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.

No. 1:17-cv-07572-ALC

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Institute") respectfully submits this memorandum of law in support of its cross-motion for summary judgment against Defendants Immigration and Customs Enforcement ("ICE") and U.S. Citizenship and Immigration Services ("USCIS"), and in opposition to ICE and USCIS's motion for summary judgment.

PRELIMINARY STATEMENT

As detailed in the Knight Institute's memorandum in support of its previous cross-motion for partial summary judgment and summary judgment, Pl.'s Mem. in Supp. of Mot. for Partial Summ. J. and Summ. J. ("Pl.'s Mar. 28 Mem.") 1–2, ECF No. 101, this Freedom of Information Act ("FOIA") lawsuit seeks records relating to the government's authority to exclude or remove individuals from the United States based on their speech, beliefs, or associations—including its authority to conduct the extreme ideological vetting President Trump ordered shortly after taking office. *See id*. To inform the public about the implementation of the President's extreme vetting program, and about various agencies' past and current policies and practices under relevant provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, the Knight Institute filed identical FOIA requests (the "Request") with the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), ICE, USCIS, the Department of Justice ("DOJ"), and the Department of State ("DOS") (collectively, "Defendants") seeking several categories of records concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations.

In response to the Request and as a result of this litigation, Defendants have collectively released thousands of pages of records, providing some insight into immigration decisions based on these grounds. Nonetheless, ICE and USCIS have inappropriately withheld responsive records.

As relevant to the present cross-motion for summary judgment, ICE and USCIS have failed to justify their withholding of responsive records pursuant to FOIA Exemptions 5, 7(C), and 7(E). 5 U.S.C. §§ 552 (b)(5), (b)(7)(C), (b)(7)(E).

FACTUAL BACKGROUND

The Knight Institute herein incorporates the background information about the government's consideration of speech, beliefs, and associations in immigration decisions, as well as background information about the Request, provided in its memorandum in support of its cross-motion for partial summary judgment against ICE and DOJ's Office of Legal Counsel ("OLC") and for summary judgment against DOS, and in opposition to their motions for partial summary judgment and summary judgment, respectively. Pl.'s Mar. 28 Mem. 3–7.

A. ICE's and USCIS's development of new vetting policies.

Following the President's extreme vetting orders, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); *see also* Presidential Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017), ICE and USCIS have proposed and/or implemented policies for examining visa applicants' and visa holders' speech, beliefs, and associations. Since June 2017, ICE has pursued an initiative—originally labeled the "Extreme Vetting" Initiative—to implement a program for the online monitoring of visa applicants and visa holders in the United States.[1] Borrowing language from the President's first extreme vetting order, ICE said it must develop a "continuing vetting process" to "determine and evaluate an applicant's probability of becoming a positively contributing member of society as well as their ability to contribute to national interests."[2] After confronting technological limitations on its ability

[1] ICE, *Extreme Vetting Initiative: Statement of Objectives*, FBO (June 12, 2017), *available at* https://perma.cc/LL8G-5V79.

[2] *Id.*

to create an automated review program, ICE announced that it would instead seek to hire about 180 people to continuously, manually monitor the social media activities and other online activities of 10,000 people per year.[3] In October 2017, USCIS acknowledged its expansion of the categories of information it collects from applicants for immigration benefits to include "social media handles, aliases, associated identifiable information, and search results."[4] USCIS collects this information not only from the applicants themselves, but also from "publicly available information obtained from the Internet" and "commercial data aggregators."[5]

B. Defendants' responses to the Request.

The Request seeks information about these and other new vetting policies, as well as the government's understanding of its authority to base immigration decisions on individuals' speech, beliefs, or associations. Defendants largely completed their productions of responsive records by July 2018. As relevant to the present cross-motion, Defendants provided the following responses:

ICE: On September 29, 2017, ICE sent the Knight Institute a "final response" letter that quoted the language of Item 1 of the Request. First Am. Compl. Ex. C, ECF No. 42-3. Along with its letter, ICE released 1,666 pages of records but withheld 1,653 of those pages in full. *See id.* Following an administrative appeal, ICE determined that "new search(s) or modifications to the existing search(s) . . . could be made," and remanded the Request to ICE's FOIA Office for further processing and retasking. First Am. Compl. Ex. F, at 3, ECF No. 42-6; *see also* Decl. of Carrie

[3] *See* Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of "Extreme Vetting" Software That Could Predict Whether a Foreign Visitor Would Become a Terrorist*, Wash. Post (May 17, 2018), https://perma.cc/LQ72-RG2H.

[4] *See* Chinmayi Sharma, *The National Vetting Enterprise: Artificial Intelligence and Immigration Enforcement*, Lawfare (Jan. 8, 2019), https://perma.cc/J3LV-LXDY (citing Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,556, 43,557 (effective Oct. 18, 2017)).

