UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF JUSTICE, and U.S. DEPARTMENT OF STATE,

Defendants.

17 Civ. 7572 (ALC)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AND UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES FOR SUMMARY JUDGMENT

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2743
Facsimile: (212) 637-2730

ELLEN BLAIN
Assistant United States Attorney
– Of Counsel –

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PRELIMINARY STATEMENT

Defendants United States Immigration and Customs Enforcement ("ICE") and United States Citizenship and Immigration Services ("USCIS") (together, the "agencies" or the "government") respectfully submit this memorandum of law in support of their motion for summary judgment in this action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.[1]

In their FOIA request, Plaintiff the Knight First Amendment Institute at Columbia University ("plaintiff") seeks information from a multitude of agencies and components concerning the exclusion or removal of individuals from the United States based on their speech, beliefs or associations. Specifically, and as previously noted, *see* Dkt. No. 90 at 1, plaintiff seeks records from USCIS and ICE, as well as OLC, State, United States Customs and Border Protection ("CBP"), the Department of Homeland Security ("DHS"), and the Department of Justice Office of Public Affairs ("OPA") and Office of Information Policy ("OIP"). With the exception of DHS, which is undertaking a supplemental search, these agencies and components have completed their searches for records responsive to the FOIA request, and collectively have produced over three thousand pages of documents to plaintiff, properly withholding certain records in part or in full.

In this motion, the government addresses plaintiff's challenges to the withholding determinations made by USCIS and ICE. As demonstrated by their respective declarations, USCIS and ICE have logically and plausibly justified their withholding of certain documents in

[1] In the motion submitted on February 26, 2019, the government addressed plaintiff's challenges to the searches conducted by ICE and the United State Department of Justice, Office of Legal Counsel ("OLC"), as well as the withholding determinations made by the Department of State ("State"). This motion addresses the withholding determinations made by ICE and USCIS. Plaintiff does not challenge USCIS's search.

full or in part pursuant to FOIA Exemptions 5, 6, 7(C) and/or 7(E), 5 U.S.C. § 552(b)(5), (6), 7(C) & (7)(E), and thus are entitled to summary judgment dismissing both from this action.

BACKGROUND

A. The FOIA Request and Subsequent Narrowing

On August 7, 2017, plaintiff submitted identical FOIA requests to each defendant agency or component, seeking six categories of records:

- **Item 1:** All directives, memoranda, guidance, emails, or other communications sent by the White House to any federal agency since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude or remove individuals from the United States.
- **Item 2:** All memoranda written since May 11, 2005, concerning the legal implications of excluding or removing individuals from the United States based on their speech, beliefs, or associations.
- **Item 3:** All legal or policy memoranda written since May 11, 2005, concerning the endorse or espouse provisions[2] or the foreign policy provision of the Immigration and Nationality Act as it relates to "beliefs, statements or associations."[3]
- **Item 4:** All records created since May 11, 2005, containing policies, procedures, or guidance regarding the application or waiver of the endorse or espouse provisions or the foreign policy provision as it relates to "beliefs, statements or associations."
- **Item 5:** All Foreign Affairs Manual sections (current and former, since May 11, 2005) relating to the endorse or espouse provisions or the foreign policy provision as it relates to "beliefs, statements or associations," as well as records discussing, interpreting, or providing guidance regarding such sections.

[2] 8 U.S.C. §§ 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(i)(IV)(bb) (providing that an alien who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity" or who is a representative of "a political, social, or other group that endorses or espouses terrorist activity" is inadmissible); *see also* 8 U.S.C. §§ 1225(c), 1227(a)(4)(B), 1158(b)(2)(A)(v) (providing for removal of various classes of aliens on these grounds and refugees otherwise qualified for asylum on similar grounds).

[3] 8 U.S.C. § 1182(a)(3)(C)(iii) (providing that an "alien whose entry or proposed activities in the United States . . . would have potentially serious adverse foreign policy consequences" is inadmissible, even if the determination of inadmissibility is based on "beliefs, statements or associations [that] would be lawful within the United States"); *see also* 8 U.S.C. §§ 1225(c)(1), 1227(a)(4)(C) (providing for expedited removal and removal on the same grounds).

