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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Case No. 4:17-cv-03571-JSW **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Hearing Date: November 17, 2017 Hearing Time: 9 a.m. Hon. Jeffrey S. White Courtroom 5, 2nd Floor Oakland Courthouse

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PLEASE TAKE NOTICE that on November 17, 2017, at 9 a.m., Defendant the United States Department of Justice ("Justice Department" or "DOJ") will move, and hereby does move, for summary judgment pursuant to Federal Rule of Civil Procedure 56.

SUMMARY OF ARGUMENT

At issue in this case are two memoranda written by DOJ attorneys that Plaintiffs seek to require the Justice Department to release under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. These memoranda, however, were written to provide legal analysis and strategic considerations to other DOJ attorneys for use in future litigation. As recently held by both the D.C. Circuit and the Southern District of New York, such memoranda providing litigation guidance constitute attorney work product because they are prepared in anticipation of litigation and reflect attorneys' litigation strategies and legal theories. *National Association of Criminal Defense Lawyers ("NACDL") v. Department of Justice*, 844 F.3d 246 (D.C. Cir. 2016); *ACLU v. DOJ*, 210 F. Supp. 3d 467, 482–83 (S.D.N.Y. 2016); *see also United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (setting out work product standard). Thus, the Justice Department properly withheld these memoranda in full as attorney work product under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). These memoranda also reflect legal advice given by DOJ attorneys to their clients, and thus were properly withheld in full under Exemption 5 as protected by the attorney-client privilege. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169–70 (2011) (holding privilege applies to communications between Government attorneys and their clients). Because the Justice Department properly withheld these documents and Plaintiffs are not challenging the adequacy of its FOIA search, the Justice Department has fulfilled its FOIA obligations, the Court should grant summary judgment to it on all claims.

STATEMENT OF ISSUES

1. Whether the Justice Department properly withheld in full two related memoranda in which Justice Department attorneys present legal analysis and suggest litigation strategy under FOIA Exemption 5 as attorney work product?[1]

[1] Of course, if the Court determines that the documents were properly withheld in full as attorney work product (or attorney-client communication), it need not reach the other issue.

2. Whether the Justice Department properly withheld these memoranda in full under FOIA Exemption 5 as attorney-client communication?

STATEMENT OF FACTS

Plaintiffs seek to compel the release of two related attorney-authored documents: (1) an internal Justice Department memorandum entitled "Determining Whether Evidence Is 'Derived from' Surveillance under Title III or FISA" ("the FISA Memo"), and (2) and a two-page cover memorandum to the FISA Memo, dated November 23, 2016 ("the Cover Memo"), which summarizes the purpose and content of the FISA Memo. *See* Ex. 1, Declaration of Susan L. Kim ("Kim Decl.") ¶¶ 3–7. In these two memoranda, Justice Department attorneys describe relevant legal frameworks and provide strategic considerations to help litigating Justice Department attorneys assess whether evidence related to electronic surveillance is "derived from" that surveillance within the meaning of Title III of the Omnibus Crime Control and Safe Streets Acts of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), and the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1801 *et seq.*, for purposes of complying with statutory notice obligations. Kim Decl. ¶¶ 4–7.

Title III and FISA both authorize the Government to conduct certain forms of electronic surveillance under certain circumstances. *See* 18 U.S.C. §§ 2516, 2518(3)–(5); 50 U.S.C. §§ 1805(a), 1824(a), 1842(d). And both Title III and FISA allow evidence obtained or "derived from" such surveillance to be used in legal proceedings if certain conditions are met. *See* 18 U.S.C. § 2518(9); 50 U.S.C. § 1806(c). In particular, although the details differ between Title III and FISA, both require the Government to provide notice of the surveillance to certain persons—generally criminal defendants—before evidence obtained or "derived from" Government electronic surveillance may be used in trial or other such proceedings. *See* 18 U.S.C. § 2518(9); 50 U.S.C. § 1806(c). Consequently, in cases in which the Government has conducted related electronic surveillance, federal prosecutors and other Justice Department attorneys may be required to determine whether evidence on which they intend to rely was in any respect "derived from" the electronic surveillance, in order to know whether they are required to provide notice of that surveillance to litigants.

