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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 REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT Date: August 22, 2013 Time: 10:00 a.m. Place: San Francisco U.S. Courthouse Judge: Hon. Maria-Elena James

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PRELIMINARY STATEMENT

Plaintiffs the American Civil Liberties Union of Northern California and the San Francisco Bay Guardian ("plaintiffs") accuse the U.S. Department of Justice ("DOJ" or "Department") of crafting secret "working law" involving surveillance techniques with "enormous consequence[s] for democratic governance." These accusations obscure the real issue in this case, which involves FOIA process, not surveillance policy. That issue is a simple one: whether in responding to plaintiffs' FOIA request, the DOJ properly withheld information exempt from public disclosure under Exemption 5, 5 U.S.C. § 552(b)(5), and Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). The answer is yes: The DOJ has properly withheld, in whole or in part, records exempt from disclosure under FOIA. For that reason, as further explained below, this Court should deny the plaintiffs' cross-motion for summary judgment and it should grant the DOJ's motion for partial summary judgment.

BACKGROUND

As discussed in more detail in DOJ's original brief in support of partial summary judgment (ECF No. 23, 06/06/2013) ("DOJ Br."), there are two sets of records at issue: the documents from the U.S. Attorney's Office for the Northern District of California which were processed by the Executive Office for United States Attorneys ("EOUSA"), and the DOJ's Criminal Division documents. DOJ Br. 6-8. The EOUSA-processed documents consist of two categories. First, a 16-page set of templates for the use of pen register and trap and trace devices, which were created by the U.S. Attorney's Office for the Northern District of California and withheld in full. *See* Declaration of John W. Kornmeier (attached to DOJ Br., ECF No. 23-1, 06/06/2013) ("Kornmeier Decl.") ¶ 9 and Ex. C. Second, a power point presentation by attorneys in the U.S. Attorney's Office for the Northern District of California regarding legal issues in connection with the use of location tracking devices, in which only two pages were withheld. *See* Kornmeier Decl. Ex. C. The Criminal Division documents at issue include five items: CRM One, Two, Three, Four and Five. *See* Declaration of John E. Cunningham III (attached to DOJ Br., ECF No. 23-2, 06/06/2013) ("First Cunningham Decl.") ¶ 8. CRM One, Two, and Three are memoranda concerning decisions in *United States v. Jones*, 132 S. Ct. 945

(2012), and *In re Application*, 534 F. Supp. 2d 585 (W.D. Pa. 2008). *See* First Cunningham Decl. ¶ 15. CRM Four and Five constitute relevant portions of the USABook, which provides legal advice and guidance to federal prosecutors. First Cunningham Decl. ¶ 16.

ARGUMENT

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

A. The Withheld Documents Do Not Constitute DOJ "Working Law."

Plaintiffs speculate that the Northern District of California and Criminal Division documents constitute the secret, working law of DOJ, and as such must be disclosed even if they are protected attorney work product. *See* Mem. in Supp. of Pls.' Cross-Mot. for Partial Sum. J. and in Opp. to Def.'s Mot. for Partial Sum. J., ECF No. 25, 06/27/2013 ("Pl. Br.") at 8-9. Plaintiffs are wrong.

The concept of "secret law" or "working law" has developed as an exception to Exemption 5. *See New York Times Co. v. Dep't of Justice*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012). Under this principle "i[f] an agency's memorandum or other document has become its 'effective law and policy,' it will be subject to disclosure as the 'working law' of the agency." *Brennan Ctr. for Justice at N.Y.U. Sch. of Law v. Dep't of Justice*, 697 F.3d 184, 199 (2d Cir. 2012) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). Documents may be working law when they resemble "final opinions, statements of policy and interpretations which have been adopted by the agency, and instructions to staff that affect a member of the public." *Id*. at 201 (internal quotation marks omitted).

