**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 FURTHER SUPPORT OF THE MOTION OF THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AND DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL FOR PARTIAL SUMMARY JUDGMENT, AND THE MOTION OF THE UNITED STATES DEPARTMENT OF STATE FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

GEOFFREY S. BERMAN
United States Attorney for the Southern
District of New York
86 Chambers Street
New York, New York 1007
Telephone: (212) 637-2743

ELLEN BLAIN
Assistant United States Attorney
- Of Counsel –

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT……1

ARGUMENT ……..……..….2

I. ICE AND OLC ADEQUATELY SEARCHED FOR RESPONSIVE RECORDS……..…2

A. ICE Conducted An Adequate Search…….……..2

1. ICE Conducted Multiple Searches……...……2

2. ICE's Search Was Reasonable……..…….……..6

B. OLC Conducted An Adequate Search…….…9

II. THE STATE DEPARTMENT PROPERLY WITHHELD RECORDS PURSUANT TO FOIA'S EXEMPTIONS …….13

A. The State Department Properly Withheld Four Records Pursuant to Exemption 5…….……..14

1. State Properly Withheld Three Records in Full and in Part Pursuant to the Presidential Communications Privilege……..…….…….…….14

2. State Properly Withheld Four Records in Full Pursuant to the Deliberative Process Privilege……18

3. State Properly Withheld Four Records in Full Pursuant to the Attorney Client Privilege……..……21

4. State Properly Withheld the "First Amendment Concerns" Memorandum in Full Pursuant to the Work Product Privilege ……23

B. The State Department Properly Withheld in Part Versions of Three Foreign Affairs Manuals Pursuant to Exemption 7(E) ……..24

CONCLUSION…….26

# TABLE OF AUTHORITIES

Page(s)

Cases

*A. Michael's Piano, Inc. v. FTC*,
18 F.3d 138 (2d Cir. 1994) ..... 23

*Adamowicz v. IRS*,
552 F. Supp. 2d 355 (S.D.N.Y. 2008) ..... 2

*Afshar v. Dep't of State*,
702 F.2d 1125 (D.C. Cir. 1983) ..... 20-21

*Allard K. Lowenstein Int'l Human Rights Project v. DHS*,
626 F.3d 678 (2d Cir. 2010) ..... 24

*American Civil Liberties Union v. DOJ*,
No. 15 Civ. 1954 (CM), 2016 WL 889739 (S.D.N.Y. Mar. 4, 2016) ..... 17

*Amnesty Int'l USA v. CIA*,
No. 07 Civ. 5435 (LAP), 2008 WL 2519908 (S.D.N.Y. June 19, 2008) ..... 7

*Bloomberg LP v. Bd. of Governors of Fed. Reserve Sys.*,
649 F. Supp. 2d 262 (S.D.N.Y. 2009) ..... 10

*Brennan Center for Justice v. DOJ*,
697 F.3d 184 (2d Cir. 2012) ..... 20, 21

*Carney v. USDOJ*,
19 F.3d 807 (2d Cir. 1994) ..... 2, 21

*Citizens for Responsibility and Ethics in Washington v. Office of Admin.*,
566 F.3d 219 (D.C. Cir. 2009) ..... 12

*Coastal States Gas Corp. v. Dep't of Energy*,
617 F.2d 854 (D.C. Cir. 1980) ..... 21

*Conti v. DHS*, No. 12 Civ. 5827,
2014 WL 1274517 (S.D.N.Y. Mar. 24, 2014) ..... 6

*Delaney, Migdail & Young, Chartered v. IRS*,
826 F.2d 124 (D.D.C. 1987) ..... 23

*Democracy Forward Found. v. White House Office of Am. Innovation*,
356 F. Supp. 3d 61 (D.D.C. 2019) ..... 11

*DOJ v. Tax Analysts*,
492 U.S. 136 (1989) ..... 10, 11

*FLRA v. U.S. Dep't of Veterans Affairs*,
958 F.2d 503 (2d Cir. 1992) ..... 10

*Fox News Network, LLC v. U.S. Dep't of Treasury*,
739 F. Supp. 2d 515 (S.D.N.Y. 2010) ..... 9

*Grand Cent. P'ship, Inc. v. Cuomo*,
166 F.3d 473 (2d Cir. 1999) ..... passim

*Hopkins v. HUD*,
929 F.2d 81 (2d Cir. 1991) ..... 19

*Ibrahim v. United States Dep't of State*,
311 F. Supp. 3d 134 (D.D.C. 2018) ..... 25

*Immigrant Def. Project v. U.S. Immigration & Customs Enforcement*,
208 F. Supp. 3d 520 (S.D.N.Y. 2016) ..... 6, 8, 7, 9

*In re County of Erie*,
473 F.3d 413 (2d Cir. 2007) ..... 21, 22, 23

*In re Sealed Case*,
121 F.3d 729 (D.C. Cir. 1997) ..... 15, 17, 18

*Jones-Edwards v. Appeal Bd. of NSA*,
196 F. App'x 36 (2d Cir. 2006) ..... 10, 11

*Judicial Watch, Inc. v. DOJ*,
365 F.3d 1108 (D.C. Cir. 2004) ..... 14, 18

*Judicial Watch, Inc. v. U.S. Secret Serv.*,
726 F.3d 208 (D.C. Cir. 2013) ..... 12

*Kissinger v. Reporters Comm. for Freedom of the Press*,
445 U.S. 136 (1980) ..... 11

*Long v. OPM*,
692 F.3d 185 (2d Cir. 2012) ..... 2, 6

*Loving v. DOD*,
496 F. Supp. 2d 101 (D.D.C. 2007) ..... 15

*Main St. Legal Servs., Inc. v. NSC*,
811 F.3d 542 (2d Cir. 2016) ..... 11, 12

*Maynard v. C.I.A.*,
986 F.2d 547 (1st Cir. 1993) ..... 9

*Meyer v. Bush*,
981 F.2d 1288 193 n.3 (D.C. Cir. 1993) ..... 11

*Morley v. CIA*,
508 F.3d 1108 (D.C. Cir. 2007) ..... 25

*New York Times v. DOJ*,
101 F. Supp. 3d 310 (S.D.N.Y. 2015) ..... 23

*Nixon v. Adm'r of Gen. Servs.*,
433 U.S. 425 (1977) ..... 14, 17

*NLRB v. Sears, Roebuck & Co.*,
421 U.S. 132 (1975) ..... 18, 19, 20

*Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*,
421 U.S. 168 (1975) ..... 18