[5] *Id.*

DeCell ("Mar. 28 DeCell Decl.") ¶¶ 10–15, Mar. 28, 2019, ECF No. 102. By email dated February 13, 2018, ICE informed the Knight Institute that it had located approximately 14,000 pages of "potentially responsive documents," First Am. Compl. Ex. G, ECF No. 42-7, based on the initial Request. On March 7, 2018, ICE informed the Knight Institute that it had processed 560 pages for release. First Am. Compl. Ex. H, ECF No. 42-8. ICE referred 87 of those pages to other agencies for processing and released the remaining 463 pages with redactions. *See* Joint Status Report ¶ 25, ECF No. 48. On April 30, 2018, ICE informed the Knight Institute that it had processed an additional 1,124 pages of responsive records. It released 395 pages in full or in part, and it referred 728 pages to other agencies. Mar. 28 DeCell Decl. ¶ 21.

To expedite ICE's processing of the remaining records, the Knight Institute agreed that ICE could process only records responsive to the Request as provisionally narrowed in a January 25, 2018 agreement between the parties. *Id.* ¶¶ 7, 22. Following a re-review of the records ICE had identified as responsive to the initial Request, ICE identified ninety-nine pages of records as responsive to the narrowed Request. *See id.* ¶ 23. ICE referred forty-nine of those pages to DHS and USCIS, both of which withheld all referred pages in full, and released an additional fifty pages in part or in full to the Knight Institute. *See* Defs.' Letter Regarding ICE Status Report, ECF No. 77.

In total, ICE produced 2,677 pages of responsive records. *See* Pl.'s Letter Regarding Case Status ("Case Status Letter") 2, ECF No. 78. Of relevance to the present motion, ICE withheld most of those pages in full or in part under Exemption 5. *See* Second Decl. of Toni Fuentes ("2d Fuentes Decl.") ¶ 11, Mar. 15, 2019, ECF No. 98. The declaration ICE submitted along with the present motion for summary judgment does not contain justifications for sixteen pages of withheld documents. *See generally* 2d Fuentes Decl. Ex. 1 ("ICE *Vaughn* Index"), ECF No. 98-1; *see also*

Decl. of Carrie DeCell ("Apr. 15 DeCell Decl.") Ex. A, at 1–19, Apr. 15, 2019 (providing ICE's September 28, 2017 response letter and first sixteen pages of accompanying production). Similarly, fifteen pages of records ICE referred to USCIS for review were completely withheld, yet neither ICE's nor USCIS's declarations contain justifications for those withholdings. *See generally* ICE *Vaughn* Index; Decl. of Jill A. Eggleston ("Eggleston Decl."), Mar. 14, 2019, ECF No. 97; *see also* Apr. 15 DeCell Decl. Ex. A, at 20–35 (providing USCIS's July 27, 2018 response letter and accompanying production).

USCIS: Between May 30, 2018, and July 27, 2018, USCIS released 1,293 pages of records and one Excel spreadsheet responsive to the Request, including fifteen pages from the records ICE had referred to USCIS for review.[6] Apr. 15 DeCell Decl. ¶¶ 18–21. USCIS withheld 357 pages in part, invoking Exemptions 5, 6, and 7(E), and withheld the fifteen pages from ICE's referral in full. *See id*. Of relevance to the present motion, USCIS withheld numerous records in part under Exemptions 5 and 7(E), *see* Eggleston Decl. ¶ 12, and withheld fifteen pages in full under Exemptions 7(C) and 7(E), *see* Apr. 15 DeCell Decl. ¶ 21.

LEGAL STANDARD

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361

[6] The parties stated slightly different record counts in the October 5, 2018 status update letter to the Court, *see* Case Status Letter 2, but apart from the fifteen pages referred by ICE and withheld in full, the Knight Institute accepts the numbers provided by USCIS in support of its motion for summary judgment.

(1976)). Accordingly, defending agencies bear the burden of demonstrating that any withheld information falls within the claimed FOIA exemptions. 5 U.S.C. § 552 (a)(4)(B); *Ray*, 502 U.S. at 173; *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

To carry this burden on summary judgment, agencies must submit affidavits that are "detailed, nonconclusory and submitted in good faith." *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005) (citing *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488–89 (2d Cir. 1999)). The affidavits must provide a "logical and plausible" justification for invoking FOIA exemptions, *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citation omitted), and they must be "adequate on their face," *Carney*, 19 F.3d at 812. To justify its decision to withhold responsive records, an agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Id.* In other words, "agency affidavits . . . must describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure—conclusory assertions are insufficient." *N.Y. Times Co. v. CIA*, 314 F. Supp. 3d 519, 525 (S.D.N.Y. 2018).

Agencies typically provide that information in a *Vaughn* index, which "requires agencies to itemize and index the documents requested, segregate their disclosable and non-disclosable portions, and correlate each non-disclosable portion with the FOIA provision which exempts it from disclosure." *Brennan Ctr. for Justice v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 547 (S.D.N.Y. 2018) (quotation marks omitted); *see also ACLU v. U.S. Dep't of Justice*, 844 F.3d 126, 129 n.4 (2d Cir. 2016) (stating that *Vaughn* index should identify documents "by number, title, and description"); *Vaughn v. Rosen*, 484 F.2d 820, 827–28 (D.C. Cir. 1973). The purposes of a *Vaughn* index are (1) to "permit [the opposing party] to contest the affidavit in adversarial fashion," and (2) to "permit a reviewing court to engage in effective *de novo* review of the [government's] redactions." *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999). Therefore,

"[c]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not carry the government's burden." *Intellectual Prop. Watch v. U.S. Trade Representative*, 134 F. Supp. 3d 726, 745 (S.D.N.Y. 2015) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009)).