- **Item 6:** All records created since May 11, 2005, concerning the application, waiver, or contemplated application or waiver of the endorse or espouse provisions, or of the foreign policy provision as it relates to "beliefs, statements or associations," to exclude or remove individuals from the United States. This item of the Request enumerated five non-exhaustive categories of information sought, including statistical data or reports on the application, waiver, or contemplated application or waiver of those provisions, and notifications or reports from the Secretary of Homeland Security or Secretary of State concerning waivers of the endorse or espouse provision pursuant to 8 U.S.C. § 1182(d)(3)(B)(ii).

Dkt. No. 1, Exh. A. After plaintiff commenced this action on October 4, 2017, plaintiff agreed to narrow the request as follows:

- **For Item 1:** Search only OLC systems for the records sought.
- **For Items 2-5:** Limit searches to final policy memoranda and equivalent records that have been created since May, 11, 2005, and represent final guidance.
- **For Item 5:** Search only State systems for the records created since May 11, 2005.
- **For Item 6:** Limit searches to the records sought in Item 6(a), statistical data and reports on the application, waiver, or contemplated application or waiver of the endorse or espouse and foreign policy provisions that have been created since January 19, 2012; and Item 6(e), notifications or reports from the Secretary of Homeland Security or Secretary of State, created since May 11, 2005, concerning waivers of the endorse or espouse provision pursuant to 8 U.S.C. § 1182(d)(3)(B)(ii). For Item 6(e), the parties agreed the government could initially search only DHS and State systems for the records sought.

See Dkt. No. 48 at ¶ 2 (the "Narrowed Request").

B. The Agencies' Withholdings

1. ICE

As described in the second declaration of Toni Fuentes, dated March 15, 2019 ("Second Fuentes Decl."), ICE began producing records on a rolling basis that were responsive to plaintiff's original FOIA request, *see* Dkt. No. 48 at ¶ C(g), producing a total of 2,574 pages, and applying withholdings pursuant to Exemptions 5, 6, 7(C), and 7(E), *see* Second Fuentes Decl. ¶ 11 & Exhibit A (Vaughn Index). Thereafter, ICE re-reviewed the collected documents to

identify materials responsive to the Narrowed Request, *see* Dkt. No. 64. As a result of that re-review, ICE determined that 99 pages of documents were responsive to the Narrowed Request; ICE released 50 pages in whole or in part on July 3, 2018, applying withholdings pursuant to Exemptions 5, 6, 7(C), and 7(E), and referred 49 pages to other agencies, which were released in whole or in part on August 3, 2018. *See* Dkt. No. 77; *see also* Fuentes Decl. ¶¶ 9-11.

2. USCIS

As described in the Declaration of Jill A. Eggleston, Assistant Center Director in the USCIS FOIA and Privacy Act Unit, National Records Center, USCIS determined that documents responsive to the Narrowed Request would include "records related to [USCIS's] enforcement of the Immigration and Nationality Act (INA), particularly its provisions on terrorism-related inadmissibility grounds (TRIG), found in INA § 212, codified in 8 U.S.C. § 1182[.]" Declaration of Jill A. Eggleston, dated March 14, 2019 ("Eggleston Decl."), ¶ 9.[4] USCIS initially compiled more than 2,200 pages of potentially responsive documents, and determined that 1,278 pages were responsive to the Narrowed Request. *Id.* ¶ 11. On May 30, 2018, and June 29, 2018, USCIS produced to plaintiff a total of 957 pages in their entirety, and withheld 357 pages in part. *Id.* Specifically, USCIS withheld in part 17 pages pursuant to FOIA Exemption 5 (the deliberative process privilege), and 256 pages and 33 slides pursuant to FOIA Exemption 7(E). *Id.* ¶¶ 11-41. USCIS did not withhold any document in full. *Id.*

[4] As explained in the Eggleston Declaration, an individual's "activities and associations could result in him or her being deemed inadmissible to the United States pursuant to the TRIG grounds enumerated in INA § 212," which include as grounds for inadmissibility, *inter alia*, individuals who are engaged in or likely to engage in terrorist activity or endorse or espouse terrorist activity. Eggleston Decl. ¶ 9.