*SafeCard Servs., Inc. v. SEC*,
926 F.2d 1197 (D.C. Cir. 1991) ..... 7, 8, 9

*Sonds v. Huff*,
391 F. Supp. 2d 152 (D.D.C. 2005) ..... 10, 12

*Sweetland v. Walters*,
60 F.3d 852 (D.C. Cir. 1995) ..... 12

*Tax Analysts v. IRS*,
117 F.3d 607 (D.C. Cir. 1997) ..... 22

*Tax Analysts v. IRS*,
294 F.3d 71 (D.C. Cir. 2002) ..... 24, 25

*Techserve Alliance v. Napolitano*,
803 F. Supp. 2d 16 (D.D.C. 2011) ..... 25

*Tigue v. DOJ*,
312 F.3d 70 (2d Cir. 2002) ..... 18, 19

*Truitt v. Dep't of State*,
897 F.2d 540 (D.C. Cir. 1990) ..... 7

*Tutor Time Learning Centers, LLC v. GKO Grp., Inc.*,
No. 13 CIV. 2980 (JMF), 2013 WL 5637676 (S.D.N.Y. Oct. 15, 2013) ..... 13

*United States v. Nixon*,
418 U.S. 683 (1974) ..... 14

*Washington v. Office of Administration*,
566 F.3d 219 (D.C. Cir. 2009) ..... 12

Statutes, Regulations, Rules

5 U.S.C. § 552 ..... passim

28 C.F.R. § 0.25 ..... 10

Fed. R. Civ. P. 26(b)(3)(A) ..... 23

## PRELIMINARY STATEMENT

The government respectfully submit this reply memorandum of law in further support of United States Immigration and Customs Enforcement and Department of Justice Office of Legal Counsel's reply memorandum of law in further support of their motion for partial summary judgment and in opposition to plaintiff's motion, and reply memorandum of law in further support of the Department of State's motion for summary judgment and in opposition to plaintiff's motion.[1]

As explained in the government's prior memorandum and the agencies' declarations, *see* Dkt. Nos. 90-92, and as demonstrated by ICE's supplemental declaration submitted herewith, ICE and OLC conducted reasonable and diligent searches, entitling these agencies to partial summary judgment. Indeed, plaintiff's sole challenge to OLC's search is that it did not search *another entity's* records – a proposition that is both legally and factually impossible. Regarding the State Department, Plaintiff has withdrawn challenges to the agency's withholding of information pursuant to FOIA Exemptions 1 or 3 and certain records pursuant to Exemptions 5 or 7(E), and instead challenges the State Department's withholdings only as to four records pursuant to Exemption 5, and three records pursuant to Exemption 7(E). As demonstrated by the State Department's first declaration, *see* Dkt. No. 93, and the supplemental declaration submitted herewith, State has logically and plausibly justified its withholding of those documents in full or in part, entitling it to summary judgment.

[1] This memorandum employs the same abbreviations as those defined in the government's moving brief, Docket No. 90.

## ARGUMENT

## I. ICE AND OLC ADEQUATELY SEARCHED FOR RESPONSIVE RECORDS

### A. ICE Conducted an Adequate Search

As detailed in the First Fuentes Declaration and further elaborated in the Supplemental Declaration of Toni Fuentes, dated May 3, 2019 ("Suppl. Fuentes Decl."), ICE has amply demonstrated "'that its search was adequate.'" *Long v. OPM*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney v. USDOJ*, 19 F.3d 807, 812 (2d Cir. 1994)). Indeed, the search "need not be perfect, but rather need only be reasonable," and ICE has met that standard. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (a search is judged by the efforts the government undertook, not by its results: the agency must demonstrate that its search was "reasonably calculated to discover the requested documents," not that the search "actually uncovered every document extant") (internal citation omitted); *see also Adamowicz v. IRS*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008).

#### 1. ICE Conducted Multiple Searches

In this case, after receiving plaintiff's FOIA request in August 2017, the ICE FOIA office tasked OPLA and Policy to search for responsive records. As explained in the First and Supplemental Fuentes Declaration, those searches included:

- Policy: After receipt of the FOIA request from the ICE FOIA Office, a FOIA POC in Policy reviewed the request and, based on her experience and knowledge of her office's practices and activities, tasked a Policy Analyst to search for potentially responsive documentation. The Policy Analyst conducted a search on the ICE Policy Manual Database, as well as her government computer (including personal and shared drives), using the following search terms: "speech," "beliefs," "determinations," "endorse," "espouse," "exclude," and "remove." The Policy Analyst also searched Outlook as well as the shared network drive using the search terms "speech," "beliefs," and "White House." The Policy Analyst did not locate any responsive records.

- DPLA: While OPLA directed DPLA to search for responsive documents, DPLA did not complete its search until January 2018, as described below.

Suppl. Fuentes Decl. ¶¶ 7-8. After conducting a review of the potentially responsive records collected from Policy's search, and applying appropriate FOIA exemptions, on September 29, 2017, ICE produced 1,666 pages of records to plaintiff. *Id.* ¶ 9.

Instead of filing an administrative appeal challenging FOIA's response, plaintiff, on October 4, 2017, filed the instant complaint. ICE reviewed the agency's response as outlined above and determined that additional searches should be conducted. *Id.* ¶ 10.

In the meantime, acknowledging that it had not exhausted its administrative remedies before filing suit, plaintiff, on January 5, 2018, administratively appealed ICE's response. *Id.* ¶ 11. On January 11, 2018, the parties filed a stipulation of voluntary dismissal without prejudice as to ICE. *See* Dkt. Nos. 30-31. On February 6, 2018, ICE responded to plaintiff's appeal, explaining that it had concluded that the agency should conduct new or modified searches. *See* Dkt. No. 91, First Fuentes Decl., Exhibit 2; Suppl. Fuentes Decl. ¶ 12.

Anticipating that it would conduct additional searches, ICE began conducting those additional searches in October 2017. *Id.* ¶ 13. Specifically, ICE conducted an additional search for responsive records in the following offices: ILPD, NSLS, EROLD, ERO, FLO, and the Office of the Director. ICE also re-tasked DPLA to search for responsive documents. *Id.*

- ILPD: Between October and November 2017, ILPD tasked the entire division to search for responsive records. Consistent with ICE's practice, and as was the case here, when a plaintiff does not suggest search terms, the ICE FOIA Office suggests search terms and individual employees then use their knowledge and experience to choose among the suggested terms and to determine if there are other search terms which would be helpful. ILPD attorneys and staff searched their government computers (including personal and shared drives) and Outlook e-mail accounts, using the following electronic search terms: "endorse," "espouse," "espouses," "speech," "beliefs," and/or "association." Some of these searches located responsive records, which were provided to ICE FOIA in November 2017.