The documents in question are not "secret law" or "working law" because they discuss or otherwise reflect strategies, defenses, risks, and arguments that may arise *in litigation*. *See* Kornmeier Decl. Ex. C; First Cunningham Decl. ¶¶ 15, 16; Second Declaration of John E. Cunningham III ("Second Cunningham Decl.") ¶ 19 (attached hereto). In other words, any final decisions or law with respect to the issues addressed in the documents will be generated in the course of the adjudicative process, not by an agency decision. It is ultimately the courts that will decide the law in this area, not the DOJ attorneys who prepared the documents.

The Supreme Court in *Sears, Roebuck & Co.* came to this conclusion when it determined that memoranda from the NLRB's general counsel recommending filing a complaint with the Board were properly withheld under Exemption 5; they did not constitute agency law because "[t]he case will be litigated before and decided by the Board; and the General Counsel will have the responsibility of advocating the position of the charging party before the Board." *Sears, Roebuck & Co.*, 421 U.S. at 159-60. The Court reasoned that the memoranda were protected by the work product privilege because they "contain the General Counsel's theory of the case and . . . will also have been prepared in contemplation of the upcoming litigation." *Id.* The Court concluded that "the public's interest in disclosure is substantially reduced by the fact . . . that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board; and that the 'law' with respect to these cases will ultimately be made not by the General Counsel but by the Board or the courts." *Id.* Here too, the ultimate position taken by an Assistant United States Attorney ("AUSA") in a particular case, even if suggested by the documents, will not constitute law, but rather an argument that will be adjudicated by the court. Accordingly, the "working law" doctrine simply is not applicable to the documents in question. *See Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 396 (S.D.N.Y. 2011) ("[T]he secret law doctrine in FOIA cases generally arises in contexts in which agencies are *rendering decisions* based on non-public analyses. I am aware of no precedent for evaluating whether law enforcement *policies* constitute secret law.").

Each of the categories of documents reveals that they do not constitute "secret law." For example, the Northern District of California templates provide the format for AUSAs in that district to use in filing pen register/trap and trace applications, while the power point analyzes legal issues that may arise in connection with the use of location tracking devices. Kornmeier Decl. Ex. C. Both therefore involve legal issues that ultimately will be adjudicated by the court.

Similarly, the Criminal Division documents, consisting of the memoranda (CRM One, Two and Three) and relevant portions of USABook (CRM Four and Five), discuss potential legal strategies, defenses, and arguments that *might* be considered by the federal prosecutors. First Cunningham Decl. ¶ 15-16. Final decisions about what arguments, practices or information to

include are left up to the prosecutor who will make judgments on a case-by-case basis. Second Cunningham Decl. ¶ 20.[1] To that end, "CRM One through CRM Five do not contain reasoning or conclusions that have been adopted as official DOJ policy or opinions and do not provide any official interpretation of DOJ's Fourth Amendment obligations." Second Cunningham Decl. ¶ 21.

B. EOUSA Properly Withheld Records Pursuant to Exemption 5.

The Northern District of California templates and power point pages are protected as work product under Exemption 5. Plaintiffs argue that because these documents do not relate to a particular case they must instead constitute "general standards" unworthy of work product protection. *See* Pl. Br. at 12. But materials need not be "case-specific," as plaintiffs contend, *id.*, in order for the work product protection to attach. *See, e.g.*, *Feshback v. SEC*, 5 F. Supp. 2d 774, 782 (N.D. Cal. 1997) (noting that the phrase "in anticipation of litigation" includes "documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated.") (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)). In determining whether the work product doctrine applies, the "critical issue" is the "primary purpose for the creation of the document." *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000) (citing *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987)). The document must have been prepared in anticipation of litigation, Fed. R. Civ. P. 26(b)(3), though as mentioned previously this privilege extends to documents prepared in anticipation of litigation "even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d at 1208.

