter investigate certain categories of investigations."); at 23 (Section 12.2: "Disclosure of these techniques and practices could assist

Courts regularly reject similar unadorned, non-specific assertions. In *Jett v. FBI*, 139 F. Supp. 3d 352, 363 (D.D.C. 2015), the FBI asserted, much as ICE does, that revealing the redacted information would provide "valuable insight into how the FBI develops its investigations and whether or when the FBI may act on the information it has gathered," making "it easier for criminals to time and structure their illegal activities accordingly in order to circumvent the FBI's attempts to enforce the law." The FBI asserted that "[r]evealing these strategies would reveal how and when the FBI chooses to utilize certain investigative techniques in response to particular investigative circumstances," which would make it easier for criminals "to predict and avoid the FBI's attempts to detect and/or disrupt their criminal activities." *Id.* But the court determined that the FBI had failed to justify the withholding under Exemption 7(E), because the agency declaration lacked "any case-specific, meaningful explanation as to how any particular technique, procedure or guideline at issue *in this case*," involving public corruption, "would make it easier for individuals to evade the law." *Id.* The court concluded that the FBI's "formulaic statements" failed to "provide any edification about why the specific redacted portions of the documents withheld . . . might interfere with law enforcement in future public corruption investigations or provide an advantage to the subjects of such investigations." *Id.*

Similarly here, ICE provides only formulaic recitations that disclosure will aid "bad actors", but offers only opaque incantations to explain how disclosing the redacted materials would specifically create that risk. This is not enough. *See Kolbusz v. FBI*, No. 1:17-cv-00319 (EGS/GMH), 2021 WL 1845352, at *23-24 (D.D.C. Feb. 17, 2021) (collecting cases and finding

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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, based on knowledge of how law enforcement and intelligence agencies coordinate and designate agency involvement in furtherance of national security investigations.").

that "generic, vague, and conclusory representations are not sufficient to invoke Exemption 7(E)" as they do not allow judges to "deduce [anything] of the nature of the techniques in question and mostly restate the statutory standard with respect to circumvention").

3. Publicly Known Information Cannot Be Shielded by Exemption 7(E).

Finally, ICE appears to have withheld information pursuant to Exemption 7(E) related to border device searches, *Vaughn* Index at 19-20, National Security Letters, *id.* at 25-26, and the Joint Terrorism Task Force ("JTTF"), *Vaughn* Index at 22-25, at least some of which is already publicly known. *See ACLU v. Dep't of Justice*, 2014 WL 956303, at *7. Border device searches have been the topic of circuit court cases, white papers, advisories, articles; ICE and other DHS components have also released policies on border device searches. Dwyer Decl. ¶ 17. NSLs too are well-known—the topic has its own Wikipedia page, was the subject of Ninth and Second Circuit cases, and was addressed in detail in a Brennan Center paper. *Id.* ¶ 24. *See also id.* ¶ 20 (setting forth sampling of public information regarding JTTFs). Nor does ICE's evidence offer any differentiation between the information that is publicly known and the information contained in the *NSI Handbook*. Exemption 7(E) does not apply to such publicly known materials.

E. *In Camera* Review Is an Appropriate and Efficient Way to Address the 15 Pages in Dispute.

Because Plaintiff is challenging only 15 pages of documents, *in camera* review is an appropriate and efficient mechanism to resolve this dispute. District courts may review withheld documents *in camera* to assist in analyzing FOIA exemption claims. *See* 5 U.S.C. § 552(a)(4)(B). *See also N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 315 (S.D.N.Y. 2012). Assessing the propriety of *in camera* review is within the district court's discretion. *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1179-80 (2d Cir. 1988). Where, as here, the FOIA documents at issue are "few in number and of short length," *in camera* review is an "appropriate

and most efficient means to resolve the parties' dispute" and can save "time and money." *Adelante Ala. Worker Ctr. v. U.S. Dep't of Homeland Sec.*, 376 F. Supp. 3d 345, 360 (S.D.N.Y. 2019) (quoting *ACLU v. FBI*, 59 F. Supp. 3d 584, 589 (S.D.N.Y. 2014), and *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987)). *See also N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d at 315 (agreeing to review documents *in camera* "in view of the Report's brevity"). The parties dispute the withholding of a mere 15 pages of material, with approximately only 7 pages of actual redactions. Azmi Decl. ¶ 16; Ex. H. As such, *in camera* review is a resource-effective way to resolve the appropriateness of ICE's redactions.

Moreover, *in camera* review is appropriate because, as discussed *supra in* III.C.3 and III.D.2, "[t]he *Vaughn* index is vague and conclusory, and the accompanying affidavit does little to fill in the gaps." *ACLU v. U.S. Dep't of Justice*, 90 F. Supp. 3d at 215-16. In such circumstances, courts in this district have found that *in camera* review is an appropriate step before ruling on an exemption's applicability. *See ACLU v. Dep't of Justice*, 2014 WL 956303, at *7 (noting that "[t]he ACLU is correct that the Government's affidavits do not provide sufficient information to determine whether either requirement is met" and concluding, after *in camera* review, that Exemption 7(E) did not apply).

Finally, *in camera* review is warranted because the *Vaughn* Index raises questions about the segregability of disclosed and undisclosed material. As an example, when explaining the redactions in Section 7.4 of the *NSI Handbook*, the *Vaughn* Index states that the information about guidance and considerations that HSI SAs "will utilize when initiating a national security investigation" are redacted along with "internal database codes, databases utilized, and the interface between these databases."[12] *See Vaughn* Index at 17. While Plaintiff is not challenging

[12] A similar issue arises in Section 7.2. *Vaughn* Index at 11.

the latter redaction, absent *in camera* review, given ICE's vague declaration, which merely asserts that "line-by-line review" was conducted and information was "correctly segregated," Pineiro Decl. ¶¶ 103-104, it is unclear that the former material cannot be properly segregated and disclosed to Plaintiff. *See Nat. Res. Def. Council*, 2019 WL 3338266, at *2 (finding similarly vague and sweeping assertions in a declaration regarding segregability warranted *ex parte*, *in camera* review of the challenged documents).

IV. CONCLUSION

For the foregoing reasons, Plaintiff Brennan Center respectfully requests that this Court grant its Cross-Motion and deny ICE's Motion for Summary Judgment.

Dated: Washington, D.C.
September 27, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September 2021, I served the foregoing **PLAINTIFF BRENNAN CENTER'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**, including all exhibits and attachments, via ECF upon all counsel of record.

Dated: September 27, 2021

Nimra H. Azmi
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