The Court reviews agency withholdings *de novo*. 5 U.S.C. § 552 (a)(4)(B); *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The availability of FOIA exemptions should not obscure "the basic policy that disclosure, not secrecy, is the dominant objective of [the Act]." *Id.* at 150 (quoting *Rose*, 425 U.S. at 361). Exemptions must therefore be "narrowly construed with all doubts resolved in favor of disclosure." *Grand Cent. P'ship*, 166 F.3d at 478 (quoting *Local 3, Int'l Broth. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988)). Additionally, even where portions of a record fall within a FOIA exemption, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see also N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 117 (2d Cir. 2014).

ARGUMENT

I. ICE and USCIS improperly withheld information under FOIA Exemption 5.

Both ICE and USCIS improperly withheld responsive records concerning relevant agency policy under Exemption 5, which applies to "inter-agency or intra-agency memorandums or letters which 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). This exemption allows the government to withhold records that would be privileged in civil discovery, *Tigue v. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002), including under the privileges Defendants invoke here: the deliberative process privilege, attorney-client privilege, and attorney work product privilege. These privileges do not apply, however, to records

that constitute an agency's "working law." Given "a strong congressional aversion to secret agency law" and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law," the Supreme Court has held that "Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (quotation marks omitted); *see Brennan Ctr. for Justice v. Dep't of Justice*, 697 F.3d 184, 195–96 (2d Cir. 2012).

As explained below, ICE and USCIS have failed to establish that the privileges they invoke apply to the records at issue. Their *Vaughn* indices provide insufficient information to allow the Knight Institute to contest the application of these privileges to those records "in adversarial fashion" and to permit this Court to "engage in effective *de novo* review" of ICE's and USCIS's withholdings. *Halpern*, 181 F.3d 279, 293 (2d Cir. 1999).

A. ICE

ICE has failed to justify its application of Exemption 5 to the five records challenged here.[7]

[7] Specifically, ICE has failed to establish the applicability of Exemption 5 to the following records, representative versions of which are available in Exhibit B to the Declaration of Carrie DeCell filed April 15, 2019: "Meeting Minutes for Homeland Security Investigations Law Division (HSILD) All-Hands Meeting on Aug. 17, 2017" ("Aug. 17, 2017 Meeting Minutes") (2018-ICAP-00118, at 281–87), *see* ICE *Vaughn* Index 22; "Removal of National Security Threat Aliens" and accompanying emails ("INA § 235(c) Memo") (2018-ICAP-00118, at 298–306), *see* ICE *Vaughn* Index 26–28; "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns" ("First Amendment Concerns") (2018-ICAP-00118, at 307–19, 515–23, 698–706, 711–30, 736–54, 758–61), *see* ICE *Vaughn* Index 28–30, 32–34, 41–43; "Memo Discussing Whether the Taliban Is a Terrorist Organization Under the INA" ("Taliban Memo") (2018-ICAP-00118, at 859–69), *see* ICE *Vaughn* Index 45; "ICE Ability to Use 212(a)(3)(C) Foreign Policy Charge" ("Foreign Policy Provision Memo") (2018-ICAP-00118, at 870–73), *see* ICE *Vaughn* Index 45–46. The Knight Institute does not concede that the Exemption 5 withholdings in any other records were appropriate, but it does not challenge those withholdings here.

1. ICE has failed to establish that the deliberative process privilege applies to the records at issue.

"An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually related to the process by which policies are formulated." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (internal quotation marks and citations omitted). A document qualifies as "predecisional" if "the preparer was not the final decisionmaker and . . . the contents confirm that the document was originated to facilitate an identifiable final agency decision." *Brennan Ctr.*, 697 F.3d at 202 (citation omitted). A document qualifies as "deliberative" if "it formed an essential link in a specific consultative process, reflects the personal opinions of the writer rather than the policy of the agency, and if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id.* Like other privileges recognized under Exemption 5, however, the deliberative process privilege does not apply to records that constitute the "working law" of an agency, including records containing "the reasons which . . . suppl[ied] the basis for an agency policy actually adopted." *Sears*, 421 U.S. at 152.

ICE has not adequately supported its application of the deliberative process privilege to the records at issue. Its *Vaughn* index (1) does not adequately establish that these records "originated to facilitate an identifiable final agency decision"; (2) does not establish that all of these records were deliberative; (3) does not sufficiently counter the likelihood that some of the records constitute "working law"; and (4) does not provide meaningful information regarding the segregability of factual information contained in the records.