In the FISA Memo and Cover Memo, senior Justice Department attorneys attempt to assist other Justice Department attorneys with making this determination, *i.e.*, with determining whether evidence in a case was "derived from" electronic surveillance under Title III or FISA such that notice must be provided in litigation, and provide related legal and strategic observations about such cases. Kim Decl. ¶¶ 4–7, 10. Neither the Cover Memo nor the FISA Memo purport to be making policy regarding how Justice Department attorneys must act when faced with particular "derived from" determinations. *Id.* ¶ 7. To the contrary, the Cover Memo explicitly states that the FISA Memo is not intended to provide comprehensive guidance regarding Title III or FISA, but rather to provide an overview of relevant legal and strategic considerations for attorneys' use. *Id.* As stated in the Cover Memo, the FISA Memo is to be used as a starting point for determinations of whether information is "derived from" surveillance, to be supplemented by attorneys' own updated legal research and consultation with Justice Department attorneys knowledgeable about such matters. *Id.* Indeed, rather than a final statement of policy, the FISA Memo, as described by the Cover Memo, was designed to facilitate further discussion of these issues within the Justice Department and may be updated in the future. *Id.*

The Cover Memo is two pages long and dated November 23, 2016. *Id.* ¶ 4. It is addressed to "all federal prosecutors" from the chiefs of the Appellate Section of the DOJ Criminal Division and the Appellate Unit of the DOJ National Security Division. *Id.* It is marked "privileged and confidential." *Id.* Its subject line is "Determining Whether Evidence Is 'Derived from' Surveillance under Title III or FISA," *i.e.*, the title of the attached FISA Memo. *Id.* In a series of paragraphs, the Cover Memo summaries the subject, content, and purpose of the FISA Memo, and comments more broadly on the Justice Department's efforts to ensure compliance with the law in this area. *Id.*

The FISA Memo was originally attached to the Cover Memo. *Id.* ¶ 3. It is thirty-two pages (or thirty-one without the title page), and each page is marked "Attorney Work Product" and "For Official Use Only." *Id.* ¶ 5. It is dated "November 2016," and was written by a group of Justice Department attorneys. *Id.* ¶¶ 5–6. It consists of four sections—an introduction

summarizing the purpose of the memorandum, a table of contents, a summary of conclusions, and a section of legal analysis. *Id.* ¶ 5. The legal analysis section constitutes the vast majority of the document, and is divided into a number of subsections based on the legal issue under discussion. *Id.* The FISA Memo thus consists primarily of a legal analysis of Title III, FISA, and relevant caselaw, including conclusions regarding the present state of the law on when evidence is "derived from" electronic surveillance under Title III and FISA. *Id.* The FISA Memo cautions, however, that it is simply setting forth the basic law and legal frameworks at issue, and that courts could conceivably disagree with the FISA Memo's conclusions in some contexts. *Id.* ¶ 7. In light of this, the FISA Memo encourages Justice Department attorneys to seek further guidance from knowledgeable attorneys within the Department, especially when encountering difficult questions. *Id.* Interwoven throughout this legal analysis are various strategic considerations for litigation—generally, what steps Justice Department attorneys should take to ensure they are complying with the relevant law and what legal arguments and litigation approaches have the greatest chance of success in light of the law in this area. *Id.* ¶ 5.