ARGUMENT

THE AGENCIES ARE ENTITLED TO SUMMARY JUDGMENT

"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." *Id.*; *see also Assoc. Press v. U.S. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008).

FOIA disputes are generally resolved by summary judgment. *See, e.g., Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if the 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(a). "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 declaration in support of its withholding determinations is "accorded a presumption of good faith." *Id*. (quotation marks omitted). The agency's justification for invoking a FOIA exemption is sufficient if it appears logical and plausible. *See ACLU v. DoD*, 901 F.3d 125, 133 (2d Cir. 2018); *see also Wilner v. NSA*, 592 F.3d 60, 69-73 (2d Cir. 2009) (citation and internal quotation marks omitted).

In this case, USCIS and ICE have provided declarations that provide a logical and plausible basis for withholding records pursuant to FOIA Exemptions 5, 6, 7(C) and/or 7(E).[5] The agencies have therefore met their burden of establishing the propriety of their claimed exemptions.

I. USCIS PROPERLY WITHHELD PORTIONS OF RECORDS PURSUANT TO FOIA'S EXEMPTIONS

USCIS's declaration and accompanying Vaughn index logically and plausibly justify the claimed exemptions—specifically, Exemptions 5 and 7(E).[6]

A. USCIS Properly Withheld Records Pursuant to Exemption 5

1. The Deliberative Process Privilege

Exemption 5 protects from disclosure "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). Exemption 5 "incorporate[s] into the FOIA all the normal civil discovery privileges," *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991), thus exempting from disclosure agency documents "which would not be obtainable by a private litigant in an action against the agency under normal discovery rules," *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (quotation marks omitted).

Here, the applicable privilege is the deliberative process privilege. This privilege "protects the decisionmaking processes of the executive branch in order to safeguard the quality

[5] The government has not submitted a Local Rule 56.1 statement because "[t]he 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 quotation marks and alterations omitted).

[6] Because Plaintiff does not challenge the withholdings pursuant to Exemption 6, this memorandum will address only Exemptions 5 and 7(E).

and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84. An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Central P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (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) (*quoted in Tigue*, 312 F.3d at 80). While a document is pre-decisional if it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Central*, 166 F.3d at 482, the government need not "identify a specific decision" made by the agency to establish the pre-decisional nature of a particular record, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). Rather, so long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is pre-decisional. *Tigue*, 312 F.3d at 80.

"A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Central*, 166 F.3d at 482 (citation omitted). Courts inquire as to 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. Pre-decisional, deliberative documents include "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).

2. Application

USCIS properly withheld in part 17 pages in three documents pursuant to deliberative process privilege. First, USCIS withheld in part 5 pages in a memorandum, dated February 8,

2017, entitled "Briefing Memo for the Acting Director: Recommendation to Eliminate the USCIS Terrorism-Related Inadmissibility Grounds (TRIG)," which included a draft copy of a proposed new USCIS policy, entitled "Policy Memorandum: Revised Guidance for Processing Cases Involving Terrorism-Related Inadmissibility Grounds and Elimination of the Hold Policy for Such Cases." Eggleston Decl. ¶ 23. The withheld pages "contain discussions and recommendations from USCIS staff to senior agency management regarding the current and future posture of the USCIS TRIG Hold Policy," as well as a proposed revision to the policy addressing "the way USCIS processes cases involving possible terrorist ties pursuant to TRIG[.]" *Id.* Second, USCIS withheld in part 5 pages in a "Senior Policy Council-Briefing Paper: TRIG Exemptions & INA § 318," an "internal agency briefing paper . . . prepared by agency personnel for senior agency management" discussing "specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants who seek immigration benefits from USCIS." *Id.* ¶ 24. The briefing paper includes "various scenarios and present[s] options for action by senior management when making the final agency policy determination," and contains a "specific course of action recommended by the drafters for senior agency management's consideration" "regarding application of TRIG exemptions to cases presented to USCIS immigration officers for adjudication." *Id.* Third, USCIS withheld in part 7 pages from an "Options Paper: Exercise of Authority Relating to the Terrorism-Related Inadmissibility Grounds," an internal agency memorandum "prepared by agency personnel for senior agency management and discuss[ing] [three] options for implementing an Executive Order that directed the Secretaries of State and DHS to consider rescinding the TRIG exemptions permitted by Section 212 of the INA (EO 13780 13780 – Protecting the Nation from Foreign Terrorist Entry, March 9, 2017)." *Id.* ¶ 25.