The EOUSA-processed documents offer AUSAs in the U.S. Attorney's Office for the Northern District of California such prospective advice and legal strategy, or otherwise reflect that advice and strategy. *See* Kornmeier Decl. Ex. C. Plaintiffs claim that these documents are analogous to those at issue in *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978),

[1] The Stipulation that the parties entered regarding DOJ's search protocol for Parts 2-4 of the FOIA request defines "policies" broadly to include not only policies, but also final "guidance, procedures, and/or practices." Stip. re Processing of Items 2-4 of Pls.' FOIA Req. ¶ 5, attached to JCMS (ECF No. 17, 01/03/2013).

Judicial Watch v. U.S. Department of Homeland Security, No. 11-00604, _F. Supp. 2d_, 2013 WL 753437 (D.D.C. Feb. 28, 2013), and *American Immigration Council v. U.S. Department of Homeland Security*, 905 F. Supp. 2d 206 (D.D.C. 2012), and therefore are not exempt as work product. Pl. Br. at 11-12. These are false comparisons. Courts in those three cases found that the contested material offered guidance bereft of opinions, legal theories, or legal strategies relevant to any on-going or prospective trial. *See Jordan*, 591 F.2d at 776; *Judicial Watch*, _F. Supp. 2d_, 2013 WL 753437, at *15; *Am. Immigration Council*, 905 F. Supp. 2d at 222. By contrast, in the current case, both the templates and the power point presentation incorporate interpretations of the law by the U.S. Attorney's Office that will arise in the course of litigation; thus, they do not reflect routine agency policy, but rather legal strategy protected as work product. *See* Kornmeier Decl. Ex. C.

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

As with the EOUSA-processed documents, the Criminal Division documents also qualify for Exemption 5. Plaintiffs maintain that these materials are "neutral, objective analyses" of the law, which are not entitled to work product protection, Pl. Br. at 12-13, as compared to "more pointed documents," which do fall within the exemption because they recommend "how to proceed further with specific investigations" or "advise the agency of the types of legal challenges likely to be mounted against a proposed program," *Delaney*, 826 F.2d at 127 (D.C. Cir. 1987) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980)). Plaintiffs are incorrect and the cases they cite do not support their conclusions.

As a threshold matter, plaintiffs' characterization of the Criminal Division documents cannot be squared with reality. As amplified by the Second Cunningham Declaration, CRM One, Two, and Three "are intended to outline possible arguments and or litigation risks prosecutors could encounter" and "assess the strengths and weaknesses of alternative litigating positions." Second Cunningham Decl. ¶ 8. These documents were all "prepared because of ongoing litigation and the prospect of future litigation." *Id.* ¶ 9. As for CRM Four and Five, the USABook similarly "discusses potential legal strategies, defenses, and arguments that might be

considered by federal prosecutors." *Id.* ¶ 10.

Plaintiffs point to *Delaney* to argue that the Criminal Division documents are "neutral, objective analyses" of the law. Pl. Br. at 12. Setting aside plaintiff's misapprehension about the nature of the records here, *Delaney* nonetheless offers little help since the court held that the documents, which analyzed the legal implications of the IRS' proposed statistical sampling, were not neutral but rather were work product "advis[ing] 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." *Delaney*, 826 F.2d at 127 (D.C.Cir. 1987). The Criminal Division documents are similarly entitled to work product protection because they too discuss "potential legal strategies, defenses, and arguments that might be considered by federal prosecutors" with respect to the *Jones* and *In re Application* decisions and to various forms of electronic tracking and surveillance. First Cunningham Decl. ¶¶ 15-16; *see also* Second Cunningham Decl. ¶¶ 8-10.