First, ICE's *Vaughn* index does not adequately establish that the records are predecisional, in that they "originated to facilitate an identifiable final agency decision." *See Brennan Ctr.*, 697

F.3d at 202 (quotation marks omitted). Specifically, the *Vaughn* entries for "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns" memoranda ("First Amendment Concerns") (2018-ICAP-00118, at 307–19, 515–23, 698–706, 711–30, 736–54, 758–61), "Memo Discussing Whether the Taliban Is a Terrorist Organization Under the INA" ("Taliban Memo") (2018-ICAP-00118, at 859–69), and "ICE Ability to Use 212(a)(3)(C) Foreign Policy Charge" ("Foreign Policy Provision Memo") (2018-ICAP-00118, at 870–73) do not provide any detail about whether the documents originated to facilitate identifiable final decisions, or what those decisions might be. *See* ICE *Vaughn* Index 28, 33, 41–42, 45–46. Rather, all of these descriptions contain identical boilerplate language related to the invocation of the deliberative process privilege. *See id.* (containing identical statements that "[t]he information being withheld contains pre-decisional, draft, and deliberative information. The document is not a final draft. . . . The document also contains non-final agency decisions, options being considered, and recommendations."). ICE has thus failed to explain what agency decision these records were meant to further, leaving the Knight Institute and the Court unable to evaluate whether the deliberative process privilege applies. *See Brennan Ctr.*, 697 F.3d at 202.

Moreover, with respect to at least one version of First Amendment Concerns, ICE's statement that the record is "not a final draft" appears inaccurate. ICE released an email referring to a "final version" of the memorandum that was sent to DHS. Apr. 15 DeCell Decl. Ex. B, at 18 (2018-ICAP-00118, at 693). Assuming ICE processed all versions of that memorandum in response to the Request, then it seems indisputable that at least one version of the memorandum is the "final version" to which the email refers. If so, then that record would itself be the "final agency decision" and therefore could not qualify as predecisional for purposes of Exemption 5. *See Brennan Ctr.*, 697 F.3d at 202.

Second, at least as to the Foreign Policy Provision Memo, the conclusory nature of the *Vaughn* entry fails to establish that the record was deliberative. *See* ICE *Vaughn* Index 45–46; Apr. 15 DeCell Decl. Ex. B, at 43–46. There are no indications in the record itself that "it formed an essential link in a specific consultative process, reflects the personal opinions of the writer rather than the policy of the agency, [or] if released, would inaccurately reflect or prematurely disclose the views of the agency." *Brennan Ctr.*, 697 F.3d at 202. Nor does the relevant *Vaughn* entry include any detail about the record's deliberative nature beyond the boilerplate language contained in every entry invoking the deliberative process privilege. *See* ICE *Vaughn* Index 46.

Third, some of the records at issue appear to constitute "working law," which must be released. *Brennan Ctr.*, 697 F.3d at 195, 196 (citing *Sears*, 421 U.S. at 153). The *Vaughn* entry describing "Removal of National Security Threat Aliens" and accompanying emails ("INA § 235(c) Memo") (2018-ICAP-00118, at 298–306) states that in the accompanying emails ICE attorneys discussed whether the memo "reflects current policy or law on Section 235(c)," and indicates that the memo contains "ICE's interpretation and implementation of [§ 235(c)]." ICE *Vaughn* Index 26. And the Foreign Policy Provision Memo contains no indication that it is anything other than a memo explaining ICE's "ability to use 212(a)(3)(C) Foreign Policy Charge," as the document title states. *See* ICE *Vaughn* Index 45–46. As a result, both records appear to reflect "the agency's effective law and policy," or "working law," and are therefore subject to disclosure. *Brennan Ctr.*, 697 F.3d at 202 (quoting *Sears*, 421 U.S. at 153); *see id.* at 201 (noting D.C. Circuit holding that "[d]ocuments reflecting OMB's formal or informal policy on how it carries out its responsibilities fit comfortably within the working law framework" (quoting *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010)).

Fourth, ICE does not provide adequate information about whether the records contain segregable factual information. ICE discussed the reasonable segregability of the records as a whole in a conclusory manner. *See* 2d Fuentes Decl. ¶¶ 40–41 ("My staff, under my supervision, has reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied. With respect to the records that were released in part, all information not exempted from disclosure . . . was correctly segregated and non-exempt portions were released."). But the broad nature of the five withholdings being challenged here—often of entire records, including titles and headings, which were revealed only in the *Vaughn* index—suggests there may be reasonably segregable information that has been improperly withheld along with purportedly privileged content. For example, it is unlikely that every detail aside from the date of the "Meeting Minutes for Homeland Security Investigations Law Division (HSILD) All-Hands Meeting on Aug. 17, 2017" ("Aug. 17, 2017 Meeting Minutes") (2018-ICAP-00118, at 281–87) is properly considered privileged, assuming the minutes accurately convey that the meeting was an "all-hands" meeting. *See* ICE *Vaughn* Index 22. Further, the *Vaughn* entry for the INA § 235(c) Memo indicates the record contains "background on Section 235(c)," which is likely to be factual in nature. ICE *Vaughn* Index 26. And the headers in the Taliban Memo that have been disclosed imply that it contains factual discussion of the various tiers of terrorist organizations under the INA. *See* Apr. 15 DeCell Decl. Ex. B, at 32–42. To the extent the withheld records contain both factual and deliberative information, ICE must release the purely factual information unless it is "inextricably intertwined with the deliberative or policymaking functions of the agency." *Title Guar. Co. v. NLRB*, 534 F.2d 484, 492 n.15 (2d Cir. 1976) (internal quotation marks omitted).

