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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; SAN FRANCISCO BAY GUARDIAN, Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Case No. 12-cv-4008-MEJ NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT Date: August 22, 2013 Time: 10:00 a.m. Place: San Francisco U.S. Courthouse Judge: Hon. Maria-Elena James

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on August 22, 2013, at 9:00 a.m. in the United States Courthouse at San Francisco, California, defendant U.S. Department of Justice, by and through undersigned counsel, will move this Court for summary judgment regarding Parts 2, 3, and 4 of plaintiffs' Freedom of Information Act request.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant U.S. Department of Justice ("DOJ" or "Department") hereby moves for summary judgment on all of the claims in plaintiffs' Complaint relating to Parts 2, 3, and 4 of plaintiffs' Freedom of Information Act request pursuant to Federal Rule of Civil Procedure 56

and the Freedom of Information Act, 5 U.S.C. § 552, for the reasons more fully set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs the American Civil Liberties Union of Northern California and the San Francisco Bay Guardian ("plaintiffs") brought this lawsuit to compel defendant the U.S. Department of Justice ("DOJ") to process their Freedom of Information Act ("FOIA") request seeking records relating to the defendant's use of location-tracking technology. That FOIA request contained four separate parts; this Summary Judgment motion relates only to Parts 2, 3, and 4 of that request.[1] As to those parts, the parties have entered into a Stipulation defining the steps that defendant would take in searching for responsive records. Defendant has undertaken those steps, and plaintiffs do not contend otherwise. Accordingly, the only issue for this Court to resolve regarding Parts 2-4 of plaintiffs' FOIA request concerns the FOIA exemptions that defendant has claimed over some of the responsive records. In processing plaintiffs' FOIA request, the DOJ properly withheld, in whole or in part, records exempt from disclosure under FOIA. For that reason, as set forth in more detail below, defendant's Motion for Partial Summary Judgment should be granted.

BACKGROUND

In April 2012, plaintiffs submitted to the DOJ a FOIA request for various records relating to location tracking technology. *See* Decl. of John W. Kornmeier ("Kornmeier Decl.") ¶ 4 & Ex. A attached thereto. Specifically, plaintiffs' FOIA request sought the following materials:

1) All requests, subpoenas, and applications for court orders or warrants seeking location information since January 1, 2008.

2) Any template applications or orders that have been utilized by United States Attorneys in the Northern District to seek or acquire location information since January 1, 2008.

[1] The parties have stipulated to, and this Court has adopted, a bifurcated briefing schedule. *See* ECF No. 22, 05/13/2013. Pursuant to that schedule, DOJ will file a separate Motion for Partial Summary Judgment relating to Part 1 of plaintiffs' FOIA request on August 15, 2013. *Id.*

3) Any documents since January 1, 2008, related to the use or policies of utilizing any location tracking technology, including but not limited to cell-site simulators or digital analyzers such as devices known as Stingray, Triggerfish, AmberJack, KingFish or Loggerhead.

4) Any records related to the Supreme Court's holding in *United States v. Jones*, excluding pleadings or court opinions filed in the matter in the Supreme Court or courts below.

Id. Ex. A.

After this lawsuit was filed, *see* Complaint, ECF 1, undersigned counsel and counsel for plaintiffs conferred numerous times regarding the scope and processing of plaintiffs' FOIA request. As a result of those discussions, the parties negotiated a Stipulation regarding the processing of Parts 2-4 of plaintiffs' FOIA request. *See* ECF 17 (Appendix), 01/03/2013; *see also* Kornmeier Decl. ¶ 4. That Stipulation clarified the scope of Parts 2-4 of plaintiffs' FOIA request and defined the steps that DOJ would take to search for records responsive to those parts of the FOIA request. *See* ECF 17. There is no dispute that DOJ complied with the requirements of the Stipulation regarding the adequacy of its search for responsive records.