The portions of these three documents withheld under Exemption 5 are inter- or intra-agency documents created by a government agency. *Id.* ¶¶ 23-25. The withheld information is pre-decisional and deliberative because it concerns either: (1) proposed courses of action and recommendations regarding revising the TRIG Hold Policy (*id.* ¶ 23); or (2) a briefing paper discussing how to interpret and apply specific TRIG exemptions during immigration adjudications (*id.* ¶ 24); or (3) provides options for implementing an Executive Order (*id.* ¶ 25). Each document contains the authors' personal analyses and recommendations for senior management to consider when making policy decisions. *See id.* Disclosure of such "sensitive, predecisional and deliberative records could have a chilling effect on the ability of agency personnel to formulate new government policy." *Id.* This information reflects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," and accordingly was properly withheld pursuant to Exemption 5 and the deliberative process privilege. *Hopkins*, 929 F.2d at 84–85 (internal quotation marks and citation omitted).

B. USCIS Properly Withheld Portions of Records Pursuant to Exemption 7(E)

USCIS properly withheld information pursuant to Exemption 7, which exempts from disclosure "records or information compiled for law enforcement purposes" that fall within one or more of the exemption's withholding categories. 5 U.S.C. § 552(b)(7). Specifically, Exemption 7(E) protects 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). Techniques and procedures are categorically exempt from

disclosure, without any need for inquiry into the harm that would result from their disclosure. *See Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010).

Here, USCIS properly withheld information contained in 12 documents (256 pages) and 4 power points (33 slides) pursuant to Exemption 7(E). *See* Eggleston Decl. ¶¶ 22, 26-41. These materials consist of officer training manuals (¶¶ 26, 27, 41), course instructor guides (¶¶ 22, 28, 32, 36, 39), student participant guides (¶¶ 29, 33, 37, 40), and power point slides (¶¶ 31, 34, 35, 38) related to training USCIS immigration officials to identify and evaluate potential TRIG exemptions when conducting applicant interviews.[7] Each of these documents contains specific examples of "questions that should be asked and topics to cover" when questioning an applicant for admission that "could trigger assessment of a TRIG bar to admission," including "suggestions on how to spot possible terrorist activities by looking for certain key words used by applicants in their immigration interviews and applications." *Id.* ¶ 37; *see also id.* ¶ 33 (withholding portions of a guide "used by students taking the newly hired USCIS immigration officers' BASIC course") & ¶ 35 (withholding portions of power point slides "meant to help new USCIS officers identify basic principles of TRIG" which contain "key words used by applicants that could identify their associations with terrorist groups"). This information "serves as guidelines as well as techniques and procedures for law enforcement investigations utilized by USCIS immigration officers to screen immigration applicants." *Id.*

Furthermore, although not necessary for purposes of establishing the applicability of the exemption to law enforcement techniques and procedures, *see Allard K. Lowenstein Int'l Human Rights Project*, 626 F.3d at 681, disclosure of this information could reasonably be

[7] *See supra* n.4.

expected to risk circumvention of the law because "future applicants" could use it "to tailor their testimony and applications when seeking immigration benefits so they could hide possible terrorism ties, avoid government detection, and gain admission to the U.S., illegally obtain immigration benefits and illegally remain in the U.S., thus posing a risk to national security." Eggleston Decl. ¶ 37. Accordingly, USCIS properly withheld this information pursuant to Exemption 7(E).

E. USCIS Produced Any Reasonably Segregable Portions of the Challenged Records

Finally, the Eggleston Declaration establishes that USCIS complied with FOIA's requirement 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). This provision does not require disclosure of records in which the non-exempt information that remains is without value or would be meaningless. *See, e.g.*, *Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information existed because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"); *Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 88 (2d Cir. 1979) (Friendly, J.) (disclosure not required where all that remains is "a few nuggets of non-intertwined, 'reasonably segregable'" information). Here, USCIS reviewed the withheld material and disclosed all non-exempt information that reasonably could be segregated and disclosed. *See* Eggleston Decl. ¶¶ 31, 41.