2. ICE has failed to establish that the attorney-client privilege applies to the records at issue.

"The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011); *see also Brennan Ctr.*, 697 F.3d at 207–08. An agency invoking the attorney-client privilege to withhold documents sought under FOIA bears "[t]he burden . . . to demonstrate that confidentiality was expected in the handling of these communications and that it was reasonably careful to keep this confidential information protected from general disclosure." *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 519 (S.D.N.Y. 2010). To meet this requirement, the agency must generally submit a *Vaughn* index that—"[m]uch like . . . a privilege log in civil litigation"—states, among other things, "the subject matter, number of pages, author, date created, and the identities of all persons to whom the original or any copies of the document were shown or provided." *Id.* (internal quotation marks and citation omitted).

ICE has failed to provide this information. Indeed, ICE has failed to list the identities of all those who received the records in any of the *Vaughn* entries at issue. In addition, ICE has not asserted that these records were intended to be or remained confidential. *See* ICE *Vaughn* Index 27, 29, 33, 42, 45–46 (offering identical boilerplate statements that the "attorney-client privilege applies in this instance because the redacted portions constitute and/or reflect opinions, analysis, guidance and legal advice provided by attorneys (OPLA attorneys) relating to guidance on a particular section of the INA"). As a result, ICE has failed to carry its burden to demonstrate that "the communications between client and attorney were made in confidence and have been maintained in confidence." *Brennan Ctr.*, 697 F.3d at 207 (internal quotation marks and citation omitted).

3. ICE has failed to establish that the work product privilege applies to the records at issue.

The work product privilege protects "the files and the mental impressions of an attorney," *Hickman v. Taylor*, 329 U.S. 495, 510 (1947), but only when they are "prepared in anticipation of litigation," Fed. R. Civ. P. 26(b)(3). A document is "prepared in anticipation of litigation" if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (internal quotation marks and citation omitted). The privilege does not apply to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation." *Id.*

ICE's *Vaughn* index fails to support its application of the work product privilege to the INA § 235(c) Memo and the First Amendment Concerns records because the entries are conclusory and boilerplate.[8] *See* ICE *Vaughn* Index 27, 29, 33. For both sets of records, the *Vaughn* entries merely state that the records contain material prepared by attorneys "regarding pending litigation in immigration and federal court." ICE *Vaughn* Index 27, 29, 33. Based on the titles of these records, however—"Removal of National Security Threat Aliens," *see* ICE *Vaughn* Index 26, and "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns," Apr. 15 DeCell Decl. Ex. B, at 23—they could have been made in the process of policymaking, not specifically "because of the prospect of litigation," as required for this privilege to apply. *See Adlman*, 134 F.3d at 1202. ICE has also failed to allege facts showing that the records

[8] In addition, ICE's inconsistent invocation of the work product privilege to the First Amendment Concerns records undermines the validity of the agency's assertion of the privilege. The *Vaughn* entries indicate that each record contains the same document, but ICE does not invoke the work product privilege as to all of them. *See* ICE *Vaughn* Index 41–43 (indicating the relevant records are versions of First Amendment Concerns, but not invoking the work product privilege).

"would not have been prepared in substantially similar form but for the prospect of that litigation," *id.* at 1195, or that the records were prepared "with . . . specific claim[s] supported by concrete facts which would likely lead to litigation in mind," *N.Y. Times v. U.S. Dep't of Justice*, 101 F. Supp. 3d 310, 319 (S.D.N.Y. 2015) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)); *see also State of Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 69 (1st Cir. 2002) (holding that "mere relation of documents to litigation does not automatically endow those documents with privileged status," and that agency's "conclusory" statements had failed to "make the [requisite] correlation between each withheld document and the litigation for which the document was created"). Without more information about the nature of the record, the names of ongoing cases, and factual descriptions of anticipated litigation, it is impossible for this Court and the Knight Institute to evaluate the application of this privilege. *See Halpern*, 181 F.3d at 293.

B. USCIS

USCIS has likewise failed to justify its application of the deliberative process privilege with respect to three records.[9]

All three records at issue here—"Briefing Memo for the Acting Director: Recommendations to Eliminate the USCIS Terrorism-Related Inadmissibility Grounds (TRIG)" ("Acting Director Memo"), "Senior Policy Council—Briefing Paper: TRIG Exemptions & INA

[9] Specifically, USCIS has failed to establish the applicability of Exemption 5 to the following records, available in Exhibit C to the Declaration of Carrie DeCell filed April 15, 2019: "Briefing Memo for the Acting Director: Recommendations to Eliminate the USCIS Terrorism-Related Inadmissibility Grounds (TRIG)" ("Acting Director Memo"), *see* Eggleston Decl. ¶ 23; Apr. 15 DeCell Decl. Ex. C, at 1–5; "Senior Policy Council—Briefing Paper: TRIG Exemptions & INA § 318" ("Senior Policy Council Paper"), *see* Eggleston Decl. ¶ 24; Apr. 15 DeCell Decl. Ex. C, at 6–10; and "Options Paper: Exercise of Authority Relating to the Terrorism-Related Inadmissibility Grounds" ("TRIG Options Paper"), *see* Eggleston Decl. ¶ 25.