On February 6, 2017, Plaintiffs submitted a FOIA request to the Justice Department seeking the FISA Memo; any cover letter or any document attached to the FISA Memo; any other version of the FISA Memo created or distributed on or after November 23, 2016; and any documents "modifying, supplementing, superseding, or rescinding" the FISA Memo. *Id.* ¶ 2. The DOJ National Security Division responded on behalf of the Justice Department on February 10, 2017. *Id.* ¶ 3. The National Security Division indicated that it had conducted a search for records responsive to Plaintiffs' FOIA request, and had located two responsive records, the FISA Memo and the Cover Memo, both of which it was withholding in full pursuant to Exemption 5. *Id.* Plaintiffs administratively appealed, and their appeal was denied. *Id.*

Plaintiffs' filed this lawsuit on June 21, 2017, seeking to compel the disclosure of the FISA Memo and the Cover Memo. *See* Compl., ECF No. 1. Plaintiffs are not challenging the adequacy of the Justice Department's search for records responsive to their FOIA request. Jnt. Case Management Statement, ECF No. 23, ¶ 15. Thus, the only matter to be decided in this case

is whether the Justice Department properly withheld the FISA Memo and Cover Memo under FOIA.

ARGUMENT

FOIA entitles the Government to withhold attorney-authored memoranda setting forth legal analysis and strategic considerations for use by Government attorneys in litigation, as recently reaffirmed by the D.C. Circuit and the Southern District of New York. Requiring the disclosure of such documents would prevent the free flow of legal guidance within the Government, undermining the Government's effort both to fulfill its legal obligations and litigate cases. The Justice Department thus properly withheld in full the two memoranda at issue in this case, and summary judgment should be granted in its favor.

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). "Congress recognized, however, that public disclosure is not always in the public interest[.]" *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Thus, in passing FOIA, "Congress sought 'to reach 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.'" *John Doe*, 493 U.S. at 152 (citation omitted).

To that end, FOIA does not require disclosure of Government records that fall within one of nine enumerated exceptions. *See* 5 U.S.C. § 552(b). "A district court only has *jurisdiction* to compel an agency to disclose *improperly withheld* agency records," *i.e.*, records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'"). Despite the "liberal congressional purpose" of FOIA, the statutory exemptions must be given "meaningful reach and application." *John Doe*, 493 U.S. at 152.

While Government defendants bear the burden of proving that the withheld information falls within the exemptions it invokes, 5 U.S.C. § 552(a)(4)(B); *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987), courts nonetheless "accord substantial weight to an agency's declarations regarding the application of a FOIA exemption." *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012). Thus, in a FOIA case, a court may grant summary judgment to Government defendants solely on the basis of information provided in affidavits or declarations that describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also Animal Legal Def. Fund v. U.S. Food & Drug Admin.,* 836 F.3d 987, 989 (9th Cir. 2016) (en banc) ("Most FOIA cases are resolved by the district court on summary judgment, with the district court entering judgment as a matter of law."); *Lawyers' Comm. for Civil Rights of S.F. Bay Area 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.").

Given these standards, the attached Declaration of Susan L. Kim demonstrates that the Justice Department appropriately withheld the FISA Memo and Cover Memo in full under Exemption 5. As the Kim Declaration shows, the two memoranda consist of attorney work product and attorney-client communications, with no meaningful segregable materials. The Justice Department's withholdings were thus entirely proper under FOIA, and it is entitled to summary judgment.

I. THE JUSTICE DEPARTMENT PROPERLY WITHHELD ATTORNEY-AUTHORED MEMORANDA OFFERING LEGAL ANALYSIS AND RELATED STRATEGIC CONSIDERATIONS AS ATTORNEY WORK PRODUCT UNDER FOIA EXEMPTION 5.

A. The Government May Withhold Attorney-Authored Litigation Guidance as Attorney Work Product.

Under Exemption 5, FOIA exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 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).

Here, Defendant is withholding both the FISA Memo and the Cover Memo in full under Exemption 5 as attorney work product. Protecting attorney work product is essential to the fair and effective conduct of litigation: "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); *accord Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."). Hence, "[t]he privilege aims primarily to protect the integrity of the adversary trial process itself . . . [and] [i]t does so by providing a working attorney with a zone of privacy within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *NACDL*, 844 F.3d at 251 (citations omitted); *accord United States v. Christensen*, 828 F.3d 763, 805 (9th Cir. 2015) ("The purpose of the work product privilege is to protect the integrity of the adversary process.").