II. ICE PROPERLY WITHHELD RECORDS PURSUANT TO FOIA'S EXEMPTIONS

ICE's declaration and accompanying Vaughn index logically and plausibly justify the claimed exemptions—specifically, Exemptions 5 and 7(C).[8]

A. ICE Properly Withheld Records Pursuant To Exemption 5

ICE withheld 31 documents in part and 5 documents in full pursuant to Exemption 5.

1. Legal Standards for Attorney-Client and Work Product Privileges

Along with the deliberative process privilege, *see supra* I.A.1., Exemption 5 also encompasses the attorney-client and work product privileges. *See, e.g.*, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

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 (first alteration in original). 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.*

[8] Plaintiff does not challenge ICE's application of Exemption 6.

Exemption 5 further incorporates the work product doctrine. *See Sears*, 421 U.S. at 154-55; *Tigue*, 312 F.3d at 76. That doctrine protects documents "prepared in anticipation of litigation or for trial by or for another party or its representative," as well as "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(A), (B); *accord A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir. 1994). Without such protection, an entity would have to choose between "scrimp[ing] on candor and completeness" or disclosing its "assessment of its strengths and weaknesses . . . to litigation adversaries." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998).

2. Application

Here, ICE withheld four documents in full[9] and 20 documents in part[10] pursuant to the deliberative process privilege. Of those 24 documents, ICE also withheld information in 17 documents pursuant to the attorney-client privilege[11], and information in 12 documents pursuant to the work product privilege.[12]

Deliberative Process Privilege: Regarding the information withheld in full pursuant to the deliberative process privilege, as described in the Second Fuentes Declaration and

[9] In the 2017-ICFO-43023 production, pages 30-1,666; and in the 2018-ICAP-00118 production, pages 322-463, 307-319, and 584-591.

[10] In the 2018-ICAP-00118 production, pages 18-19, 21-26, 50, 232-241, 281-288, 100, 260-261, 290-291, 293-297, 298-306, 307-319, 515-523, 566-580, 884-898, 645-648, 465-490, 581-583, 874-875, 584-591, 652-682, 690, 691, 696, 698-706, 711-730, 736-754, 758-761, 765-793, 796-824, 828-858, 859-869, and 870-873.

[11] In the 2018-ICAP-00118 production, pages 100, 260-261, 290-291, 293-297, 298-306, 307-319, 515-523, 566-580, 884-898, 645-648, 465-490, 581-583, 874-875, 584-591, 652-682, 690, 691, 696, 698-706, 711-730, 736-754, 758-761, 765-793, 796-824, 828-858, 859-869, and 870-873.

[12] In the 2018-ICAP-00118 production, pages 100, 260-261, 290-291, 293-297, 298-306, 307-319, 515-523, 566-580, 884-898, 645-648, 581-583, 874-875, 584-591, and 652-682.

accompanying Vaughn index, ICE withheld: (1) two proposed pieces of legislation concerning "border security immigration and law enforcement personnel, emergency port of entry and infrastructure spending"; (2) a draft document titled "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns," discussing "First Amendment concerns that may arise in applying the security-related ground of inadmissibility under Section 212(a)(3)(B)(i)(VII) of the INA"; and (3) a draft document titled "Application of INA § 212(a)(2)(A)(i)(I) to Foreign Convictions," discussing the application of Section 212(a)(2)(A)(i)(I) of the INA concerning crimes involving moral turpitude. *See supra* n.9. These documents are pre-decisional because they are all drafts (either of legislation or guidance regarding the application of INA sections) and deliberative because they contain edits, comments, and/or recommendations by ICE staff. *See* Second Fuentes Decl. ¶¶ 18-20.