In processing the FOIA request, the Executive Office for United States Attorneys ("EOUSA") identified some potentially responsive records that it referred to the Department's Criminal Division, as those records were authored and maintained by that Division. *See* Kornmeier Decl. ¶ 4; Declaration of John E. Cunningham III ("Cunningham Decl.") ¶ 8. EOUSA processed the remaining records. Kornmeier Decl. ¶ 5. On March 22, 2013, EOUSA and the Criminal Division separately released responsive, non-exempt records to plaintiffs. *See* Kornmeier Decl. ¶ 5 & Ex. B; Cunningham Decl. ¶ 11 & Ex. 3. Specifically, EOUSA indicated that 41 pages were being released in full, and 18 pages were being withheld in full pursuant to FOIA Exemption 5. *See* Kornmeier Decl. Ex. B. As for those materials referred to the Criminal Division, 2 pages were released in full, 3 pages were released in part, and 530 pages were withheld in full pursuant to FOIA exemptions 5, 6, 7(C), and 7(E). *See* Cunningham Decl. ¶ 11 & Ex. 3.[2]

[2] 304 of the 530 pages initially identified as exempt were subsequently determined not to be responsive to the FOIA request. *See* Cunningham Decl. ¶ 10.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Because facts in FOIA cases are rarely in dispute, most such cases are decided on motions for summary judgment." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012); *see also Lawyers' Comm. for Civil Rights v. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) ("As a general rule, all FOIA determinations should be resolved on summary judgment."). Discovery is seldom necessary or appropriate. *See Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th Cir. 2012) (holding that district court "properly denied [plaintiff's] discovery requests for information concerning the nature and origins of documents he requested" because FOIA cases "revolve[] around the propriety of revealing certain documents"). A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

I. DOJ Properly Withheld Records That Are Exempt From Disclosure Under FOIA.

The Freedom of Information Act was enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation omitted). However, the public's interest in government information under FOIA is not absolute, as "Congress recognized . . . that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quotation omitted). Thus, FOIA is designed to achieve a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *Id.* (citation omitted).

To that end, FOIA incorporates "nine exemptions . . . which a government agency may invoke to protect certain documents from public disclosure." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). Ordinarily, government agencies submit "detailed public affidavits identifying

the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption" that are "commonly referred to as [] 'Vaughn' ind[ices]." *Lion Raisins v. Dep't. of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (citing *Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir.1973)). These statutory exemptions must be given "meaningful reach and application." *John Doe Agency*, 493 U.S. at 152. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007). And courts "accord substantial weight to an agency's declarations regarding the application of a FOIA exemption." *Shannahan*, 672 F.3d 1142, 1148 (9th Cir. 2012).

A. EOUSA Properly Withheld Records Pursuant to Exemption 5.

FOIA exempts from mandatory disclosure "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) ("Exemption 5"). In other words, Exemption 5 permits agencies to withhold privileged information, including attorney work product, deliberative materials, and confidential attorney-client communications. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997).

The attorney work product doctrine protects materials prepared by an attorney or others in anticipation of litigation, including the materials of government attorneys generated in litigation and pre-litigation counseling. *See* Fed. R. Civ. P. 26(b)(3); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154; *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004). As the Supreme Court has observed, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Both "fact" work product and "opinion" work product are protected. Fact work product consists of factual material that is prepared in anticipation of litigation or trial. *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 507 (S.D. Cal. 2003). Opinion work includes the selection, organization, and characterization of facts that reveals the theories, opinions, or mental impressions of a party or the party's

representative. *See id.*; *U.S. ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 563 (C.D. Cal. 2003). The doctrine protects all aspects of an attorney's preparation, including note-taking, strategizing with other attorneys or experts, and analyses prepared by the attorney or others for the attorney. "Without a strong work-product privilege, lawyers would keep their thoughts to themselves, avoid communicating with other lawyers, and hesitate to take notes." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998). The protection of the work product doctrine continues beyond the termination of the particular situation for which the materials were created. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983).

The phrase "in anticipation of litigation" extends beyond an attorney's preparation for a case in existing litigation, and includes "documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *Feshback Secs. v. Securities and Exch. Comm'n*, 5 F. Supp. 2d 774, 782 (N.D. Cal. 1997) (citing *Schiller v. NLRB.*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 131 S. Ct 1259 (2011)); *see also Delaney, Migdail & Young v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (work product protection for memos that "advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome"); *Heggestad v. Dep't of Justice*, 182 F. Supp. 2d 1, 8 (D.D.C. 2000) (work product doctrine applies "even without a case already docketed or where the agency is unable to identify the specific claim to which the document relates"). To that end, internal government reports addressing "recurring research topics" that were intended "to provide consistent and thorough information to all attorneys" litigating various categories of cases were found to be work product created in anticipation of litigation, and thus exempt from disclosure under FOIA. *Raytheon Aircraft v. U.S. Army Corps of Eng'rs*, 183 F. Supp. 2d 1280, 1285, 1289-90 (D. Kan. 2001).