"To qualify for work-product protection, documents must: (1) be 'prepared in anticipation of litigation or for trial' and (2) be prepared 'by or for another party or by or for that other party's representative.'" *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt.*, 357 F.3d 900, 907 (9th Cir. 2004)). "Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Sears, Roebuck & Co.*, 421 U.S. at 154.

"[D]ocuments are deemed prepared because of litigation if in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Richey*, 632 F.3d at 568 (citations omitted). When applying this standard, "courts must consider the totality of the

circumstances and determine whether the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation." *Id*. (citations omitted).

The phrase "in anticipation of litigation" extends beyond an attorney's preparation for a specific case in existing litigation, such that "documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated" may also be attorney work product. *Feshbach v. SEC*, 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*, 562 U.S. 562 (2011)); *see also NACDL*, 844 F.3d at 253 ("[W]e have long held that there is no general, overarching requirement that a governmental document can fall within the work-product privilege only if prepared in anticipation of litigating a specific claim."); *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 78 (D.D.C. 2003) ("To qualify for work product protection, litigation need not be actual or imminent; it need only be 'fairly foreseeable.'") (quoting *Coastal States Gas. Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)).

Thus, internal Government memoranda addressing "recurring research topics" that are intended "to provide consistent and thorough information to all attorneys" litigating various categories of cases have been 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); *see also Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (work product protection for memoranda 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"); *Schiller*, 964 F.2d at 1208 (work product protection for Government documents that "contain[] tips for handling unfair labor practice cases that could affect subsequent [Equal Access to Justice Act ("EAJA")] litigation, that [. . .] contain[] advice on how to build an EAJA defense and how to litigate EAJA cases, and that [. . .] provide instructions on preparing and filing pleadings in EAJA cases, including arguments and authorities."); *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 130 (D.D.C. 2009) ("Because the legal advice contained in the documents covered documents that

the defendant has frequently litigated, the court determines that litigation on these topics was reasonably foreseeable when the documents were created, even though no specific claim was contemplated at the time."); *N.Y. 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).

Two recent cases confirming that the Government may withhold such litigation memoranda are especially instructive here. In the first, *National Association of Criminal Defense Lawyers ("NACDL") v. Department of Justice*, 844 F.3d 246 (D.C. Cir. 2016), the Justice Department withheld as attorney work product an internal DOJ publication known as the Federal Criminal Discovery Blue Book, which "describes the nature and scope of federal prosecutors' discovery obligations under applicable constitutional provisions, caselaw, and the Federal Rules of Criminal Procedure." *Id*. at 249, 251 (citation omitted). In *NACDL*, the D.C. Circuit flatly rejected the plaintiffs' argument that, because the Blue Book offered general litigation guidance rather than dealing with specific claims, it could not have been prepared in anticipation of litigation: the Blue Book "is aimed directly for use in (and will inevitably be used in) litigating cases" and thus disclosing it "risks revealing DOJ's litigation strategies and legal theories regardless of whether it was prepared with a specific claim in mind." *Id*. at 254. Documents "prepared with the litigation of *all* charges and *all* cases in mind" are still attorney work product. *Id*.

The D.C. Circuit further noted in *NACDL* that the Blue Book generally consists of "legal analysis" interspersed with "strategic considerations, procedures, and practical advice." *Id*. at 256 (citation omitted). Such discussion of "legal strategy," the D.C. Circuit held, was "exactly the sort of information" that was protected by Exemption 5 as attorney work product. *Id*. at 256 (citation omitted). Similarly, although the legal analysis contained in the Blue Book might be based on publicly available law and have an "air of neutrality," "disclosure of the publicly-available information a lawyer has decided to include in a litigation guide—such as citations of (or specific quotations from) particular judicial decisions and other legal sources—would tend to

reveal the lawyer's thoughts about which authorities are important and for which purposes," thus implicating attorney work product protection. *Id*.