Similarly, the information withheld in part pursuant to the deliberative process privilege includes an email between ICE employees discussing drafts to a powerpoint presentation about immigration priorities; a draft memorandum of agreement between an ICE field office in Miami and the local employee union concerning training programs; an email between ICE employees drafting a message to send to field offices about the impact of a recent court decision; a draft memorandum from the Acting Director of ICE to the Secretary of DHS concerning the implementation of Executive Orders; and the minutes of a meeting at the Homeland Security Investigations Law Division containing "status updates regarding a variety of issues and cases," "recommendations and guidance to attorneys on how to exercise prosecutorial discretion [and] how to implement President's Executive Orders on Immigration[.]" *See supra* n.10. Thus, the redacted information contains deliberative information because it reflects "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), and is pre-decisional because it contains drafts of legislation, memoranda or guidance. Furthermore, disclosure of this information "would chill the free and frank exchange of ideas and recommendations and hamper the agency's ability to efficiently and effectively formulate its final positions on issues of public significance." Vaughn Index at 42; *see also id.* at 2-45.

Attorney-Client Privilege: The information ICE withheld in part pursuant to the attorney-client privilege includes, for example, an email drafted by the Acting General Counsel for DHS, labeled "Attorney Client Communication," discussing the potential impact of a federal district court's order in a pending litigation and strategies to address it; an email authored by an attorney with the National Security Law Section ("NSLS") in September 2017, providing background and discussing current and next steps in high-interest cases; a draft document titled "Questionnaire for Evaluating Whether an Organization Is a Totalitarian Party" and "Update on Lawyers Group Analysis of Immigration Ineligibility Categories," providing guidance by ICE attorneys on the application of Section 212(a)(3)(D) of the INA; and a memorandum drafted by ICE attorneys addressing a series of interrelated questions related to a particular lawful permanent resident (LPR) in a pending case. *See supra* n.11. The Second Fuentes Declaration and Vaughn Index thus logically and plausibly demonstrate that all of the information withheld pursuant to the attorney-client privilege constitutes "communications between client[s] and counsel" that were "intended to be and [were] in fact kept confidential," and were "made for the purpose of obtaining or providing legal advice." *County of Erie*, 473 F.3d at 419. Accordingly, ICE has properly withheld such information pursuant to Exemption 5.

Work Product Privilege: The information ICE withheld in part pursuant to the work product privilege includes, for example, a draft document titled "Inadmissibility Based on

Endorsing or Espousing Terrorist Activity: First Amendment Concerns," written by ICE attorneys discussing inadmissibility under Section 212(a)(3)(B)(i)(VII) of the INA, labeled "FOR OFFICIAL USE ONLY/PRE-DECISIONAL" and "Attorney Work Product/Attorney-Client Privileged," and watermarked "DRAFT"; a document titled "Hot Lit Report," drafted by ICE attorneys and providing updates and analyses for certain pending ICE cases; a draft document titled "Inadmissibility Based on Money Laundering that Occurs Entirely Outside of the United States," drafted by ICE attorneys and addressing the application of the INA to certain individuals; and an email between ICE attorneys discussing a case implicating Section 235(c) of the INA and attaching a document containing ICE's interpretation and implementation of the section, a case study, and OPLA's recommendation regarding the use of the section. *See supra* n.12. This information is quintessential attorney work product, as the information was drafted by attorneys for the purpose of evaluating current or future litigations. *See, e.g.*, *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, No. CV 18-47 (CKK), 2019 WL 1004042, at *14 (D.D.C. Feb. 28, 2019) (agency properly withheld draft memorandum containing "legal advice and analysis of the arguments made in an Issue Paper submitted [to the agency] by Plaintiff").

B. ICE Properly Withheld Records Pursuant To Exemption 7(C)

Exemption 7(C) exempts from disclosure information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).[13] In

[13] This is similar to Exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 522(b)(6), but the standard the government must show to meet Exemption 7(C) is lower, *see, e.g.*, *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 569 (S.D.N.Y. 2005). Under Exemption 7(C), the information's release need only be "reasonably [] expected to constitute" an unwarranted invasion of privacy, rather than the more definite "would constitute" such an invasion in Exemption 6. And the invasion need only be "unwarranted" to meet exemption 7(C), whereas to meet Exemption 6, the invasion must be "clearly unwarranted." Thus, Exemption 7(C) "is more protective of privacy" than exemption 6. *Associated Press v. DOJ*, No. 06 Civ. 1758 (LAP), 2007 WL 737476 at *4 (S.D.N.Y. Mar. 7, 2007).