- NSLS: In October 2017, NSLS tasked the entire division to search for responsive records. Consistent with ICE's practice, and as was the case here, when a plaintiff does not suggest search terms, the ICE FOIA Office suggests search terms and individual employees then use their knowledge and experience to choose among the suggested terms and to determine if there are other search terms which would be helpful. NSLS staff searched their government computers (including personal and shared drives) and Outlook e-mail accounts, using the following electronic search terms: "endorse," "espouse," "foreign policy," "212(a)(3)(B)(i)(VII)," "212(a)(3)(C)," and/or "200715919." Some of these searches located responsive records, which were provided to ICE FOIA.

- EROLD: In October 2017, two supervising attorneys for EROLD were also directed to search for responsive records by conducting similar searches to the other components. EROLD provides comprehensive legal advice and operational guidance to agency personnel. The supervising attorneys concluded that if EROLD were involved in the subjects requested by the FOIA request, they would have been the individuals involved. They further determined that they had had no interaction with anything related to policies, procedures, or guidance related to the exclusion or removal of individuals based on their "beliefs, statements or associations." Therefore, the attorneys concluded that a search in their division would not be reasonably calculate to uncover any relevant documents.

- ERO: After receipt of the FOIA request from the ICE FOIA Office, an ERO FOIA POC received and reviewed the request and, based on the contact's knowledge of the program offices' activities within ERO, the POC determined that the searches for potentially responsive records should be conducted at ERO's Executive Associate Director's (EAD) level. ERO's Deputy EAD of ERO's practices and activities, determined that his correspondence was likely to contain responsive documents because, during the relevant time frame, he represented ERO leadership in correspondence with other agencies and components. The Deputy EAD's assistant searched the Deputy's government computer (including personal and shared network drive) and Outlook e-mail account on November 14, 2017, using the following search terms: "Removal policies," "Removal terrorist," "Executive Order," "13780," "WH.gov," "Removal speech," "Removal belief," and "Removal association." The assistant located responsive records, which were provided to ICE FOIA.

- Office of the Director: After receipt of the FOIA request from the ICE FOIA Office, a Policy analyst was tasked to search for potentially responsive records. The analyst searched the ICE Director's government computer, including the Director's personal and shared drives, and Outlook e-mail account, using the following search terms: "Exclude," "Remove," "Speech," "Beliefs," "Associations," "Endorse Provision," "Espouse Provision," "Foreign Policy Provision," "Waiver," and "Application." The documents found to be responsive were provided to ICE FOIA on November 30, 2017.

- DPLA: Special Counsel to the DPLA conducted the searches on January 5, 2018, by searching the DPLA's government computer (including personal and shared drives) and Outlook e-mail account, using the following search terms: "endorse," espouse," and "eop.gov." The documents found to be responsive were provided to ICE FOIA on January 5, 2018.

- FLO: the Special Counsel conducted searches on November 13 and 14, 2017. The Special Counsel searched her government computer (including personal and shared drives) and Outlook e-mail account, using the following search terms: "Association," Foreign Affairs Manual," "Gang Association," "Foreign Policy Provision," "Beliefs," "Speech," "Memorandum," "waiver," "White House," and "ICE Policy." The documents found to be responsive were provided to ICE FOIA on December 6, 2017.

*Id.* ¶¶ 14-20. These searches conducted by ILPD, NSLS, EROLD, ERO, FLO, the Office of the Director, and DPLA resulted in the collection of approximately 14,000 pages of potentially responsive documents (including those documents previously located by Policy). On February 13, 2018, ICE offered to process and produce at least 500 pages per month, with a first production on March 7, 2018. *See* Dkt. No 54, Exhibit 9. Accordingly, on March 7, 2018, ICE responded to plaintiff, indicating that it had processed 560 pages of records, of which it referred 87 to other agencies and released 463 pages in part or in full. *See id.*, Exhibit 10. On April 30, 2018, ICE informed plaintiff that it had processed an additional 1,124 pages of records, of which it released 395 pages in full or in part and referred 728 pages to other agencies. Suppl. Fuentes Decl. ¶ 21.

Nevertheless, despite ICE's good faith effort to locate, process and produce responsive records, plaintiff filed an Amended Complaint in this action, adding ICE as a defendant. *See* Dkt. No. 42. Thereafter, plaintiff agreed to narrow the FOIA Request, seeking only final policy guidance or memoranda while excluding all draft policies and memoranda, court filings and opinions, and email correspondence. *Id.* ¶ 23.

Accordingly, ICE's Government Information Law Division ("GILD") manually reviewed the remaining pages that had been collected for final policy memoranda or guidance, thus

removing emails, the vast majority of the collected documents. *Id.* ¶ 24. GILD determined that 99 pages were responsive to the narrowed request. *Id*. On July 3, 2018, ICE produced in full or in part 50 pages, and referred 49 pages to DHS and USCIS. On August 3, 2018, DHS and USCIS responded to plaintiff, withholding those pages in full. *Id*. In total, ICE produced 1,666 pages of documents before plaintiff filed the instant suit; produced or referred 1,783 pages after suit was filed; conducted searches of eight components; searched for documents responsive to plaintiff's original, non-narrowed FOIA request; and, finally, conducted a re-review of the collected documents, applying plaintiff's narrowed criteria. *Id.* ¶ 25.

**2. ICE's Search Was Reasonable**

ICE's search was thus comprehensive and thorough, easily meeting the standard of "adequate." *Long*, 692 F.3d at 190. Plaintiff's complaints about the agency's search are unavailing.

First, the Supplemental Fuentes Declaration explains the search terms used by ILPD and NSLS. Suppl. Fuentes Decl. ¶¶ 14-15 (for ILPD: "endorse," "espouse," "espouses," "speech," "beliefs," and/or "association"; for NSLS: : "endorse," "espouse," "foreign policy," "212(a)(3)(B)(i)(VII)," "212(a)(3)(C)," and/or "200715919"). These terms are logical and plausible as they mirror the language in plaintiff's FOIA request. *See, e.g., Immigrant Def. Project v. U.S. Immigration & Customs Enforcement*, 208 F. Supp. 3d 520, 527 (S.D.N.Y. 2016) ("FOIA does not give requesters the right to Monday-morning-quarterback the agency's search.") (citing *Conti v. DHS*, No. 12 Civ. 5827, 2014 WL 1274517, at *15 (S.D.N.Y. Mar. 24, 2014) ("[A]n agency is not required to search for all possible variants of a particular name or term.")). Moreover, ICE reasonably relied on ICE employees' knowledge of their units and subject matter focus to determine which search terms were applicable. *See Immigrant Def. Project*, 208 F. Supp. 3d at

527-28 ("When evaluating the sufficiency of an agency's search, courts – mindful of the agency's superior knowledge of its recordkeeping system and the presumption of good faith owed to the declarations describing the request – look to whether the search appears designed to return all relevant records.") (citing *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 WL 2519908, at *15 (S.D.N.Y. June 19, 2008) (citing *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). ILDS and NSLS thus provided "logical explanations" for each search – reasonably relying on employee knowledge and selecting search terms consistent with the FOIA request. Moreover, each component directed its entire staff to search for responsive records, further evincing a "good faith effort." *Immigrant Def. Project*, 208 F. Supp. 3d at 527.