The D.C. Circuit's decision in *NACDL* in turn greatly informed the Southern District of New York's analysis in its decisions in *ACLU v. Department of Justice*, Civil Action No. 13-7347 (S.D.N.Y.), a case with even more in common with the instant case than *NACDL*. In the S.D.N.Y. case, the Justice Department withheld as attorney work product "memoranda [that] address how to determine if information has been derived from FISA for use in criminal prosecutions or other adjudications and the application of FISA's notice provisions in those proceedings." *ACLU v. DOJ*, 210 F. Supp. 3d 467, 482–83 (S.D.N.Y. 2016) (quoting DOJ declarations describing the documents). Thus, although the FISA Memo and Cover Memo were not themselves at issue in this S.D.N.Y. litigation—they had not yet been completed when the FOIA search in the S.D.N.Y. case was conducted, *see* Kim Decl. ¶¶ 4–5—the case did concern other internal DOJ memoranda addressing the very same issues.

The *ACLU* court upheld the withholding of the DOJ memoranda regarding FISA derivation, concluding that the Justice Department's declarations "demonstrate[d] that the documents at issue are necessarily geared to litigation in which DOJ's notice obligations under [FISA] will be at issue, and that these documents would not have been prepared in substantially similar form but for the prospect of that litigation." *ACLU*, 210 F. Supp. 3d at 483 (citation omitted); *ACLU v. DOJ*, 13-cv-7347, 2017 WL 1658780, *6 (S.D.N.Y. May 2, 2017) (same). The court discussed the *NACDL* decision and noted that the memoranda regarding FISA derivation, like the Blue Book, "address[] how attorneys on one side of an adversarial dispute—federal prosecutors—should conduct litigation," including "positions to be taken in [] criminal prosecutions or other adjudications and potential issues for prosecutors' consideration in anticipation of litigation that Department attorneys would ultimately defend on behalf on the Department." *ACLU*, 210 F. Supp. 3d at 484 (citation omitted). Thus, the memoranda, like the Blue Book, were protected attorney work product. *Id*.; *ACLU*, 2017 WL 1658780 at *6.

B. The Withheld Memoranda Consist of Legal Analysis and Strategic Considerations Prepared by Attorneys in Advance of Litigation and Thus Constitute Attorney Work Product.

The holdings in *NACDL* and *ACLU* (S.D.N.Y.) squarely apply to the FISA Memo and Cover Memo.[2] Like the Blue Book at issue in *NACDL* and the FISA-derivation memoranda at issue in *ACLU* (S.D.N.Y.), the FISA Memo and Cover Memo consist of a mix of legal analysis and strategic considerations regarding a question that arises in litigation—when information is "derived from" surveillance such that notice must be provided—and are designed for DOJ attorneys' use in such litigation. Kim Decl. ¶¶ 4–7.

As discussed above, both Title III and FISA allow evidence obtained or "derived from" electronic surveillance to be used in litigation if certain conditions are met. *See* 18 U.S.C. § 2518(9); 50 U.S.C. § 1806(c); *see also* Kim Decl. ¶ 6. In particular, both require the Government to provide notice of the surveillance to certain persons before evidence obtained or "derived from" Government electronic surveillance may be used in such litigation. *See* 18 U.S.C. § 2518(9); 50 U.S.C. § 1806(c); *see also* Kim Decl. ¶ 6. Consequently, in cases in which the Government has conducted related electronic surveillance, federal prosecutors and other Justice Department attorneys may be required to determine whether evidence on which they intend to rely was in any respect "derived from" the electronic surveillance, in order to know whether they are required to provide notice of that surveillance to litigants. Kim Decl. ¶ 6. In the FISA Memo and Cover Memo, senior Justice Department attorneys attempt to assist other

