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23 FOR THE NORTHERN DISTRICT OF CALIFORNIA
24 SAN FRANCISCO-OAKLAND DIVISION

25 AMERICAN CIVIL LIBERTIES UNION OF) Case No. 4:17-cv-03571 JSW
26 NORTHERN CALIFORNIA; AMERICAN)
27 CIVIL LIBERTIES UNION; AMERICAN CIVIL) PLAINTIFFS' REPLY
28 LIBERTIES UNION FOUNDATION,)
Plaintiffs,) Hearing Date: November 17, 2017
v.) Time: 9:00 a.m.
DEPARTMENT OF JUSTICE,) Judge: Hon. Jeffrey S. White
Defendant.) Courtroom: 5, 2nd Floor

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ACLU v. DOJ,
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Coastal States Gas Corp. v. Dep’t of Energy,
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Ctr. for Biological Diversity v. OMB,
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Cuban v. SEC,
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Dep’t of Air Force v. Rose,
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1 *Feshbach v. SEC*,
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2 *In re Fischel*,
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4 *Fox v. Shinseki*,
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24 *N.Y. Times Co. v. DOJ*,
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26 *NLRB v. Sears, Roebuck & Co.*,
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27 *North Pacifica LLC v. City of Pacifica*,
28 274 F. Supp. 2d 1118 (N.D. Cal. 2003)15

1 *NRDC v. Dep’t of Defense*,
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6 *Schlefer v. United States*,
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7 *Senate of Puerto Rico v. U.S. Dep’t of Justice*,
8 823 F.2d 574 (D.C. Cir. 1987)6

9 *Tax Analysts v. IRS*,
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11 *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*,
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12 *United States v. Bauer*,
13 132 F.3d 504 (9th Cir. 1997)15

14 *United States v. Chen*,
15 99 F.3d 1495 (9th Cir. 1996)15

16 *United States v. Nobles*,
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17 *United States v. Richey*,
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22 5 U.S.C. § 552 *passim*

23 18 U.S.C. § 2518(9)7

24 50 U.S.C. § 1806 *passim*

25 **Other Authorities**

26 Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*,
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27 *Additional Prehearing Questions for JOhn Carlin Upon His Nomination to be Assistant*
28 *Attorney General for National Security Department of Justice*, 1, 9-10, 113th Cong.
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1 Charlie Savage, *Debate Brews Over Disclosing Warrantless Spying*, N.Y. TIMES (Sept.
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2 Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct.
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4 Charlie Savage, *Power Wars, Inside Obama’s Post-9/11 Presidency 586-93 (2015)*14

5 Department of Justice Office of Legal Counsel, *Applicability of FISA’s Notification*
 6 *Provision to Security Clearance Adjudications* (June 3, 2011)4, 9

7 Department of Justice Office of Legal Policy, “Mission”14

8 Department of Justice, *Revised FISA Use Policy as Approved by the Attorney General*
 9 (Jan. 10, 2008),4

10 H.R. Rep. No. 93-876 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 627120

11 *Hearing to Consider the Nominations of John P. Carlin & Francis X. Taylor*, 113th
 12 Cong. 25 (2014) (Statement of John P. Carlin)2, 18

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I. INTRODUCTION

The documents in this case contain the government’s position on when it must provide notice to individuals it has secretly surveilled. Disclosure of these documents would serve FOIA’s core purpose—to prevent the government from making secret agency law. DOJ’s use of an earlier, unlawful notice policy significantly thwarted adversarial challenges to Section 702 of FISA for years. Although DOJ was forced to modify that policy, its new policy is secret, too. Here, DOJ impermissibly seeks to shroud its policy documents under the cloak of inapplicable legal privileges. While high-ranking DOJ officials may be attorneys, they are also policymakers. When attorneys perform a “policymaking” role, they “cease[] to function as lawyers” and legal privileges no longer apply. *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1994). The specific-claim test and dual-purpose doctrine distinguish between documents authored in a legal as distinct from policymaking capacity. The subject matter of these documents confirm that their authors were performing a policymaking function: deciding important policy questions—under a legal regime with room for interpretation—about how the federal government should comport itself when it uses its power as sovereign to conduct secretive surveillance. Neither the work-product nor the attorney-client privilege shields the government’s policy on how to implement its statutory duty to provide notice.

II. ARGUMENT

A. The Memoranda Are Not Attorney Work-Product.

DOJ’s arguments hinge on an incorrect and overbroad understanding of the work-product privilege: that simply because these high-level policy memoranda regulate the government’s conduct in legal proceedings, they were prepared “in anticipation of litigation.” But that position is inconsistent with the purpose of the privilege, which shields only those documents whose disclosure would impair the integrity of the adversarial process. Courts have used the “specific-claim” test and the “dual-purpose” test to define the outer limits of the privilege. Under both tests, DOJ may not withhold the Notice Memo and the Cover Memo.