§ 318" ("Senior Policy Council Paper"), and "Options Paper: Exercise of Authority Relating to the Terrorism-Related Inadmissibility Grounds" ("TRIG Options Paper")—are nearly entirely withheld, and the *Vaughn* index includes only a cursory, boilerplate statement about segregability for each of them. *See* Eggleston Decl. ¶ 31 ("USCIS FOIA staff ensured that all non-exempt, reasonably segregable information was disclosed as required by FOIA. USCIS FOIA staff determined that no further responsive, reasonably segregable information could be disclosed from these records other than the information that was disclosed."). The descriptions of these records, however, indicate that there may be significant sections that are reasonably segregable.

For two of the records at issue, USCIS appears to be withholding information that "is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy" and thus constitutes the agency's "working law." *Brennan Ctr.*, 697 F.3d at 195. For the Acting Director Memo, the *Vaughn* entry indicates that the memo "contain[s] discussions and recommendations from USCIS staff to senior agency management regarding the *current* and future posture of the USCIS TRIG Hold Policy." *See* Eggleston Decl. ¶ 23 (emphasis added). The Senior Policy Council Paper is described as "discuss[ing] specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants who seek immigration benefits from USCIS." Eggleston Decl. ¶ 24. Discussions of USCIS's current policies and approaches to immigration decisions are tantamount to the "working law" of the agency, and any reasonably segregable sections of the record reflecting that working law must be released. *Brennan Ctr.*, 697 F.3d at 202 (noting D.C. Circuit holding that "IRS documents explaining whether certain tax exemptions applied to specific taxpayers . . . constituted "working law" because their "tone . . . indicate[d] that they simply explain[ed] and appl[ied] established policy" (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 80–81 (D.C. Cir. 2002)).

For the third record—the TRIG Options Paper—it appears USCIS has improperly withheld reasonably segregable factual material. The paper contains lengthy "Background" and "Methodology" sections that are withheld nearly entirely. *See* Apr. 15 DeCell Decl. Ex. C, at 11–14. These sections are likely to contain the sorts of factual information that can be reasonably segregated from the deliberative discussions later in the draft, and those sections should thus be released. *See Title Guar. Do.*, 534 F.2d at 492 n.15.

The Knight Institute respectfully requests that the Court conduct an *in camera* review of these records to ensure that USCIS has released all reasonably segregable material. *See Iraqi Refugee Assistance Project v. U.S. Dep't of Homeland Sec.*, No. 12-cv-3461, 2017 WL 1155898, at *3 (S.D.N.Y. Mar. 27, 2017) ("Absent in camera review, the Court would be unable to make adequate findings as to the . . . claimed FOIA exemptions and whether the discussions contain segregable factual content.").

II. USCIS improperly withheld information under FOIA Exemption 7(E).

USCIS failed to justify its invocation of Exemption 7(E) in withholding sections of various versions of manuals, guides, and presentations regarding Terrorist-Related Inadmissibility Grounds ("TRIG") under the INA, *see* 8 U.S.C. § 1182(a)(3)(B), as well as training manuals from the Refugee, Asylum and International Operations Directorate ("RAIO").[10] The withheld sections appear to contain legal definitions, statements of policy, and high-level factors for consideration in admissibility determinations—not the kind of law enforcement information the exemption was meant to protect.[11]

[10] *See* USCIS, *Refugee, Asylum and International Operations Directorate*, https://perma.cc/A7VM-FR9T.

[11] Specifically, USCIS has failed to establish the applicability of Exemption 7(E) to withholdings in the following records, representative versions of which are available in Exhibit C to the Declaration of Carrie DeCell filed April 15, 2019: USCIS BASIC Instructor Guide on TRIG,

Exemption 7(E) applies to two categories of information "compiled for law enforcement purposes": (1) "techniques and procedures for law enforcement investigations or prosecutions," and (2) "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); *see also Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010). To fall within Exemption 7(E), the withheld information must first meet the threshold requirement that it was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *Pub. Emps. for Envtl. Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 202–03 (D.C. Cir. 2014). "Law enforcement purposes" entail "proactive steps designed to prevent criminal activity and to maintain security." *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring).