[2] Obviously, neither *NACDL* nor *ACLU* (S.D.N.Y.) is binding precedent here. Both decisions, however, use the same standard employed by the Ninth Circuit when determining whether a document is prepared "in anticipation of litigation": whether the document was prepared because of the prospect of litigation. *Compare Richey*, 632 F.3d at 568, *with NACDL*, 844 F.3d at 251, *and ACLU*, 210 F. Supp. at 476. And courts throughout the United States regularly find the reasoning of D.C. Circuit FOIA decisions persuasive in light of the disproportionate number of FOIA cases it handles. *See, e.g.*, *Matlack, Inc. v. EPA*, 868 F. Supp. 627, 630 (D. Del. 1994) ("The United States Court of Appeals for the District of Columbia Circuit has long been on the leading edge of interpreting the parameters of what a federal agency must disclose and may withhold consistent with the terms of FOIA."); *Estate of Ghais Abduljaami v. U.S. Dep't of State*, 14-cv-7902, 2016 WL 94140, *5 n.2 (S.D.N.Y. Jan. 7, 2016) ("Courts in the Second Circuit frequently cite FOIA decisions from the D.C. Circuit as it is a jurisdiction with considerable experience on FOIA matters.") (citation omitted).

Justice Department attorneys with making this determination, *i.e.*, with determining whether evidence in a case was "derived from" electronic surveillance under Title III or FISA such that notice must be provided in litigation, and provide related legal and practical observations about such cases. *Id*. ¶ 4–7. They also provide various strategic considerations, such as what steps Justice Department attorneys should take to ensure they are complying with the relevant law during litigation and what legal arguments and litigation approaches have the greatest chance of success in light of the law in this area. *Id*.

Thus, as in *NACDL* and *ACLU* (S.D.N.Y.), compelling the disclosure of these memoranda would reveal litigation strategies and legal theories used by DOJ attorneys in litigation, *id*., thereby revealing exactly the sort of materials that courts have consistently held are protected from disclosure as attorney work product.

Plaintiffs here may argue, as the plaintiffs did in *NACDL* and *ACLU* (S.D.N.Y.), that the FISA Memo and Cover Memo simply summarize public law and DOJ policy, and thus are not attorney work product. As those decisions held, however, regardless of how one might attempt to characterize such DOJ litigation memoranda, they remain attorney work product in light of their fundamental "adversarial function." *NACDL*, 844 F3d at 255; *accord ACLU*, 210 F. Supp. 3d at 484. Indeed, even when such internal DOJ documents are also used for non-litigation functions, such as "educational or training" purposes, such uses do not make them any less attorney work product: "material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status" and thus "any educational or training function the Blue Book might serve would not negate the document's adversarial use in (and its preparation in anticipation of) litigation." *NACDL*, 844 F.3d at 255; *accord ACLU*, 210 F. Supp. 3d at 484. Similarly, the courts rejected plaintiffs' contentions that the documents merely consisted of general legal interpretations and that such interpretations cannot be protected as attorney work product; the court noted that even seemingly neutral discussions of legal authorities tend to reveal an attorney's thoughts about litigation when those legal discussions are created in anticipation of litigation. *NACDL*, 844 F.3d at 255 (emphasizing that the Blue Book "does not merely pertain to the subject of litigation in the abstract," but how attorneys should

approach legal problems in the context of anticipated litigation); *ACLU*, 210 F. Supp. 3d at 484 (same).

The FISA Memo and Cover Memo are also not subject to disclosure as "working law," an argument that the court rejected in *ACLU* (S.D.N.Y.). As the *ACLU* court noted, "[i]t has been clearly established for nearly forty years that documents disclosable under FOIA as agency working law may nevertheless be withheld if they are protected by the attorney work product privilege." *ACLU*, 210 F. Supp. 3d at 478; *see also id*. at 480 (collecting cases). A document's use as working law may prevent it from being withheld under the deliberative process privilege, as such use indicates a degree of finality, but has no bearing on whether the document may be withheld as attorney work product. *See id*. at 479–81. "As is evident from the *NACDL* court's opinion, the Blue book is a final, concrete document binding on 'all DOJ prosecutors and paralegals,' . . . and was still found to constitute protected attorney work product." *Id*. at 484 (internal citation omitted). Thus, the issue of whether the FISA Memo and Cover Memo constitute working law is irrelevant to the question of whether they have been properly withheld.