1. Withholding these documents would not serve the purpose of the work-product privilege.

DOJ’s invocation of the work-product privilege must be rejected in light of both the

1 purpose of the privilege and the actual purpose for which these documents were developed. To
2 be sure, the documents regulate DOJ's conduct in legal proceedings. But that alone is not
3 enough. Because disclosure would not impair the integrity of the adversarial system, these
4 memoranda were not prepared "in anticipation of litigation" in the manner the privilege requires.

5 Because "disclosure, not secrecy, is the dominant objective of the Act," FOIA's
6 exemptions "must be narrowly construed." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
7 The scope of the work-product privilege must therefore be interpreted scrupulously by reference
8 to its purpose, which "is not to protect any interest of the attorney, who is no more entitled to
9 privacy or protection than any other person, but to protect the adversary trial process itself."
10 *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). Documents
11 that would permit adversaries "to probe each other's thoughts and plans concerning [their] case"
12 may be shielded, *id.*; documents that stop short of revealing such information, leaving the
13 adversarial process intact, are unprotected. This analysis helps courts judge whether documents
14 were created "in anticipation of litigation" within the meaning of the privilege.

15 Here, the events that spurred the creation of the Notice Memo and the Cover Memo shed
16 light on their purpose and whether disclosure would unfairly intrude on any attorney's "thoughts
17 and plans." The memoranda were created after it became clear that DOJ was systematically
18 depriving criminal defendants of the notice to which they were statutorily entitled. DOJ sought to
19 diffuse public controversy by replacing its old, unlawful policy with a new policy.¹ Indeed, DOJ
20 was publicly criticized for misleading the Supreme Court about its old notice policy and DOJ
21 officials were questioned before Congress about the agency's failure to give notice of
22 surveillance in cases where the statute plainly required it.² DOJ then publicly represented that it
23 had adopted a new, Department-wide interpretation of the statute, and ultimately memorialized
24 that change in these memoranda.³ Given this context, disclosure is consistent with both the
25 purpose and limits of the work-product privilege for three overarching reasons.

26 ¹ See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16,
27 2013), <https://nyti.ms/2tZDU3H> (attached as Diakun Decl., Ex. 17).

28 ² See, e.g., *id.*

³ *Hearing to Consider the Nominations of John P. Carlin & Francis X. Taylor*, 113th Cong. 25
(2014) (statement of John P. Carlin), [https://www.intelligence.senate.gov/sites/default/files/
hearings/CHRG-113shrg93212.pdf](https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-113shrg93212.pdf) (attached as Diakun Decl., Ex. 21).

1 First, DOJ prepared these memos not in anticipation of any litigation, but rather to clarify
2 as a matter of Department-wide policy “how the Government should comply with FISA’s notice
3 obligation.” Compare Kim Decl. ¶ 12, with *United States v. Nobles*, 422 U.S. 225, 237 (1975)
4 (privilege allows attorney to “assemble information, sift what he considers to be the relevant
5 from the irrelevant facts, prepare his legal theories and plan his strategy” in “preparation of a
6 client’s case.”). Congress imposed on the government a mandatory duty to provide notice in
7 certain circumstances when it uses FISA- and Title III-derived information. Precisely because
8 the surveillance is secret, the government must comply with that obligation, even if no individual
9 demands notice. These memoranda were prepared to address the public and congressional
10 backlash when it came to light that the government had been violating that statutory duty.

11 Second, there is a critical difference between documents that set policy for legal
12 proceedings and documents that would reveal actual case preparation. *American Immigration*
13 *Council v. DHS*, 905 F. Supp. 2d 206 (D.D.C. 2012), rejected the government’s work-product
14 argument as to a memorandum interpreting an agency’s legal obligation, under binding
15 regulations, to permit access to counsel in immigration proceedings, even though it pertained to
16 legal proceedings and, in some formalistic sense, was prepared in anticipation of litigation. After
17 reviewing the memorandum *in camera*, the court found that it sought to provide “the best
18 interpretation of the regulation at issue, with no hint that the decision was influenced by
19 litigation, let alone that the memo was written ‘because of’ litigation.” *Id.* at 222. Therefore, even
20 though the memorandum was providing legal advice “to the agency in contemplation of
21 contested administrative hearings,” Def’s Reply 22, *Am. Imm. Council*, 1:11-cv-01971-JEB
22 (D.D.C. Sept. 6, 2012), ECF. No. 20 (attached as Cagle Decl., Ex. 6), the court concluded that
23 the memorandum was not “written ‘because of’ litigation” in the manner required by the work-
24 product privilege. *Id.* at 222.