In addition, the Supplemental Fuentes Declaration explains the basis for EROLD's senior attorneys' decision to not search EROLD's files: supervising attorneys concluded that if EROLD were involved in the subjects requested by the FOIA request, they would have been the individuals involved, further determined that they had had no interaction with anything related to policies, procedures, or guidance related to the exclusion or removal of individuals based on their "beliefs, statements or associations," and therefore "concluded that a search in their division would not be reasonably calculated to uncover any relevant documents." Suppl. Fuentes Decl. ¶ 16. This is entirely appropriate, as an agency's decision to decline "to make hopeless and wasteful efforts to locate copies that would never have been created in the normal course" is entirely reasonable. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (concluding that the SEC need not search for documents that it determined did not exist).

Second, the First and Supplemental Fuentes Declarations describe in detail the searches that ICE conducted after ICE granted plaintiff's administrative appeal. Specifically, Policy searched for responsive documents in August and September 2017, and the ICE FOIA Office

directed DLPA to also search for responsive documents. Once ICE reviewed those responses, ICE directed six components to conduct searches –ILPD, NSLS, EROLD, FLO, the Office of the Director, and ERO – and re-directed DPLA to search for responsive documents. Suppl. Fuentes Decl. ¶¶ 13-20; Dkt. No. 91 ¶¶ 19-24, 28, 30.

Third, the Second Fuentes Declaration explains how the agency re-reviewed the remaining pages ICE had collected as a result of the additional searches, applying plaintiff's narrowed criteria. ICE's GILD manually reviewed pages, looking for final policy memoranda or guidance and excluding emails: exactly what plaintiff requested. Suppl. Fuentes Decl. ¶ 24.

Finally, the searches run by the Office of the Director and ERO were adequate. Both components searched the computers and emails of high-level employees. In the Office of the Director, a Policy analyst searched the Director's computer, including personal and shared drives, using search terms mirroring the FOIA request. *Id.* ¶ 18. Similarly, in ERO, the Deputy Executive Associate Director ("EAD") determined that his correspondence "was likely to contain responsive documents because, during the relevant time frame, he represented ERO leadership in correspondence with other agencies and components." *Id.* ¶ 17. Accordingly, the Deputy's assistant searched the Deputy's government computer (including personal and shared network drive) and Outlook e-mail account using targeted search terms. *Id*. In addition, both searches returned responsive documents. *See id.* ¶¶ 17-18. Although plaintiff claims that the search terms were "too restrictive" because "these are not necessarily the terms ICE would use," Dkt. No. 101 at 12, plaintiff's claim is purely speculative. ICE reasonably relied on ICE employees' "superior knowledge of its recordkeeping system" to fashion a plausible search – knowledge that plaintiff simply does not possess. *Immigrant Def. Project,* 208 F. Supp. 3d at 527-28. Moreover, "the search need not be 'perfect' in Plaintiffs' estimation (or even the Court's), so long as the agency

'has provided logical explanations for each of the decisions it made as to search terms to be used and how to conduct the searches,' evincing a good faith effort to design a comprehensive search." *Id.* (quoting *Fox News Network, LLC v. U.S. Dep't of Treasury*, 739 F. Supp. 2d 515, 535 (S.D.N.Y. 2010)). Where an agency's declaration demonstrates that it has conducted a reasonable search, as here, "the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993). Plaintiff cannot make that showing. ICE therefore conducted an adequate search, entitling it to partial summary judgment. *See Grand Cent. P'ship*, 166 F.3d at 489. [2]

**B. OLC Conducted an Adequate Search**

Plaintiff does not challenge the adequacy of OLC's search of its own records, but rather, makes the remarkable assertion that OLC should have searched the White House's records instead of its own.

As an initial matter, the White House and OLC are distinct. When not referring to the building itself, the term "White House" is generally used to refer to the advisors to the President working in the White House Office, one of the components of the Executive Office of the President ("EOP"). *See* Exec. Order No. 8248, 3 C.F.R., 1938-1943 Comp., p. 576 (Sept. 8, 1939)

[2] Plaintiff notes that ICE stated in the First Fuentes Declaration that ICE had produced a total of 1,054 pages responsive to both the original FOIA request and the Narrowed Request," but plaintiff further notes that ICE produced 1,666 pages pre-suit in response to the original request, thus suggesting that ICE's 1,054 page number count is inaccurate. Dkt. No. 101 at 11 n.10. But ICE is correct. ICE produced 1,666 pages pre-suit; the 1,054 pages the First Fuentes Declaration referenced is the approximate number of pages ICE produced *after* suit, which were responsive both to the original FOIA request and then also to the Narrowed Request. *See* Suppl. Fuentes Decl. ¶¶ 21 & 24. ICE also referred an additional approximately 815 documents to other agencies, thus producing or referring a total of approximately 1,783 pages post-suit. *See id.* ¶ 25. Moreover, those numbers are approximate due to the file corruption that occurred after applying the narrowing criteria. *See id.* ¶ 24. Accordingly, ICE's declarations are entirely consistent and complete, and to the extent that there are minor inconsistencies in the page numbers due to the corrupted file, they are "trivial." *SafeCard Servs., Inc.*, 926 F.2d at 1202 ("SafeCard's claim that there are "troubling inconsistencies" in the SEC affidavits and briefs refers us only to trivial matters, such as typographical errors and minor ambiguities undeserving of extended treatment here," such as differences between the Vaughn index submitted to the district court versus the circuit).

(establishing EOP and its components, including the White House Office); 3 U.S.C § 105 (providing for the hiring of employees of the White House Office).[3] OLC, on the other hand, is a component of the United States Department of Justice, is led by an Assistant Attorney General who reports to the Attorney General of the United States, and provides legal advice to the President and all executive branch agencies. *See* 28 C.F.R. § 0.25 (establishing Office of Legal Counsel under the Department of Justice). Of particular importance here, OLC "[p]repar[es] and mak[es] necessary revisions of proposed Executive orders and proclamations, and advis[es] as to their form and legality prior to their transmission to the President; and perform[s] like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General." 28 C.F.R. § 0.25(b); *see also* https://www.justice.gov/olc (last accessed on April 30, 2019) ("All executive orders and substantive proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval.").