Once the threshold requirement is met, the information must fall into one of the two categories protected by Exemption 7(E). The first category, "techniques and procedures," encompasses information on "how law enforcement officials go about investigating a crime." *Allard K. Lowenstein,* 626 F. 3d at 682. The Second Circuit has clarified that a "technique" is a "technical method of accomplishing a desired aim," and a "procedure" is "a particular way of doing or going about the accomplishment of something." *Id*. A technique or procedure must be truly "specialized" and "calculated" to qualify under Exemption 7(E), meaning it is "technical" or

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versions dated Nov. 2015, 2012, and 2010, *see* Eggleston Decl. ¶¶ 22, 32, 36; USCIS BASIC Participant Guide on TRIG, versions dated 2012 and 2010, *see* Eggleston Decl. ¶¶ 33, 37; USCIS TRIG Training PowerPoint, Course 234, versions dated Mar. 21, 2017, Nov. 2015, May 9, 2012, and May 2010, *see* Eggleston Decl. ¶¶ 30–31, 34–35, 38; USCIS TRIG Instructor Guide, versions dated May 2017 and Mar. 2017, *see* Eggleston Decl. ¶¶ 28, 39; USCIS TRIG Participant Guide, versions dated May 2017 and Mar. 2017, *see* Eggleston Decl. ¶¶ 29, 40; TRIG Exemptions – Group-Based Exemptions / Situational Exemptions (officer training manual), *see* Eggleston Decl. ¶ 26; USCIS RAIO Office Training – Combined Training Manual on National Security, versions dated Jan. 24, 2013 and Oct. 26, 2015, *see* Eggleston Decl. ¶¶ 27, 41.

involves some "special method or skills." *ACLU v. Dep't of Homeland Sec.*, 243 F. Supp. 3d 393, 403–04 (S.D.N.Y. 2017) ("*ACLU v. DHS*"). The second category, law enforcement "guidelines," covers information providing "an indication or outline of future policy or conduct" implicating "resource allocation." *Allard K. Lowenstein*, 626 F.3d at 682; *see Schwartz v. DEA*, No. 13-cv-5004, 2016 WL 154089, at *9 (E.D.N.Y. Jan. 12, 2016). Guidelines are exempt "from disclosure only if public access to such guidelines would risk circumvention of the law." *Allard K. Lowenstein*, 626 F.3d at 681.

In several sections of the TRIG records, USCIS improperly withheld lists of questions to be asked of applicants for immigration benefits under Exemption 7(E). For example, USCIS withheld information under the headings "Possible material support questions to address in an interview or Request for Evidence (RFE)," *see* Apr. 15 DeCell Decl. Ex. C, at 50, and "Additional questions to consider with respect to when the applicant encountered the group," *id.* at 67. In its declaration, USCIS simply states that this information consists of "model questions . . . that were withheld because they are guidelines and techniques and procedures used by USCIS immigration officers to screen applicants for possible terrorism ties." Eggleston Decl. ¶ 39; *see also* Defs.' Mem. in Supp. of Mot. of ICE and USCIS for Summ. J. ("Defs.' Mem.") 10, ECF No. 96. These descriptions are, at best, restatements of section headings within the documents, offering no more than "generic assertions" to justify USCIS's Exemption 7(E) withholdings. *ACLU v. DHS*, 243 F. Supp. 3d at 403 (quoting *ACLU v. ODNI*, 10-cv-4419, 2011 WL 5563520, at *11 (S.D.N.Y. Nov. 15, 2011)). *ACLU v. DHS* involved a set of routine questions that were used to elicit information from minors "regarding affiliations between suspected smugglers and each other, criminal organizations, and gangs, as well as their modus operandi." *Id.* at 402. The court concluded that CBP had "not established that there is anything technical about the questions asked, that any

special method or skills are being used, or that children who were subjected to questioning would not thereby learn the 'technique' that CBP wishes to keep secret." *Id*. at 403 (citation omitted). In previous cases, including the Second Circuit case *Allard K. Lowenstein International Human Rights Project v. Department of Homeland Security*, 626 F.3d 678, courts had "permitted agencies to withhold certain techniques used *internally* by agencies when, even after those techniques were applied, the target did not know how the technique worked." *ACLU v. DHS*, 243 F. Supp. 3d at 402 (emphasis added). Here, in contrast, the questions asked by USCIS will necessarily become known to applicants, and the agency has not demonstrated that they "truly embody a specialized, calculated technique or procedure." *Id.* at 404. Therefore, Exemption 7(E) cannot apply.

USCIS also failed to justify its withholding of information regarding when an applicant qualifies for a TRIG exemption. This information, found in sections of both the TRIG and the RAIO records, includes a "non-exhaustive list of appropriate factors" to be considered when determining whether an applicant merits an exemption under the "totality of the circumstances." Apr. 15 DeCell Decl. Ex. C, at 68, 159. These factors, the TRIG section notes, are "not requirements." *Id*. at 68. Nonetheless, USCIS claims that the release of this information could be used by applicants to "tailor their testimony." *See, e.g.*, Eggleston Decl. ¶ 36. Similarly, in a document explaining the TRIG group-based exemptions, USCIS attempts to justify its Exemption 7(E) withholdings by stating that the information "is used to train USCIS immigration officers how to correctly grant an applicant an exemption to the TRIG bases." Eggleston Decl. ¶ 26. USCIS claims that the information, "if disclosed, could be used by applicants to illegally represent themselves to USCIS officers as being eligible for a TRIG exemption and enable them to obtain immigration benefits." *Id.*; *see also* Defs.' Mem. 10–11. USCIS thus claims, in a conclusory manner, that mere knowledge of the criteria the agency considers in determining whether