In any event, the FISA Memo and Cover Memo are not in fact DOJ working law. Only a "conclusive or authoritative statement of [an agency's] policy" constitutes working law. *Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 9 (D.C. Cir. 2014). Legal advice and analysis, even if customarily followed, is not working law if it lacks this binding, authoritative character. *Id*.; *cf. N.Y. Times v. Dep't of Justice*, 101 F. Supp. 3d 310, 318 (S.D.N.Y. 2015) ("Documents that advise agency personnel of likely legal challenges and potential defenses . . . do not constitute working law.") (citation omitted). Here, nothing in the FISA Memo or Cover Memo purports to provide binding policy instruction to DOJ attorneys. Kim Decl. ¶ 7.[3] Indeed, the Cover Memo explicitly states that the FISA Memo is not intended to provide comprehensive

[3] The Cover Memo and FISA Memo were final, disseminated memoranda regarding FISA derivation, *see* Kim Dec. ¶¶ 4–5, in contrast to the draft memoranda regarding FISA derivation at issue in *ACLU* (S.D.N.Y.), *see* 210 F. Supp. 3d at 483–84. But this difference is irrelevant here. First, the attorney work product protects both final documents and drafts. *See ACLU*, 210 F. Supp. 3d at 484 ("The work product privilege is certainly no less applicable to the non-governing NSD documents at issue in this case than it was applicable to the final manual made available to prosecutors nationwide, as was at issue in *NACDL*."). Second, a document is not working law merely because it is final—only if it is a binding, authoritative statement of policy. *Elec. Frontier Found.*, 739 F.3d at 9.

guidance regarding Title III or FISA, but rather to provide an overview of relevant legal and strategic considerations for attorneys' use. *Id*. The FISA Memo is to be used as a starting point for determinations of whether information is "derived from" surveillance, to be supplemented by attorneys' own updated legal research and consultation with Justice Department attorneys knowledgeable about such matters. *Id*. The Cover Memo and FISA Memo make clear that the law they discuss is subject to further revision by courts, and that this law itself remains the authority binding on DOJ attorneys, not the analysis and advice about the law provided the Cover Memo and FISA Memo themselves. *Id*.

Thus, because, as the Kim Declaration demonstrates, the FISA Memo and Cover Memo offer advice, legal analysis, and strategic consideration for DOJ attorneys to use in (or when preparing for) litigation, *id*. ¶¶ 4–7, 10, they were properly withheld under FOIA Exemption 5 as attorney work product.

C. The Withheld Memoranda Do Not Contain Any Segregable Information.

Although FOIA requires that "[a]ny reasonably segregable portion of a record . . . 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), such segregation was not required for the FISA Memo and Cover Memo because all portions of a document prepared by an attorney in anticipation of litigation are generally protected from disclosure. *See Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997) ("Any part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5."); *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) ("[I]f a document is covered by the attorney work-product privilege, the government need not segregate and disclose its factual contents.").

In *NACDL*, the D.C. Circuit held that it was nonetheless "generally preferable" to assess "the feasibility of segregating nonexempt material" in "cases involving voluminous or lengthy work-product records." *NACDL*, 844 F.3d at 256–57. Even so, the D.C. Circuit noted that it was not calling for "line-by-line" parsing or segregating of material "dispersed throughout the

document," only segregation of material found in "logically divisible sections" in lengthy work product. *Id*. at 257.