It is axiomatic that OLC cannot be compelled to search records in the possession of other agencies. *Jones-Edwards v. Appeal Bd. of NSA*, 196 F. App'x 36, 38 (2d Cir. 2006) ("An agency is not obliged to conduct a search of records outside its possession or control."); *Sonds v. Huff*, 391 F. Supp. 2d 152, 160 (D.D.C. 2005), *aff'd*, 2006 WL 3093808 (D.C. Cir. 2006) (agency is "not required to respond to a FOIA request that should be directed to another agency."). That is because FOIA applies to "agency records," 5 U.S.C. § 552(a)(4)(B); *DOJ v. Tax Analysts*, 492 U.S. 136,

[3] EOP contains a large number of entities, many of which fall well outside the common use of the term "White House," including the Office of Management and Budget, the U.S. Trade Representative, the Office of National Drug Control Policy, and the Council on Environmental Quality, among others. *See, e.g.*, Exec. Order 82483 (identifying original EOP entities); *see also, e.g.*, EOP Fiscal Year 2018 Congressional Budget Submission, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/EOP-FY18-Budget.pdf (identifying current EOP entities and identifying employees of the White House Office as "The White House" for budget purposes).

142 (1989); *FLRA v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992), and to qualify as agency records, the requested materials must be "created or obtained by the agency to which the FOIA request was made" and "under that agency's control at the time the FOIA request is made," *Bloomberg LP v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 275 (S.D.N.Y. 2009) (citing *Tax Analysts*, 492 U.S. at 144-45)), *aff'd*, 601 F.3d 143 (2d Cir. 2010); *see also Grand Cent. P'ship*, 166 F.3d at 479. Since FOIA "only obligates [agencies] to provide access to those [records] which it in fact has created and retained," *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980), an "agency is not obliged to conduct a search of records outside its possession or control," *Jones-Edwards* 196 F. App'x at 38. As a result, OLC cannot be obligated to search other agencies' records. *See Jones-Edwards*, 196 F. App'x at 38 (finding agency's "declaration was sufficient to meet its burden of showing that it had conducted an adequate search of its own records," and that the agency was not obligated expand its search to encompass "domestic and international networks" outside of its control). Indeed, as a practical matter, one agency does not have access to another agency's records systems. *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 151-52 (1980) ("FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control.").

Moreover, FOIA "applies only to federal agencies," *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 546 (2d Cir. 2016), and as a general matter, components of the White House Office "are not agencies within the meaning of FOIA." *Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 65 (D.D.C. 2019); *see also Meyer v. Bush*, 981 F.2d 1288, 193 n.3 (D.C. Cir. 1993) (the President's "immediate personal staff," encompassing "at least those . . . individuals employed in the White House Office," are exempted

from FOIA "without a careful examination of [their] function"). And certain other entities within the much larger EOP are also not subject to FOIA. *See Main St. Legal Servs*., 811 F.3d at 552 (examining units within the Executive Office of the President, and concluding that the because the National Security Council "lacks any authority independent of the President, it is not an agency subject to the FOIA"); *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 566 F.3d 219, 222-23 (D.C. Cir. 2009) (a unit within the Executive Office of the President is subject to FOIA only if it 'wield[s] substantial authority independently of the President'") (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)). As a result, even if OLC could be compelled to search the White House as a legal or practical matter – which it cannot – such a search would be largely moot because White House components are exempt from FOIA. And even if plaintiff meant for its request to reach those for those EOP components subject to FOIA, *see Judicial Watch, Inc. v. U.S. Secret Serv*., 726 F.3d 208, 232 n.28 (D.C. Cir. 2013), plaintiff could only request records from those units by sending a FOIA request directly to those units and not through another agency, *see Sonds*, 391 F. Supp. 2d at 160.

Plaintiff now points to one sentence in a Joint Status report drafted by plaintiff, stating that OLC would "[s]earch only White House systems for records sought, as Counsel for Defendants indicated that searching each recipient agency would be a slower and duplicative process." Dkt. No. 101 (citing Dkt. No. 48 at ¶ 2(a)). However, government's counsel understood that sentence (and the months of conversations that occurred before and after the Joint Status report was filed) to mean that OLC would search *its* systems for White House records, given the relationship between OLC and the White House concerning executive orders: the gravamen of plaintiff's complaint. The government recognizes that there appears to have been a misunderstanding; however: (a) plaintiff could have raised the issue when OLC provided a draft search declaration

on November 2, 2018, *see* Dkt. No. 101 at 8, instead of raising it for the first time months later when the parties are engaged in summary judgment briefing; and (b) it is legally and practically impossible for OLC to search White House records. Accordingly, despite this apparent confusion, OLC simply cannot be obligated to search another agency's files, as plaintiff seeks.

Finally, the Colborn Declaration demonstrates that OLC conducted a careful, thorough search that was designed to return records responsive to the Narrowed Request. OLC began by searching the central storage system, Perceptive, containing "all final unclassified written legal advice," which, in light of the fact that "OLC attorneys use this database to perform internal research," is kept "as complete as possible." Colborn Decl. ¶¶ 8, 10. Further, OLC FOIA staff searched the email account and electronic files of the custodian reasonably likely to have responsive records. *See id. Id.* ¶ 11. Moreover, after receiving one document from the State Department, OLC staff "revisited the search of Perceptive to ensure that nothing had been missed," *id.* ¶ 12, thus further ensuring that its search was adequate. These facts demonstrate that OLC's search was "reasonably calculated to discover" responsive documents, *Grand Cent. P'ship*, 166 F.3d at 489, and plaintiff has made no argument in response. And any argument plaintiff seeks to raise in its reply brief concerning OLC's search of its own records is waived. *See, e.g., Tutor Time Learning Centers, LLC v. GKO Grp., Inc.*, No. 13 CIV. 2980 (JMF), 2013 WL 5637676, at *1 (S.D.N.Y. Oct. 15, 2013) ("arguments raised for the first time in a reply memorandum are waived and need not be considered") (citations omitted). OLC is therefore entitled to partial summary judgment.

## II. THE STATE DEPARTMENT PROPERLY WITHHELD RECORDS PURSUANT TO FOIA'S EXEMPTIONS

Plaintiff has withdrawn challenges to the State Department's application of Exemptions 1 or 3 to any records, or its application of Exemption 5 and 7(E) to certain records; rather, plaintiff

now challenges only the State Department's application of Exemption 5 to four records,[4] and the State Department's application of Exemption 7(E) to versions of three sections of the Foreign Affairs Manual.[5] The Stein Declaration and accompanying Vaughn index, along with the Supplemental Declaration of Eric Stein, dated May 3, 2019 ("Suppl. Stein Decl."), submitted herewith, logically and plausibly justify the claimed exemptions.