In *American Immigration Council*, which plaintiffs also cite, the court did declare the documents in question to be "neutral, objective analyses," *Id.* at 221-222, but the "primary purpose for the creation of the document[s]" – essential for determining whether work product protection attaches, *Heggestad* 182 F. Supp. 2d at 7 (D.D.C. 2000) (citing *Delaney*, 826 F.2d at 127 (D.C. Cir. 1987)) – was entirely different than for documents in the current case. The *American Immigration Council* documents included a power point intended to teach agency employees how to interact with private attorneys during hearings and a memo regarding an INS regulation and whether it created a right of counsel for people seeking admission as refugees. *Am. Immigration Council*, 905 F. Supp. 2d at 221. The court held that the power point "convey[ed] routine agency polic[y]" and the memo was "a legal opinion meant to bind the agency, not a memo plotting litigation strategy." *Id.* at 222. By contrast, CRM One, Two, and Three offer federal prosecutors litigation strategy and analysis following the *Jones* and *In re Application* decisions, First Cunningham Decl. ¶ 15, while CRM Four and Five (the USABook) offer federal prosecutors similar analysis with respect to electronic surveillance, tracking devices and non-wiretap electronic surveillance, First Cunningham Decl. ¶ 16; *see also* Second Cunningham Decl. ¶¶ 8-10. The advice is not binding and in each case final decisions rest with

the individual prosecutor. Second Cunningham Decl. ¶ 20 (noting that "CRM One through CRM Five do not require DOJ attorneys to make any particular arguments" and "decisions . . . are left solely to the discretion of the prosecutor.").

Disclosing the Criminal Division documents would undermine the very purpose of the attorney work product privilege, which exists because documents "reflecting [an entity]'s litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to [its] prospects in the litigation." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998). The Criminal Division documents reflect the DOJ's potential legal strategies with respect to the *Jones* and *In re Application* decisions and to the use of various devices. They are protected as attorney work product, which the Department of Justice properly withheld pursuant to Exemption 5.

As for the cases that the Department cited in its opening brief, plaintiffs attempt to hide their analysis by placing it in a footnote. *See* Pl. Br. at 13 n.5. For example, and in attempting to distinguish *Raytheon Aircraft Co. v. United States Army Corps of Engineers*, plaintiffs observe that the court granted work product protection to the government reports at issue because they were generated in response to "identified litigation where these issues had arisen," as compared to the DOJ documents, which plaintiffs claim were not. Pl. Br. at 13 n.5, *quoting Raytheon Aircraft Co. v. United States Army Corps of Eng'rs*, 183 F.Supp.2d 1280, 1289 (D. Kan. 2001). The reports in *Raytheon*, however, *were not created for one particular case*. Instead, these reports addressed "recurring research topics" and were intended "to provide consistent and thorough information to all [government] attorneys" litigating these types of cases. *Raytheon*, 183 F. Supp. 3d at 1289-90. Similarly, the documents at issue here were created to assist AUSAs with recurring litigation issues related to the *Jones* and the *In re Application* decisions and to various location tracking methods, and thus are protected as work product. *See* Kornmeier Decl. Ex. C; First Cunningham Decl. ¶¶ 15, 16; Second Cunningham Decl. ¶¶ 8-10.

Regarding *New York Times v. United States Dep't of Defense*, plaintiffs imply that the case is not helpful to DOJ because the requester there "concede[d]" that the documents were "properly withheld as attorney work product." Pl. Br. at 13 n.5, *quoting New York Times v.*

United States Dep't of Defense, 499 F. Supp.2d 501, 517 (S.D.N.Y. 2007). That is the point: The documents at issue in *New York Times* are virtually identical to the documents DOJ is seeking to withhold here. *Compare New York Times*, 499 F. Supp. 2d at 517 (describing work product material from U.S. Attorney's Office as "pertaining to foreign communications acquisition and watch listing" and "provid[ing] guidance for responding to motions made in criminal litigation.") (internal quotation marks omitted) *with* First Cunningham Decl. ¶ 15 (describing various Criminal Division documents as "specifically address[ing] cases involving GPS tracking devices" and "other investigative techniques employed by DOJ" and "provid[ing] guidance to federal prosecutors concerning requests for historical cellular telephone location information"). To the extent the material at issue in *New York Times* was so obviously work product that plaintiff there felt compelled to concede the exemption's applicability, so, too, should plaintiffs make the same concession here.