determining whether personal information is exempt from disclosure under exemption 7(C), the Court must balance the public's need for this information against the individual's privacy interest. *See Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 284 (2d Cir. 2009). Because FOIA did not intend unwarranted "disclosure of records regarding private citizens, identifiable by name," *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 765 (1989), courts have found that "an individual has a general privacy interest in preventing dissemination of his or her name and home address," *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir.1992) (names and addresses of federal employees contained in computer databases properly withheld); *see also Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1994) (identities of FBI agents, federal employees, state and local law enforcement personnel and other third parties who appear in documents properly withheld).

Here, ICE has withheld information in 26 documents that contains personally identifiable information of ICE employees, such as names, contact information, telephone numbers, and signatures.[14] Disclosure of this information could reasonably be expected to constitute an unwarranted invasion of personal privacy by: "(1) conceivably subjecting ICE personnel to harassment and annoyance in conducting their official duties and in their private lives; (2) potentially placing them in danger as targets of law enforcement investigations may begrudge personnel for an indefinite time period and seek revenge; and (3) possibly minimizing their ability to effectively conduct future investigations." Vaughn Index at 3. Moreover, disclosure of this personal information serves no public benefit because it would not assist the public in understanding how the agency is carrying out its statutory responsibilities. Accordingly, ICE

[14] Specifically, ICE withheld information under 7(C) in one draft legislation document provided in the 2017-ICFO-43023 production (at pages 30-1654), and in the following pages provided in the 2018-ICAP-00118 production: 18-19, 50, 100, 245, 248, 253, 256, 260-61, 263, 266, 270-71, 273, 275, 277, 279, 290-91, 293-97, 298-306, 307-319, 465-490, 515-523, 645-48, 652-682, 690-761, 765-858.

properly withheld such personal information pursuant to Exemption 7(C). *See Fed. Labor Relations Auth.*, 958 F.2d at 513 (withholding appropriate because "[t]here is a measurable privacy interest that is threatened by the . . . disclosure of a list of names and addresses which identifies the individuals as federal employees," and there "is no relevant public purpose to be weighed against that threatened invasion").

C. ICE Properly Withheld Information in One Record Pursuant to Exemption 7(E)

Finally, ICE properly withheld a "hyperlink containing web address" pursuant to Exemption 7(E), in an email "between two NSLS ICE attorneys sharing a hyperlink containing web address to a draft document on [the] network that discusses [the] endorse and espouse" provision of the INA. Vaughn Index, 2018-ICAP-00118 production, page 279. ICE withheld the URL hyperlink because it "provides access to server(s) and creates opportunities for cyber-attacks on agency server(s), which are used to store a myriad of information/data related to countless law enforcement cases." *Id.* The release of that information would "disclose investigative techniques and procedures, such as internal database codes," and, although not necessary to establishing the applicability of 7(E), such release "could permit people seeking to violate or circumvent the law [to take] proactive steps to counter operational and investigative actions taken by ICE during enforcement operations." *Id.* Thus, ICE properly withheld the hyperlink pursuant to Exemption 7(E). *See Allard K. Lowenstein*, 626 F.3d at 681.

D. ICE Produced Any Reasonably Segregable Portions of the Challenged Records

As described in the Second Fuentes Declaration, ICE conducted an analysis of each page to determine whether "[a]ny reasonably segregable portion of a record" could be provided "after deletion of the portions which are exempt," consistent with FOIA's segregability requirement. 5

U.S.C. § 552(b). ICE reviewed the withheld material and disclosed all non-exempt information that reasonably could be segregated and disclosed. *See* Second Fuentes Decl. ¶¶ 39-41.

CONCLUSION

For the reasons given above, ICE's and USCIS's motion for summary judgment should be granted.

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Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: */s/ Ellen Blain*
ELLEN BLAIN
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2743
Facsimile: (212) 637-2730
E-mail: ellen.blain@usdoj.gov