applicants qualify for an exemption under the INA would enable applicants to circumvent the law. Yet this is always true when it comes to knowledge of the law, in the sense that it empowers individuals to act according to the law, claim the benefits to which they are entitled under the law, or misrepresent themselves to avoid punishment or obtain benefits. *Cf. Families for Freedom v. CBP*, 837 F. Supp. 2d 287, 300 (S.D.N.Y. 2011) ("Of course, *any* information about past law enforcement practices could theoretically give would-be criminals help that they would not otherwise have."). Exemption 7(E) requires that the withheld information must "reasonably be expected to risk circumvention of the law," 5 U.S.C. § 552(b)(7)(E), and USCIS has not met that mark.

Furthermore, USCIS has provided no reasonably specific justification for its withholding of a subsection in several of the TRIG records titled "What is reasonable lack of knowledge?" *See, e.g.*, Apr. 15 DeCell Decl. Ex. C, at 53. At best, USCIS's declaration generally asserts that some information found within the pages of these records is used by immigration officers to "screen applicants for possible terrorism ties." Eggleston Decl. ¶ 39. If the withheld information contains definitions or legal interpretations, however, it is not clear how it would qualify as "technical" or involve some "special method or skills," *ACLU v. DHS*, 243 F. Supp. 3d at 402, or how it would implicate "resource allocation," *Allard K. Lowenstein,* 626 F. 3d at 682 (defining techniques, procedures, and guidelines).

Finally, USCIS has failed to establish that all "segregable factual portions" not falling within Exemption 7(E) have been released. *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks and citation omitted); 5 U.S.C. § 552(b). USCIS's declaration states that the productions were "carefully reviewed" and that staff "ensured that all non-exempt, reasonably segregable information was disclosed." Eggleston Decl. ¶ 41; *see also* Defs.' Mem. 11. These conclusory

statements are unconvincing with respect to certain extensive withholdings, however, which likely contain segregable, factual information. For example, some withholdings in the RAIO manuals span seven complete pages, including section headings. Apr. 15 DeCell Decl. Ex. C, at 181–187. Therefore, the Knight Institute respectfully requests *in camera* review of USCIS's Exemption 7(E) withholdings to determine whether they contain segregable information. *See Iraqi Refugee Assistance Project*, 2017 WL 1155898, at *3 ("Although the *Vaughn* Index provides accurate and good-faith descriptions of the redacted contents, it discusses them in broad terms . . . . Absent *in camera* review, the Court would be unable to make adequate findings as to the . . . claimed FOIA exemptions and whether the discussions contain segregable factual content.").

III. ICE and USCIS failed to provide any justification for their withholding of certain records.

Finally, the declarations provided by ICE and USCIS are incomplete. Neither agency provided any explanation—let alone "reasonably detailed explanations," *Carney*, 19 F.3d at 812—as to why they withheld several pages of records. On July 26, 2018, USCIS received a referral from ICE regarding the Request. *See* Apr. 15 DeCell Decl. Ex. A, at 20. In a letter to the Knight Institute dated July 27, 2018, USCIS noted that it had "identified 15 pages that are responsive" to the Request but, after review, decided to withhold them all in full, invoking Exemptions 7(C) and 7(E). *Id*.; *see also id*., at 21–35. There is no mention of these pages, however—nor any justification for their withholding—in either USCIS's or ICE's declarations in support of their motion for summary judgment. *See generally* Eggleston Decl.; 2d Fuentes Decl. Similarly, ICE withheld several records in full, invoking Exemptions 5 and 7(E), *see* Apr. 15 DeCell Decl. Ex. A, at 4–19, which do not appear in ICE's declaration or its accompanying *Vaughn* index. "The purpose of a *Vaughn* index is to afford a FOIA plaintiff an opportunity to decide which of the listed documents it wants and to determine whether it believes it has a basis to defeat the Government's claim of a

FOIA exemption." *N.Y. Times Co. v. U.S. Dep't of Justice*, 762 F.3d 233, 237 (2d Cir. 2014). Without any descriptions or justifications for the agencies' withholdings, the Knight Institute has no reasonable basis on which to evaluate and challenge them.

CONCLUSION

For the reasons stated above, ICE and USCIS have failed to justify their withholdings in the records at issue. Accordingly, this Court should grant summary judgment with respect to ICE and USCIS in favor of the Knight Institute. Specifically, the Knight Institute respectfully asks the Court to order ICE and USCIS to release records they have improperly withheld under FOIA Exemptions 5, 7(C), and 7(E), or to submit a more detailed *Vaughn* index justifying the withholding of those records. Alternatively, the Knight Institute respectfully asks the Court to conduct an *in camera* review of those records to determine the propriety of ICE and USCIS's withholding decisions and to identify any segregable sections for prompt production to the Knight Institute.

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Respectfully submitted,

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