Finally, plaintiffs assert that the DOJ's disclosure of other, distinct documents in other contexts illustrates that the withheld materials here are not work product. *See* Pl. Br. at 13-15. Plaintiffs, however, implicitly concede that their analysis is nothing more than a red herring when they state that the DOJ's disclosure of various different documents does not "dictate[ ] the result in this case." Pl. Br. at 15. Simply put, the fact that DOJ has disclosed other documents – some of which deal with completely different subject areas – does not shed light on whether the plaintiffs are entitled to pry-open the Department's litigation strategy. These extra-record materials simply are irrelevant to Department's summary judgment motion, which stands on the declarations submitted in this case.

D. The Criminal Division Properly Withheld Records Pursuant to Exemption 7.

1. The Withheld Records Pertain to Detailed Specifics about Location Tracking Techniques Unknown to the Public.

Plaintiffs' assertion that the public is aware that DOJ employs a number of electronic tracking techniques is insufficient to remove the Criminal Division documents from the protections of Exemption 7(E). Pl. Br. at 15-17. While the public may be generally aware that DOJ uses these devices and other investigative techniques, it is not aware of the details regarding

those techniques as reflected in the Criminal Division documents. *See* Second Cunningham Decl. ¶¶ 12-15.

In the Ninth Circuit, "Exemption 7(E) only exempts investigative techniques not generally known to the public." *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). However, the government may withhold detailed information regarding a publicly known technique where the public disclosure did not provide "technical analysis of the techniques and procedures used to conduct law enforcement investigations." *See Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225, 1228–29 (9th Cir. 1991); *see also Asian Law Caucus v. U.S. Dep't of Homeland Sec.*, No. 08-00842, 2008 WL 5047839, at *4 (N.D. Cal. Nov. 24, 2008) ("The public does not already have routine and general knowledge about any investigative techniques relating to watchlists. The public merely knows about the existence of watchlists. Knowing about the general existence of government watchlists does not make further detailed information about the watchlists routine and generally known."); *Barnard v. Dep't of Homeland Security*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (recognizing that "[t]here is no principle . . . that requires an agency to release all details concerning those and similar techniques simply because some aspects of them are known to the public.").

Plaintiffs maintain that CRM One, Three, Four, and Five are analogous to the documents in *Rosenfeld* and thus are not protected. Pl. Br. at 16-17. Plaintiffs are mistaken. The *Rosenfeld* court rejected the FBI's Exemption 7(E) claim that the technique at issue was not a pretext phone call, which was well-known to the public, but rather a "more precise" application of that technique, "namely, the use of the identity of a particular individual, Mario Savio, as the pretext." *Rosenfeld*, 57 F.3d at 815. CRM One, Three, Four, and Five detail techniques, procedures, and legal considerations for prosecutors related to GPS tracking, cellular telephone location information, and electronic surveillance. First Cunningham Decl. ¶ 21-24. They offer "non-public details such as "where, when, how, and under what circumstances" these techniques are used. Second Cunningham Decl. ¶¶ 12, 14, 15. These documents are not "more precise" applications of well-known techniques as plaintiffs argue. Instead, these materials offer further, detailed "analysis of the techniques and procedures used to conduct law enforcement

investigations," which courts have protected as work product in the past. *See, e.g.*, *Bowen* 925 F.2d at 1228–1229 (declining to release specifics of cyanide-tracing techniques though some knowledge of techniques was known to the public); *Asian Law Caucus*, 2008 WL 5047839 at *4 (rejecting request for further detailed information about travel watchlists despite public awareness its existence); *see also Boyd v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 570 F. Supp. 2d 156, 159 (D.D.C. 2008) (concluding that although monitoring techniques are generally known, information that would disclose the "manner and method" of installing monitoring equipment is protected by Exemption 7(E)).