These instructions do not apply to the FISA Memo and Cover Memo, which in contrast to the over five-hundred-page Blue Book at issue in *NACDL*, *id*. at 256, total only thirty-two and two pages respectively. Kim Decl. ¶¶ 4–5; *see also ACLU*, 2017 WL 1658780 at *8 (distinguishing the DOJ memoranda at issue from *NACDL* because the memoranda ranged from one to thirty-eight pages and were not easily divided into discrete sections). But even if segregation were required here, the attached Kim Declaration indicates that the Justice Department adequately reviewed the FISA Memo and Cover Memo for non-exempt material. *See* Kim Decl. ¶ 13.

A court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (internal citation omitted); *accord Pac. Fisheries*, 539 F.3d at 1148 ("The agency can meet its burden [of showing documents cannot be further segregated] by offering an affidavit with reasonably detailed descriptions of the withheld portions of the documents and alleging facts sufficient to establish an exemption."). "[A]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007), and an agency has no obligation to segregate non-exempt material that is so "inextricably intertwined" with exempt material that "the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981), *abrogated on other grounds by Church of Scientology of Cal. v. IRS*, 792 F.2d 153 (D.C. Cir. 1986); *see also Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220–21 (D.D.C. 2005) (same).

Here, the Justice Department far exceeded its obligations by conducting a line-by-line review of the FISA Memo and Cover Memo. It did not identify any reasonably segregable information that was not attorney work product. Kim Decl. ¶ 13. The Justice Department, therefore, properly withheld the Memos in full under Exemption 5, and summary judgment

should be granted for the Justice Department. *See Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776–77 (D.C. Cir. 2002) (explaining that agency showed there was no reasonably segregable non-exempt information where it submitted affidavit showing that agency had conducted line-by-line review of each document).

II. THE JUSTICE DEPARTMENT ALSO PROPERLY WITHHELD THE ATTORNEY-AUTHORED MEMORANDA AS ATTORNEY-CLIENT COMMUNICATION UNDER FOIA EXEMPTION 5.

"The purpose of the attorney-client privilege is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Christensen*, 828 F.3d at 802 (citation omitted). "The attorney-client privilege protects confidential disclosures made by a client to an attorney . . . to obtain legal advice . . . as well as an attorney's advice in response to such disclosures." *Id*. "The attorney-client privilege applies to communications between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation." *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). And the privilege applies to communications between Government attorneys and their clients within the Government. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169–70 (2011) ("The objectives of the attorney-client privilege apply to governmental clients. . . . Unless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys."); *see also In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) ("In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance.").

The FISA Memo and Cover Memo consist of legal advice, reflecting the authoring attorneys' advice to other DOJ attorneys about how they should determine if information is derived from surveillance, comply with Title III's and FISA's notice provisions, and otherwise confront related issues in the course of litigation. Kim Decl. ¶¶ 4–7, 12. This legal advice was created in response to confidential, internal discussions and information from DOJ officials

seeking advice on this topic, and this advice has itself been kept confidential—circulated only within the Executive Branch and accessed only by lawyers working on issues addressed by the Memos. *Id*. ¶¶ 6–7, 12. Its disclosure would represent an intrusion into the attorney-client relationship between the attorneys who wrote the Memos and other DOJ officials (generally, of course, themselves attorneys), impeding the Government's efforts to obtain and utilize full and frank legal advice to, in additional to providing litigation strategy, ensure its observance of the law. *See In re Cty. of Erie*, 473 F.3d at 419 (noting that the need to protect attorney-client communications applies with "special force in the government context" because Government employees must be encouraged "to seek out and receive fully informed legal advice."). Thus, the Memos are protected by the attorney-client privilege. As noted above, the Memos contain no reasonably segregable material, Kim Decl. ¶ 13, and they accordingly were properly withheld in full under Exemption 5.

CONCLUSION

For the foregoing reasons, and as further discussed in the attached Kim Declaration, the Court should grant summary judgment to the Justice Department on all claims.

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Respectfully submitted,

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