### A. State Properly Withheld Four Records Pursuant to Exemption 5

#### 1. State Properly Withheld Three Documents in Full and in Part Pursuant to the Presidential Communications Privilege

The Supreme Court has recognized a "presumptive privilege for Presidential communications" that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("*Nixon I*"). The presidential communications privilege protects "communications in performance of a President's responsibilities . . . of his office . . . and made in the process of shaping policies and making decisions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (citation and quotation marks omitted) ("*Nixon II*"). "Unlike the deliberative process privilege, which is a general privilege that applies to all executive branch officials, the presidential communications privilege is specific to the President and applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113–14 (D.C. Cir. 2004) (citation and quotation marks omitted).

[4] A memorandum (C06534021), an action memorandum and two attachments (C06569352, C06569347, C06569349), a two-page memorandum (C06568577), and a one-paragraph memorandum (C06570336).

[5] Foreign Affairs Manual 9 FAM 302.6 (C06533909, C06533920, C06533941, C06533947, C06533951, C06533970, C06534007, C06571131), Foreign Affairs Manual 9 FAM 40.32 (C06533937, C06567707, C06567710), and Foreign Affairs Manual 9 FAM 302.14 (C06571135).

Accordingly, the presidential communications privilege is "a broader privilege that provides greater protection against disclosure." *Id.*[6]

Here, State withheld three documents in full or in part pursuant to the presidential communications privilege. *First*, State withheld in full a legal memorandum concerning "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns," dated August 22, 2017 (C06534021) ("First Amendment Concerns"). As further explained in the Supplemental Stein Declaration, this "was solicited for a meeting of the National Security Council (NSC) Lawyer's Group headed by a Deputy Legal Advisor to the National Security Council at the direction of John Eisenberg, the Assistant to the President, Deputy Counsel to the President for National Security Affairs, and Legal Advisor to the National Security Council," and was drafted by attorneys at USCIS with input by members of the Lawyer's Group. Suppl. Stein Decl. ¶ 5; *see also* https://www.whitehouse.gov/nsc/ (last accessed on May 3, 2019) (explaining that the NSC is chaired by the President; it is his "principal forum for considering national security and foreign policy matters with his senior national security advisors and cabinet officials"; and that, from its inception, "the Council's function has been to advise and assist the President on national security and foreign policies"). Eisenberg "is a senior presidential adviser," and the memorandum addresses "visa policies considered by the President regarding the 'endorse or espouse' provisions of the Immigration and Nationality Act." *Id.* In addition, the "document was kept confidential and was not widely disseminated; it was only disseminated to the attendees of

[6] In addition to protecting communications directly with the President, the privilege protects communications involving senior presidential advisors, including "both [] communications which these advisers solicited and received from others as well as those they authored themselves," in order to ensure that such advisors investigate issues and provide appropriate advice to the President. *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). In the FOIA context, the presidential communications privilege need not be invoked by the President himself, but may be asserted by the agency withholding the records in question. *See, e.g., Loving v. DOD*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007), *aff'd*, 550 F.3d 32 (D.C. Cir. 2008).

the NSC Lawyer's Group, a select group of senior agency counsel . . . [whose communications] fall within the scope of governmental privileges." *Id.*

*Second,* State withheld (a) an Action Memorandum in part entitled "Travel Sanctions Against Persons Who Participate in Serious Human Rights Violations and Other Abuses," dated February 22, 2011 (C06569352), (b) Tab 2 to the memorandum in full entitled "Proposed Implementation Procedures (C06569347), and (c) Tab 3 to the memorandum in full entitled "Background on Sanctions Authority" (C06569349) (collectively, "Travel Sanctions"). The "action memorandum was drafted in response to the request of the National Security Council Staff for 'legal options for barring entry into the United States to aliens who participate in serious human rights and humanitarian law violations and related abuses' so that [staff] could present those options to the President." *Id.* ¶ 6. National Security Staff requested the memorandum "in order to advise the President in his creation of the policy announced in Presidential Proclamation 8697," and was not widely disseminated. *Id.*

*Third,* State withheld in full a memorandum from OLC entitled "Informal Legal Opinion on Section 212(d)(3)(B)(i) of the Immigration and Nationality Act" (C06568577) ("Section 212(d)(3)(B)(i)"). The National Security Council solicited this opinion in order to "evaluate[] conflicting legal views among agencies on the interpretation of INA § 212(d)(3)(B)(i)"; it was "drafted by the Office of Legal Counsel and used to brief the National Security Staff;" and it was "not widely disseminated." *Id.* ¶ 7.[7]

These records are quintessential examples of records that fall squarely within the bounds of the privilege. First, these records are communications internal to the Executive Branch, and are

[7] OLC also located this record when searching for documents responsive to plaintiff's FOIA request and included it in OLC's draft Vaughn index, but OLC has not yet briefed the propriety of its withholdings. Accordingly, if the Court requests supplemental briefing on this document, or orders *in camera* review, the government respectfully requests that OLC be permitted to submit its views regarding this document.

therefore "inter-agency and intra-agency" records for the purpose of applying Exemption 5. *See* 5 U.S.C. § 552(b)(5); *see also* Suppl, Stein Decl. ¶¶ 5-7. Moreover, they involve communications among senior presidential advisors. Moreover, they involve communications among senior presidential advisors. *See* Suppl. Stein Decl. ¶ 5 (First Amendment Concerns memorandum drafted by National Security Council Lawyer's Group for Deputy Counsel to the President; Travel Sanctions memorandum requested by the President's National Security Staff in order to advise the President; and Section 212(d)(3)(B)(i) legal opinion drafted by OLC to brief the National Security Council Staff and the President). These documents assisted the President and other members of the executive branch in carrying out their responsibilities regarding immigration enforcement. *See id.* ¶ 4. These documents assisted the president and other members of the executive branch in carrying out their responsibilities regarding immigration enforcement. *See id.* ¶ 4. And the records have been held within the Executive Branch. *See id.* ¶¶ 5-7; *American Civil Liberties Union v. DOJ*, No. 15 Civ. 1954 (CM), 2016 WL 889739, at *5 (S.D.N.Y. Mar. 4, 2016). Most importantly, disclosure of such communications would inhibit precisely the free flow of information and candid exploration of issues between the President and his advisors that lies at the heart of the privilege. *See* Vaughn Index at 8-10, 21; *Nixon II*, 433 U.S. at 449.