As for CRM Two, plaintiffs respond that DOJ offers only a "conclusory assertion" with insufficient explanation as to why the techniques discussed are not well known. Pl Br. at 17-18. The Ninth Circuit, however, does not require an agency "to 'specify its objections [to disclosure] in such detail as to compromise the secrecy of the information." *See Bowen,* 925 F.2d at 1227 (internal quotation omitted). Rather, the agency may meet its burden by submitting affidavits that "contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." *Id.* (internal quotation omitted). The Declarations provide ample evidence that establishes the need for an exemption while still protecting the secrecy of the investigative techniques. *See* Second Cunningham Decl. ¶ 13 (detailing CRM Two's description of "approximately a dozen investigative techniques," apart from GPS tracking devices, and such "non-public details as where, when, how, and under what circumstances" these techniques are used.).

2. Disclosure of the Withheld Records Would Increase the Risk of Circumvention.

The Criminal Division also properly withheld information from the documents in question pursuant to the second clause of Exemption 7(E) because the details about these investigative techniques disclosed in the documents could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). As described above, CRM One through CRM Five detail non-public information relating to "where, when, how, and under what circumstances" various investigatory techniques are used by federal prosecutors. "If would-be

wrongdoers" had access to this information they would "learn when and where certain investigatory techniques are *not* employed, and would be able to conform their activities to times, places, and situations where they know that unlawful conduct will not be detected." Second Cunningham Decl. ¶ 16. Such information is routinely exempt from public disclosure under FOIA. *See Soghoian v. Dep't of Justice*, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) ("Knowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection.) (emphasis in original); *Morely v. CIA*, 508 F.3d 1109, 1129 (D.C. Cir. 2007) (information regarding CIA's security clearance procedures "could render those procedures vulnerable and weaken their effectiveness at uncovering background information on potential candidates"); *Lewis-Bey v. Dep't of Justice*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (withholding proper under Exemption 7(E) where disclosing "details of electronic surveillance techniques" would "illustrate the agency's strategy in implementing those specific techniques" and "could lead to decreased effectiveness in future investigations by allowing potential subjects to anticipate . . . and identify such techniques as they are being employed").

Plaintiffs interpret *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248 (D.C. Cir. 1993), as standing for the proposition that an *investigatory* manual may receive Exemption 7(E) protection under the circumvention clause while a *legal* manual, which they argue the Criminal Division documents resemble, may not. Pl. Br. at 19-20. Even if the plaintiffs' characterization of the Criminal Division documents is correct, which DOJ does not concede, their conclusion on the circumvention clause is incorrect. In *PHE*, the court examined two sets of material and based its Exemption 7(E) decisions on the quality of the affidavits submitted, not on some false investigatory versus legal distinction. *PHE*, 983 F.2d 250-52. The *PHE* court held that the FBI, author of what plaintiffs' call the investigatory manual, established its Exemption 7(E) claims based on the "specificity of the [FBI] affidavit," which outlined "the substance of the withheld information" and "demonstrates logically how the release of that information might create a risk of circumvention of the law." *PHE*, 983 F.2d 248 at 251. By contrast, the court found that the National Obscenity Enforcement Unit (NOEU), creator of what the plaintiffs' label the legal

manual, failed to establish its Exemption 7(E) claims because its "affidavit is too vague and conclusory" *Id.* at 252. The court remanded the NOEU issue to the district court, observing that:

> Had the NOEU submitted a more specific affidavit containing more precise descriptions of the nature of the redacted material and providing reasons why releasing each withheld section would create a risk of circumvention of the law . . . it might have established a legitimate basis for its decision.

Id. Regardless of whether the Criminal Division documents resemble a legal manual as plaintiffs claim, they are still entitled to Exemption 7(E) protection because the Declarations "contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." *Bowen*, 925 F.2d at 1227 (internal quotation omitted).