The two sets of documents being withheld by EOUSA constitute protected work product and, therefore, are exempt from disclosure pursuant to FOIA Exemption 5. The first document, which was withheld in full, is a 16-page template that was created by the U.S. Attorney's Office for the Northern District of California. Kornmeier Decl. ¶ 9 & Ex. C attached thereto. The template is used by Assistant United States Attorneys when applying for a pen registers and trap

and trace devices. As such, it incorporates interpretations of the law by the U.S. Attorney's Office, and provides advice on what information to include in particular situations. *See* Kornmeier Decl. Ex. C. Most of the second document – which consists of a power point presentation by attorneys in the U.S. Attorney's Office for the Northern District of California – has already been released to the ACLU. *See* Kornmeier Decl. Ex. C. However, EOUSA has withheld two pages of that presentation because those pages constitute the office's legal analysis of issues that may arise in connection with the use of location tracking devices and, as such, represents the opinions of attorneys in that office. *See id.* Both of these sets of withheld materials constitute work product exempt from disclosure pursuant to FOIA Exemption 5. *See New York Times Co. v. Dep't of Defense*, 499 F. Supp. 2d 501, 517 (S.D.N.Y. 2007) (documents from U.S. Attorney's Office "provid[ing] guidance for responding to motions made in criminal litigation" properly withheld as work product and thus need not be disclosed pursuant to FOIA); *Raytheon*, 183 F. Supp. 2d at 1285, 1289-90.

B. The Criminal Division Properly Withheld Records Pursuant to Exemptions 5, 6, and 7.

As noted above, and in processing Parts 2-4 of plaintiffs' FOIA request, EOUSA referred 535 pages of records to the Department's Criminal Division for processing. *See* Kornmeier Decl. ¶ 4; Cunningham Decl. ¶ 8. The referral was comprised of two parts. *Id.* The first part consisted of three documents: a February 27, 2012 Memorandum ("CRM One"), a July 5, 2012 Memorandum ("CRM 2"), and an Electronic Communication that included a September 12, 2008 Memorandum attached thereto ("CRM Three"). *See* Cunningham Decl. ¶ 8 & Ex. 2 attached thereto. The second part consisted of records maintained at USABook, which is a DOJ intranet site ('CRM Four and Five"). *See* Cunningham Decl. ¶ 8 & Ex. 2 attached thereto.

The Criminal Division's FOIA/PA Unit conducted a line-by-line review of CRM One, CRM Two, CRM Three, and the portions of the USABook that had been referred to it. *See* Cunningham Decl. ¶ 9. Based on that review, CRM One was released-in-part, with two pages released in full, two pages released with redactions pursuant to FOIA Exemptions 5 and 7(E), and fifty-three pages withheld in full pursuant to those same exemptions. *See* Cunningham Decl.

¶ 10. CRM Two was released-in-part, with one page released with redactions pursuant to FOIA Exemptions 5 and 7(E), and fifty-three pages withheld in full pursuant to those same exemptions. *Id.* One-hundred-sixteen pages of CRM Three, CRM Four, and CRM Five were withheld in full. *Id.* ¶ 10.

1. The Criminal Division Properly Withheld Records Pursuant to Exemption 5.

Like EOUSA, the Criminal Division has invoked Exemption 5 to withhold responsive records because they constitute attorney work product. Specifically, the Criminal Division withheld all or part of CRM One, CRM Two, and CRM Three because those memoranda were prepared in anticipation of litigation by DOJ officials, and therefore constitute work product. *See* Cunningham Decl. ¶ 15. Specifically, CRM One and Two were authored by the Chief of the Criminal Division's Appellate section, were directed to federal prosecutors, and contained an analysis of the implications of the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012), to ongoing federal criminal prosecutions. *See* Cunningham Decl. ¶ 12. The memoranda – which address GPS tracking devices and other investigative techniques employed by the Department – discuss potential legal strategies, defenses, and arguments that might be considered by DOJ prosecutors. *See* Cunningham Decl. ¶ 12. Moreover, and because the memoranda identify specific techniques used in ongoing investigations and legal strategies that might be used in cases involving such techniques, their release would adversely affect the Department's handling of pending and impending litigation. *See id.*[3]