Plaintiff's arguments that the presidential privilege does not apply are meritless. First, plaintiff asserts that State has not identified "which senior presidential advisors" solicited or received these records. Pls. Br. at 19. As explained in the Supplemental Stein Declaration, the Legal Advisor to the President's National Security Council and the National Security Council itself solicited these documents; they are both indisputably "members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In*

*re Sealed Case*, 121 F.3d at 752. Second, these records are sufficiently related to presidential decision-making. *See* Suppl. Stein Decl. at ¶¶ 5-7(the First Amendment Concerns memorandum provided options for the President to consider regarding the endorse or espouse provisions; "Travel Sanctions" was drafted in order to present "legal options for barring entry . . . to the President"; and the Section 212(d)(3)(B)(i) Legal Opinion presented OLC's analysis of various agencies' interpretation of that section in relation to a classified policy discussion related to a specific geographical region). Third, the privilege has not been waived through "widespread dissemination of these records." Dkt. No. 101 at 22. Rather, the First Amendment Concerns memo was only disseminated to the NSC Lawyer's Group, and the Travel Sanctions and Section 212(d)(3)(B)(i) memos were "kept confidential." Suppl. Stein Decl. at ¶¶ 5-7.

Accordingly, State properly withheld such information pursuant to Exemption 5 and the presidential communications privilege. *See Judicial Watch*, 365 F.3d at 1114; *In re Sealed Case*, 121 F.3d at 745-46.

**2. State Properly Withheld Four Documents in Full Pursuant to the Deliberative Process Privilege**

State also withheld the three records described above pursuant to the deliberative process privilege, as well as a "Memorandum for Michele T. Bond Acting Assistant Secretary," dated June 4, 2015 (C06570336) ("Memo for AAS"). State's declarations and Vaughn index logically and plausibly justify those withholdings, and plaintiff's arguments to the contrary fall flat.

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*, 166 F.3d at 482 (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 v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002)). However, 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), so long as the document "was prepared to assist [agency] decisionmaking on a specific issue," *Tigue*, 312 F.3d at 80. "A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated," such as where it contains the opinions of the author rather than the policy of the agency, or where it might "reflect inaccurately upon or prematurely disclose the views of [the agency]." *Grand Central*, 166 F.3d at 482-83 (citation omitted). 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 v. HUD*, 929 F.2d 81, 84-85 (2d Cir. 1991) (quoting *Sears*, 421 U.S. at 150).

Here, the First Amendment Concerns memorandum is pre-decisional because it contains legal analysis that "has not been publicly adopted formally or informally" and deliberative because it "offers a legal analysis of a range of possible policy options" and "explicitly assesses the litigation risk for policy decisions." Suppl. Stein Decl. at ¶ 5. The Travel Sanctions memorandum is pre-decisional because it offers "proposals [that were] not binding on the Department or the President" in the furtherance of policy announced by Presidential Proclamation 8697, and deliberative because it "presents . . . options to the President" concerning "legal options for barring entry into the United States to aliens who participate in serious human rights and humanitarian law violations." *Id.* at ¶ 6 ("The analysis in the memorandum and the two attachments to the memorandum is predecisional with respect to the President's final decision on whether to exercise his authority to bar entry in the United States of aliens who participate in serious human rights violations, which resulted in Presidential Proclamation 8697."). Similarly, the Section

212(d)(3)(B)(i) legal opinion is pre-decisional because it provided non-binding analysis and deliberative because it presents "different viable legal interpretations." *Id.* at ¶ 7. And the Memo for AAS is pre-decisional because it contains analysis of the NSC's "legal views on a proposed exemption under INA § 212(d)(3)(B) for material support provided to a terrorist organization under duress," and is deliberative because provides analysis that "did not bind the Department to take an action" *Id.* at ¶ 8.

Contrary to plaintiff's argument, therefore, *see* Dkt. No. 101 at 17, the State Department has identified a final agency decision or "specific issue" to which each document relates. *Tigue*, 312 F.3d at 80l; *see* Suppl. Stein Decl. at ¶¶ 5-8 (the First Amendment Concerns memorandum related to the President's consideration of visa policies regarding the endorse or espouse provisions; the Travel Sanctions memo related to the President's consideration how to exercise his authority to bar entry and ultimate issuance of a Presidential Proclamation; the Section 212(d)(3)(B)(i) legal opinion was used in formulating a policy related to a specific geographic region, the details of which are classified; and the Memo for AAS was solicited in relation to a proposed exemption under INA 212(d)(3)(B) for material support). Also contrary to plaintiff's argument, the Supplemental Stein Declaration demonstrates that none of these records resulted in a final agency decision binding on the agency, and thus do not constitute "working law" sufficient to overcome the privilege. *See Brennan Center for Justice v. DOJ*, 697 F.3d 184, 196 (2d Cir. 2012) (working law doctrine requires disclosure of otherwise privileged documents only if they have become an agency's "effective law and policy" -- that is, a record that has "'the force and effect of law'") (quoting *Sears*, 421 U.S. at 153). A mere discussion or description of law or policy, or analysis of various legal options, as contained in the instant records, is not sufficient: the document must "create or determine the extent of the substantive rights and liabilities of a

person," *Afshar v. Dep't of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983), and thus must be "effectively binding on the agency," *Brennan Center*, 697 F.3d at 203 ("suggestions or recommendations as to what agency policy should be," "advice to a superior," or "suggested dispositions of a case" are not working law) (citations omitted); *cf. Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) (an agency's legal department's memoranda constituted working law because the memoranda "were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent"). Here, each document contains legal analysis and did not "bind the agency" to take a particular action, obtaining the "force and effect of law." *Brennan Center*, 697 F.3d at 203; Suppl. Stein Decl. ¶¶ 5-8. As a result, none of these records constitute the "working law" of the State Department.

Finally, the State Department conducted a line-by-line analysis of each of these documents to determine if any factual material could be released. Because "[a]ny limited the factual material is inextricably intertwined" with the "deliberative, legal analysis," State determined that no further information could be released. Suppl. Stein Decl. at ¶¶ 5-8. Particularly in light of the fact that an agency's declaration in support of its withholding determinations is "accorded a presumption of good faith," the State Department has met its burden that it segregated all possible material in these records, and properly withheld information pursuant to the deliberative process privilege. *Carney*, 19 F.3d at 812 (footnote omitted).[8]

### 3. State Properly Withheld Four Documents in Full Pursuant to the Attorney Client Privilege

The State Department has also substantiated its invocation of attorney-client privilege over these four documents. To invoke the attorney-client privilege, a party must demonstrate that there

[8] Note, however, that the State Department did release factual portions of the cover memorandum in the Travel Sanctions set of documents, further demonstrating its good faith attempt to segregate factual material. *See* Suppl. Stein Decl. at ¶ 6; Vaughn Index at 9-10.