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

As the government noted in its opening brief, all of the material being withheld, either in whole or in part, constitutes work product not subject to disclosure pursuant to FOIA. Thus, the government simply "need not segregate and disclosure [their] factual contents." *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008). Plaintiffs simply ignore this argument and binding Ninth Circuit precedent, even though the principle that the work-product doctrine applies to the entirety of a document is well-settled in this and other circuits. *See Pac. Fisheries*, 539 F.3d at 1148 (work product "shields both opinion and factual work product from discovery"); *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005) ("[F]actual material is itself privileged when it appears within documents that are attorney work product. If a document is fully protected as work product, then segregability is not required."); *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 147 (2d Cir. 1994) (in applying Exemption 5, "[t]he work product privilege draws no distinction between materials that are factual in nature and those that are deliberative"). Thus, the Ninth Circuit in *Pacific Fisheries* remanded to the district court to "make specific findings as to whether factual information has been properly segregated and disclosed in all documents or portions of documents that the [government] claims are exempt from disclosure under the deliberative process privilege *but not the attorney work product privilege*." *Pac. Fisheries*, 539 F.3d at 1150 (emphasis added).

The fact that all of the withheld material is subject to work-product protection ends this Court's segregability inquiry. Nonetheless, and as the government noted in its opening brief, 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; First Cunningham Decl. ¶ 28. Applying a "no good deed goes unpunished" philosophy, plaintiffs selectively cite the government's declaration to create a straw man argument that the declarations are too vague and the withheld information merely involves "third-party privacy [which] can readily be protected without withholding entire documents." Pl. Mem. at 21.[2] "Because the documents withheld are privileged under the work product doctrine," however, "it is irrelevant that they do not also fall within the scope of" another FOIA exemption; the entire document can be withheld. *A. Michael's Piano, Inc.*, 18 F.3d at 147. As for the level of detail in the declarations, plaintiffs ignore that the Criminal Division conducted "a line-by-line review." First Cunningham Decl. ¶¶ 9, 28. And the declarations and *Vaughn* indices also explain, in detail, why the work product doctrine and other FOIA exemptions apply. *See* First Cunningham Decl. ¶¶ 13-16; Second Cunningham Decl. ¶¶ 7-10; Kornmeier Decl. Ex. C. Moreover, and as explained in the Second Cunningham Declaration, the Criminal Division identified specific material in CRM One and CRM Two that is not subject to Exemption 7(E) and which could be reasonably segregated; even though that material would be subject to Exemption 5, the Criminal Division nonetheless made a discretionary release. *See* Cunningham Decl. ¶ 17. In short, the government has not merely met its burden under FOIA; it has exceeded it.

III. DOJ Is Not Required to Produce Non-Responsive Materials.

Plaintiffs take issue with the fact that portions of CRM Two, Four, and Five are not responsive to their FOIA request, and therefore have not been produced. Plaintiffs' position is based on a misapprehension of both the documents involved and the relevant case law.

As a threshold matter, plaintiffs' argument is somewhat academic. As noted in the Second Cunningham Declaration, even if these materials are somehow deemed responsive, they

[2] Plaintiffs do not dispute the applicability of Exemption 7(C). *See* Pl. Br. at 20.

are nonetheless subject to protection from disclosure under FOIA Exemptions 5 and 7(E). *See* Second Cunningham Decl. ¶¶ 9 n.1, 10 n.2.

In any event, CRM Four and CRM Five consist of portions of the USABook, which is a DOJ intranet site. *See* First Cunningham Decl. ¶ 16. As an intranet site, the USABook is organized into different subsections or sub-chapters, only some of which contain material responsive to plaintiffs' FOIA request. *See, e.g.*, First Cunningham Decl. Ex. 2:24 (*Vaughn* index describing sections of USA Book); Second Cunningham Decl. ¶ 10 n.2. The materials being withheld as non-responsive in CRM Four and CRM Five are subsections or sub-chapters of the USABook that had initially been referred to the Criminal Division for processing, but upon closer inspection were determined not to be responsive. *See* First Cunningham Decl. ¶¶ 8-10 (describing "three-hundred and four pages of records [as] non-responsive, as they relate to such matters as electronic surveillance, pen register, and trap and trace applications generally"); Second Cunningham Decl. ¶ 10 n.2.