25 This reasoning applies here. The Notice Memo “set[s] forth the basic law and legal
26 frameworks at issue,” with “a focus on the present state of the law on when evidence is ‘derived
27 from’ electronic surveillance under Title III and FISA.” Kim Decl. ¶¶ 5, 7. It also discusses “how
28 the Government should comply with FISA’s notice provision.” *Id.* ¶ 12. The Cover Memo

1 “comments more broadly on DOJ efforts to ensure legal compliance in the matters discussed.”
2 *Id.* ¶ 4. According to DOJ, these memoranda appear to put forward the agency’s “best
3 interpretation of the [statute] at issue,” *Am. Imm.*, 905 F. Supp. 2d at 222. Indeed, DOJ openly
4 acknowledged in a previous case that drafts of the Notice Memo contained “policy advice
5 regarding the government’s best practices for implementation of its obligations.” *See* Diakun
6 Decl., Ex. 27. Like the policy memorandum in *American Immigration*, these memoranda were
7 not created “because of” impending litigation. Because disclosure would not reveal any
8 attorney’s “thoughts or plans” in preparing a case, it would not impair the adversarial process.

9 DOJ’s general references to the memoranda’s “strategic considerations” are not sufficient
10 to establish they were prepared “in anticipation of litigation” and are, in fact, consistent with
11 their policy-setting function. *See* Kim Decl. ¶¶ 5, 7, 12. Because the core question addressed by
12 the documents is “how the Government *should* comply with FISA’s notice provision.” *Id.* ¶ 12
13 (emphasis added), these may be strategic *policy*, rather than litigation, considerations. Indeed,
14 DOJ openly acknowledged in a previous case that drafts of the Notice Memo contained “policy
15 advice regarding the government’s best practices for implementation of its obligations.” *See*
16 Diakun Decl., Ex. 27. Moreover, courts have rejected work-product claims for documents, like
17 those here, that function as “guidance,” even though DOJ asserted they “discusse[d] potential
18 legal strategies ... that might be considered by federal prosecutors.” *See ACLU v. DOJ*, 70 F.
19 Supp. 3d 1018, 1035 (N.D. Cal. 2014) (ordering disclosure of DOJ’s location-tracking
20 surveillance guidance documents); *see also Hatamian v. Advanced Micro Devices, Inc.*, No. 14-
21 CV-00226-YGR(JSC), 2016 WL 2606830, *6-7 (“documents that merely set forth a general
22 strategy . . . that might relate to or be relevant to future litigation are not prepared in anticipation
23 of a particular trial” and therefore cannot be withheld as work-product).⁴

24 Third, because of the secrecy that surrounds electronic surveillance, DOJ’s effort to

25 ⁴ Judging by DOJ’s past disclosures, it appears to agree that not every document addressing or
26 analyzing FISA’s notice requirement would reveal sensitive work-product. The Office of Legal
27 Counsel has disclosed a detailed, eight-page legal analysis of whether the notice requirement
28 applies in certain administrative “proceedings.” DOJ Office of the Legal Counsel, *Applicability*
of FISA’s Notification Provision to Security Clearance Adjudications (June 3, 2011),
<https://fas.org/irp/agency/doj/olc/fisa-clear.pdf> (attached as Diakun Decl., Ex. 13); *see also* DOJ,
Office of Legal Counsel, *Revised FISA Use Policy as Approved by the Attorney General* (Jan.
10, 2008), <https://perma.cc/3WV2-9WZQ> (attached as Diakun Decl., Ex. 9).

1 withhold its notice policy actually *undermines* the adversarial process. *Coastal States*, 617 F.2d
2 at 864 (purpose of privilege “is not to protect any interest of the attorney . . . but to protect the
3 adversary trial process itself”). It short-circuits almost all adversarial litigation over whether DOJ
4 is interpreting its statutory obligations correctly, because both the individuals affected and the
5 public remain completely in the dark. Recent history makes clear exactly how, in this area,
6 DOJ’s refusal to disclose even its basic policies serves to thwart adversarial litigation. It enabled
7 DOJ to unlawfully withhold notice of Section 702 surveillance from every single defendant who
8 was entitled to it for five years.⁵ No defendant could challenge the policy because no defendant
9 knew that DOJ had secretly narrowed its notice obligation to the point of vanishing. Although
10 DOJ has publicly stated that it has since modified its policy, no one knows whether it is now
11 interpreting its statutory obligations correctly. DOJ claims that its policy will emerge in court in
12 the fullness of time, but that is a false promise. *See Gov’t Reply* 12 n.10. Individuals who receive
13 notice have no reason to inquire into DOJ’s policy; and individuals deprived of notice are, by
14 definition, unaware that they were subject to secret surveillance at all. Conversely, if defendants
15 are aware of the underlying rationale for providing or not providing notice, they can test its legal
16 basis in court. In this case, disclosure would thus enhance, rather than impair, “the integrity of
17 our system.” *Coastal States*, 617 F.2d at 864. Application of the privilege to these guidance
18 documents is especially inappropriate here because non-disclosure has long been used to stymie
19 adversarial litigation altogether. For this overarching reason, the privilege does not apply.