CRM Three, which was authored by an associate director of the Department's Office of Enforcement Operations, provides guidance to federal prosecutors concerning requests for historical cellular telephone information; its purpose was to analyze the implication to ongoing federal criminal prosecutions and investigations of a district court decision cited as *In re Application*, 534 F. Supp. 2d 585 (W.D. Pa. 2008). *See* Cunningham Decl. ¶ 15. Like the other memoranda, CRM Three acts as an aid for federal prosecutors in current and future litigation,

[3] As noted in the *Vaughn* index accompanying the Cunningham Declaration, much of CRM Two is, in any event, not responsive to plaintiffs' FOIA request.

and discusses legal strategies, defenses, and arguments to be considered by federal prosecutors. *See id.* And like the other memoranda, the release of CRM Three would adversely affect the Department's handling of pending and impending litigation. *See id.* All three memoranda – CRM One, CRM Two, and CRM Three – therefore constitute attorney work product exempt from disclosure under FOIA. *See New York Times Co.*, 499 F. Supp. 2d at 517.

CRM Four and Five constitute relevant portions of the USABook, which functions as a legal resource book and reference guide for federal prosecutors. *See* Cunningham Decl. ¶ 16. As such, it contains up-to-date legal analysis and guidance regarding specific legal topics that are germane to federal prosecutors. *See id.* The USABook also contains an appendix with forms, or "go-bys," which are designed to aid federal prosecutors in their current and future litigation. *See id.* It identifies factual information regarding specific investigative techniques and discusses potential legal strategies, defenses, and arguments. *See id.* Like the memoranda, the release of the relevant portions of USABook would adversely affect the Department's handling of pending and impending litigation, as "the USABook identifies specific techniques used in ongoing investigations and legal strategies that might be employed in the cases involving such techniques." *Id.* Accordingly, the relevant portions of USABook constitute work product exempt from disclosure pursuant to FOIA. *See New York Times Co.*, 499 F. Supp. 2d at 517; *Raytheon*, 183 F. Supp. 2d at 1285, 1289-90.

2. The Criminal Division Properly Withheld Records Pursuant to Exemptions 6, 7(C), and 7(E).

FOIA Exemption 7 protects from mandatory disclosure "records or information compiled for law enforcement purposes" when, among other issues, production of the documents "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy" (Exemption 7(C)), or "(E) 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," (Exemption 7(E)). 5 U.S.C. § 552(b)(7). In addition to Exemption 7(C), there is a separate FOIA exemption for "personnel and medical files and similar files the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (Exemption 6).

As a threshold issue when analyzing Exemption 7, the Court must make a determination as to whether the documents have a law enforcement purpose, which, in turn, requires examination of whether the agency serves a "law enforcement function." *Church of Scientology Int'l v. IRS*, 995 F.2d 916, 919 (9th Cir. 1993) (internal quotation marks and citation omitted). There can be no dispute that the Department of Justice's Criminal Division has such a function. In this Circuit, and in order to satisfy Exemption 7's threshold requirement, a government agency with a clear law enforcement mandate "'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" *Rosenfeld*, 57 F.3d 803, 808 (9th Cir. 1995) (citation omitted).[4] As noted in Mr. Cunningham's declaration, these records "were compiled to address specific issues involving electronic surveillance, tracking devices and non-wiretap electronic surveillance as these issues relate to prospective federal criminal prosecutions and investigations that are within the authority of DOJ to conduct and to aid federal law enforcement personnel in conducting such prosecutions and investigations." Cunningham Decl. ¶ 18. Thus, there is a rational nexus between these records and the enforcement of federal laws, and Exemption 7's threshold requirement has been met.

a. The Criminal Division Properly Withheld Records Pursuant to Exemptions 6 and 7(C).

As noted above, Exemptions 6 and 7(C) exempt the disclosure of personal, private information. Specifically, Exemption 6 provides that an agency may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Its more expansive law-enforcement counterpart, Exemption 7(C), permits withholding of "records or information compiled for law enforcement purposes" to the extent that "production of such law enforcement records . . . *could reasonably be expected* to constitute an *unwarranted* invasion of personal privacy." *Id.* §

[4] Exemption 6 does not require this threshold showing that the documents at issue have a law-enforcement purpose.

552(b)(7)(C) (emphasis added); *see Yonemoto*, 686 F.3d at 693 n.7 (describing Exemption 7(C)'s broader protections). Both exceptions are often considered together. *See Yonemoto*, 686 F.3d at 693 n.7.