Plaintiffs cannot dispute that the Department can withhold these types of materials, as they, in effect, constitute unique "documents." *See* Second Cunningham Decl. ¶ 10 n.2; Pl. Br. at 22 n.7 ("Plaintiffs do not contend that the agency is precluded from withholding non-responsive *documents*"). Nor can they: the Stipulation that defined the scope of the Department's obligations indicated that plaintiffs' request shall be construed as one "for *responsive* portions of the USA Book." Stip. re: Processing of Items 2-4 of Pls.' FOIA Req. ¶ 6 (attached as Appendix to Joint Case Management Statement), ECF No. 17, 01/03/2013 (emphasis added). As these subsections and sub-chapters do not constitute "responsive portions" of the USA Book, they need not be processed.

As for CRM Two, the Department concedes that the material being withheld as non-responsive is a portion of an otherwise responsive document – here, a July 5, 2012 Memorandum analyzing the possible implications of the Supreme Court's decision in *United States v. Jones* on ongoing federal criminal prosecutions and investigations. *See* First Cunningham Decl. ¶¶ 8, 15. Nonetheless, the government still need not produce this non-responsive material. First, the material is within a memorandum that is otherwise protected by the work-product doctrine; as

noted above, that protection applies to the entirety of the document. *See Pac. Fisheries*, 539 F.3d at 1148.[3]

In any event, the law is settled that agencies simply have "no obligation to produce information that is not responsive to a FOIA request." *Wilson v. U.S. Dep't of Transp.*, 730 F. Supp. 2d 140, 156 (D.D.C. 2010), *aff'd*, 10-5295, 2010 WL 5479580 (D.C. Cir. Dec. 30, 2010). For that reason, this and other courts have held that an agency responding to a FOIA request may redact non-responsive information. *See California ex rel. Brown v. NHTSA*, No. 06-2654 SC, 2007 WL 1342514, at *1, *2 (N.D. Cal. May 8, 2007) ("Defendants' redaction of non-responsive information was proper"); *Wilson*, 730 F. Supp. 2d at 156 (D.D.C. 2010) ("there is no reason for this Court to find these redactions [for out-of-scope information] improper")). In this regard, plaintiffs' argument that "there is no 'non-responsive' exemption" is backwards. *See* Pl. Br. at 22. If material is not responsive, it need not be processed in the first instance.

Plaintiffs' citation to *Dettman v. U.S. Department of Justice* does not change this result. According to plaintiffs, the D.C. Circuit supports the view that a request for documents precludes the withholding of non-responsive material that is irrelevant to the subject matter of the request. *See* Pl. Br. at 22. As the plaintiffs concede, however, the language to which plaintiffs refer is essentially dicta, as the plaintiff in that case failed to exhaust her administrative remedies. *Dettman v. U.S. Department of Justice*, 802 F.2d 1472, 1476 (D.C. Cir. 1986). Nor can plaintiffs rely upon a non-binding eighteen-year-old guidance document to argue that the Department was required to provide plaintiff with an opportunity to request and obtain the entire memorandum. *See* Pl. Br. at 22-23 n.8. Instead, the current version of the Department of Justice's Guide to the Freedom of Information Act acknowledges that courts have held that agencies responding to FOIA requests need not process and disclose non-responsive portions of otherwise responsive records. *See* United States Department of Justice Guide to the Freedom of Information Act at 80 (2009 ed.), *available at* http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf (last visited Feb. 15, 2013). For these reasons, the Department acted properly in withholding

[3] The same, of course, can be said for the non-responsive portions of the USA Book.

non-responsive portions of CRM Two (to the extent this Court finds that they are not otherwise exempt pursuant to the work-product doctrine).

CONCLUSION

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

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