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." *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).

Here, the State Department has satisfied all three elements as to each record. First, each was a communication between client and counsel: the First Amendment Concerns memorandum was "prepared by U.S. Immigration and Customs Enforcement attorneys with input from the members of the Lawyers Group in order to provide legal advice for possible presentation to the President through Mr. Eisenberg"; the Travel Sanctions documents were drafted by the President's NSC staff to provide "legal options . . . to the President"; OLC prepared the Section 212(d)(3)(B)(i) legal memorandum for the NSC; and the Deputy Assistant Attorney General of DOJ's National Security Division ("NSD") drafted the Memo for AAS to provide legal analysis to the State Department. Suppl. Stein Decl. at ¶¶ 5-8. Second, each document was kept confidential and, except for the Memo for AAS, was used by senior staff to advise the President. *Id.* Third, each was made for the purpose of obtaining or providing legal advice: the First Amendment memo was solicited by the Legal Advisor to the NSC to present the President with a range of legal options; the Travel Sanctions documents were prepared for the National Security Staff to advise the President of legal options to prevent entry to human rights violators; the Section 212(d)(3)(B)(i)

legal opinion was solicited by the NSC to evaluate conflicting legal views on a section of the INA; and the Memo for AAS presented NSD's legal views on a proposed exemption from an INA provision concerning "material support provided to a terrorist organization under duress." *See id.* Thus, the State Department has properly applied the attorney-client privilege to these records. *See County of Erie*, 473 F.3d at 418.

**4. State Properly Withheld the "First Amendment Concerns" Memorandum in Full Pursuant to the Work Product Privilege**

Further, the State Department has properly applied the work product privilege to the First Amendment Concerns memorandum. 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). Here, a Deputy Legal Adviser to the President requested that attorneys at the State Department prepare this memorandum in order to provide legal advice to the President about a section of the INA. As a result of the fact that the current administration's immigration policies have been frequently challenged in litigation, the memorandum "explicitly assesses the litigation risks of policy decisions in this area of immigration law." Suppl. Stein Decl. at ¶ 5. Because of the well-known and frequent litigation challenging the administration's interpretation of the INA and immigration decisions, this memorandum was therefore prepared with "litigation in mind." *New York Times v. DOJ*, 101 F. Supp. 3d 310, 319 (S.D.N.Y. 2015). Documents such as this, which "advise agency personnel of types of legal challenges likely to be mounted against a proposed action, and possible defenses, are protected by the work product privilege." *Id.* (citing *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.D.C. 1987)). State has thus logically and plausibly demonstrated that the work product privilege applies to this record.

### B. State Properly Withheld in Part Versions of the Foreign Affairs Manual Pursuant to Exemption 7(E)

Finally, State properly withheld information pursuant to Exemption 7(E) in versions of three Foreign Affairs Manual Sections: 9 FAM 302.6, 9 FAM 40.32, and 9 FAM 302.14. Exemption 7(E) exempts from disclosure records 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). Such 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).

The State Department is "a mixed-function agency," in that it has both "law enforcement and administrative functions." *Tax Analysts*, 294 F.3d 71, 77 (D.C. Cir. 2002) (noting that a mixed-function agency is subject to a more "exacting standard" under 7(E)); Suppl. Stein Decl. ¶ 9. The FAM versions at issue here reflect that mixed function – certain (released) portions contain recitations of statutes and background, *see* Dkt. No. 102 at 15 (reciting Section 212(a)(3)(B)(i) and describing the background of agency enforcement), and other (withheld) portions contain specific techniques for applying those statutes, *see id.* at 21 (redacting techniques used to check for terrorism-related ineligibilities). The purpose of these sections of the Foreign Affairs Manual is to fulfill the State Department's "enforcement of the Immigration and Nationality Act" and therefore "falls squarely within the Department's law enforcement functions" – specifically, its responsibilities to process visa applications. Suppl. Stein Decl. ¶ 9. The withheld information contains techniques, procedures, and guidelines, "because the information details investigation techniques used to assess the core national security concerns that arise in processing visa

applications, such as triggers for further security investigations or checking for terrorism ineligibilities." *Id.* For example, 9 FAM 302.6-2(B)(4)c.(4) "provides details about the conditions under which to apply a presumption of inadmissibility due to involvement in terrorist activity." Vaughn Index at 2. 9 FAM 302.6-2(B)(4)d.(3)-(5) "provides information about the Palestine Liberation Organization that is used as a guideline for determining whether an applicant is associated with the organization and therefore inadmissible." *Id.* And 9 FAM 302.6-2(B)(5)f "provides information about how to assess whether to exempt an applicant associated with the Kosovo Liberation Army." *Id.* Similarly, 9 FAM 40.32 contains techniques, guidelines and procedures for State Department staff to use when processing visa applications. Sections N1.1.c and N2.1.c, for example, outline "interagency cooperation procedures during the process of checking for ineligibilities," and Section N2.3 provides "guidelines for identifying material support" for terrorist groups. *Id.* at 3. 9 FAM 302.14, Section 302.14-3(B)(3)(f) provides "procedures for investigating a visa that is flagged and may need to be revoked," and Section 302.14-7(B)(3)(1) provides "guidelines for evaluating/investigating coursework and intent to return to Iran." *Id.* at 4. Plaintiff's claim that some reacted portions "appear[]" to contain merely "definitions," is again pure speculation. Dkt. No. 101 at 20.

These sections therefore "describe the proactive steps consular officers take to prevent criminals, terrorists, and other bad actors from entering the United States," Suppl. Stein Decl. ¶ 9 – quintessential guidelines, techniques or procedures used by law enforcement in carrying out their duties, *see, e.g., Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (agency may withhold information where its release would provide insight into its investigatory or procedural techniques); *Ibrahim v. United States Dep't of State*, 311 F. Supp. 3d 134, 143 (D.D.C. 2018) (Exemption 7(E) applied to "USCIS's Refugee Application Assessment," because its disclosure

"could reasonably be expected to risk circumvention of the law by enabling applicants for refugee status to plan strategic but inaccurate answers"); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 29 (D.D.C. 2011) (disclosure would reveal the selection criteria "to prevent immigration fraud," "fraud indicators, and investigative process that USCIS and other agencies use in fraud investigations," which "would potentially enable the circumvention of law"). As a result, the State Department properly withheld certain information pursuant to Exemption 7(E).

**CONCLUSION**

For the reasons given above, ICE and OLC's motion for partial summary judgment, and the State Department's motion for summary judgment, should be granted, and plaintiff's motion denied.

Dated: May 3, 2019
New York, New York

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
E-mail: ellen.blain@usdoj.gov