Here, Exemptions 6 and 7(C) were applied to the names and identifying information of DOJ attorneys involved in the creation of CRM Three, CRM Four, and CRM Five. *See* Cunningham Decl. ¶ 27 & Ex. 2. While the privacy interests of public servants are, in some respects, reduced somewhat, "individuals do not waive all privacy interests in information relating to them simply by taking an oath of public office." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 977 (9th Cir. 2009). In particular, it is well-settled that federal employees involved in law enforcement possess protectable privacy interests in their identities. *See id.* (holding that FBI agents have cognizable interest in withholding their names because "there is some likelihood that the agents would be subjected to unwanted contact by the media and others"); *Cal-Trim, Inc. v. IRS*, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting names of lower-level IRS employees in internal IRS correspondence so as not to expose them to unreasonable annoyance or harassment).

Once a non-trivial, non-speculative privacy interest is present, then the exemptions shield the information from disclosure unless "the public interests in disclosing the *particular* information requested outweigh those privacy interests." *Yonemoto*, 686 F.3d at 694. This balances the privacy interest against the asserted public interest. Yet the "*only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* at 694 (quoting *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56, 117 S. Ct. 795, 136 L. Ed. 2d 825 (1997)). Here, there is no public interest served by revealing the information protected by Exemptions 6 and 7(C), as the disclosure of the names and identifying information of attorneys involved in the creation of these documents would not shed any light on how the Criminal Division executes its statutory duties. Cunningham Decl. ¶ 27.

b. The Criminal Division Properly Withheld Records Pursuant to Exemption 7(E).

Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions," or where it 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). Congress intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and protect against crimes as well as techniques and procedures used to investigate crimes after they have been committed. *See, e.g.*, *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (holding that portions of FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)).

The Criminal Division is asserting Exemption 7(E) for portions of CRM One through CRM Five. Specifically, CRM One discusses how GPS tracking devices are used in federal criminal investigations, including "[t]he specific techniques available to prosecutors, the circumstances in which such techniques might be employed, and the legal considerations related to such techniques." Cunningham Decl. ¶ 21. CRM Two is similar to CRM One, except that it involves investigative techniques apart from GPS tracking devices. *Id.* ¶ 22. And CRM Three discusses these same topics as they relate to historical cellular telephone location information. *Id.* ¶ 23. All three memoranda discuss techniques and procedures that are not publicly known, and disclosure of this information could provide individuals with information that would allow them to violate the law while evading law enforcement. *Id.* ¶¶ 21-23.

The responsive portions of USABook contained in CRM Four and CRM Five address specific issues relating to electronic surveillance, tracking devices, and non-wiretap electronic surveillance in the context of prospective federal criminal prosecutions and investigations. Cunningham Decl. ¶ 24. Like CRM One, Two, and Three, "[t]he specific techniques available to prosecutors, the circumstances in which such techniques might be employed, and the legal considerations related to such techniques are reflected throughout the document[s]." Cunningham Decl. ¶ 24. These portions of the USABook discuss techniques and procedures that

are not publicly known, and disclosure of this information could provide individuals with information that would allow them to violate the law while evading law enforcement. *Id.* ¶ 24.

II. DOJ Has Produced All Reasonably Segregable Portions of Responsive Records.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This provision does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words."). Moreover, because the work product doctrine "shields both opinion and factual work product from discovery[,] . . . if a document is covered by the attorney work-product privilege, the government need not segregate and disclose its factual contents." *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) (internal citations omitted). *See also Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 370-72 (D.C. Cir. 2005) ("If a document is fully protected as work product, then segregability is not required.").

As set forth above, and in addition to any other exemptions claimed, all of the material being withheld (in whole or in part) constitutes work product not subject to disclosure pursuant to FOIA. Thus, because these records constitute work product, the government "need not segregate and disclose [their] factual contents." *Pac. Fisheries, Inc.*, 539 F.3d at 1148. Nonetheless, both EOUSA and the Criminal Division have reviewed the withheld material and have disclosed all non-exempt information that reasonably could be disclosed. *See* Kornmeier Decl. Ex. C; Cunningham Decl. ¶ 28. Accordingly, the Department has produced all "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b).

CONCLUSION

For the foregoing reasons, defendant's motion for partial summary judgment regarding Parts 2-4 of plaintiffs' FOIA request should be granted.

DATED: June 6, 2013

Respectfully submitted,

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