20 **2. The specific-claim test confirms that these memoranda are not
21 protected by the work-product privilege.**

22 DOJ makes no claim that the memoranda here address any specific case. Thus, if the
23 specific-claim test applies, the memoranda must be disclosed.

24 DOJ points to some cases rejecting the specific-claim test, but other courts have found it
25 a vital tool for determining where government claims of privilege end. *See Pl. Br.* 15-16 (citing
26 cases supporting specific-claim test). Although the Ninth Circuit has not ruled on the issue,
27 another court of this district has embraced this test. In *ACLU v. DOJ*, the court applied the

28 ⁵ *See Adam Liptak, A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/us/double-secret-surveillance.html>. (attached as Diakun Decl., Ex. 14).

1 specific-claim test and ordered disclosure in an analogous context: DOJ policies on the type of
2 legal authorization prosecutors must obtain to engage in location-tracking surveillance. 70
3 F.Supp. 3d 1018, 1031 (N.D. Cal. 2014). As that court explained, in reasoning fully applicable
4 here, when DOJ issues “general standards to guide the Government’s lawyers,” the documents
5 “might be prepared literally in anticipation of litigation,” but “they do not anticipate litigation in
6 the manner the privilege requires if they do not ensu[e] from any particular transaction.” *Id.*
7 (internal quotation marks, citations omitted).

8 This Court should likewise apply the test here. The specific-claim test ensures that the
9 work-product privilege is not improperly extended beyond its purpose, given the public’s
10 pressing interest in the law and policy applied by the Executive Branch. The test protects the
11 government’s litigation needs by protecting from disclosure documents reflecting actual case
12 preparation: analysis of issues arising in specific cases, disclosure of which would unfairly
13 advantage an adversary. But it does not shield documents reflecting the exercise of a sovereign
14 function: those that set policy for how the government handles certain legal issues, disclosure of
15 which serves the salutary purpose of ensuring agencies do not create secret law. Distinguishing
16 between specific analyses and general guidance is especially necessary where government
17 agencies exercise sovereign functions—like investigations and prosecutions—that routinely lead
18 to court proceedings. In that context, everything could be said to be literally in anticipation of
19 litigation. Indeed, the entire Department of Justice exists because of the prospect of the United
20 States’ involvement in litigation. But such an approach clearly reaches too far. *See Senate of*
21 *Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 586–87 (D.C. Cir. 1987) (“While it may be
22 true that the prospect of future litigation touches virtually any object of a DOJ attorney’s
23 attention, if the agency were allowed ‘to withhold any document prepared by any person in the
24 Government with a law degree simply because litigation might someday occur, the policies of
25 the FOIA would be largely defeated.’”) (citation omitted).

26 Even if DOJ were correct that the specific-claim test applies only to investigative
27 materials, Gov’t Reply 5–6, the test would apply here. These documents relate directly to
28 investigations: they explain how the government determines when it must disclose its reliance on

1 investigative information obtained via FISA or Title III surveillance. In any event, courts have
2 used the specific-claim test well outside the investigative context in determining whether the
3 privilege applies to: a memorandum interpreting regulations concerning the right to counsel, *see*
4 *Am. Imm. Council*, 905 F. Supp. 2d at 222; slides used in training USCIS employees, *see id.*;
5 U.S. Attorney policies and guidelines for handling certain offenses, *see Jordan v. DOJ*, 591 F.2d
6 753, 757 (D.C. Cir. 1978); and “agency policies and instructions regarding the exercise of
7 prosecutorial discretion in civil immigration enforcement,” *see Judicial Watch, Inc. v. DHS*, 926
8 F. Supp. 2d 121, 143 (D.D.C. 2013). DOJ’s general policy position on its statutory duties in legal
9 proceedings fall into the same category: They govern important sovereign functions affecting the
10 rights of individuals who face imprisonment or other impairments of their liberty.

11 **3. The documents would have been created in substantially similar form**
12 **regardless of any litigation purpose.**

13 Even if this Court declined to apply the specific-claim test, DOJ still could not meet its
14 burden. The test for dual-purpose documents is whether they “would not have been created in
15 substantially similar form but for the prospect of that litigation.” *In re Grand Jury Subpoena*, 357
16 F.3d 900, 908 (9th Cir. 2004) (quotation marks omitted).

17 Even if the memoranda serve a litigation function, DOJ acknowledges they have another
18 purpose: “Both memoranda were written . . . at the request of senior DOJ officials seeking *both*
19 legal guidance for themselves . . . , and a way to assist DOJ attorneys . . . preparing for or during
20 litigation.” Kim Decl. ¶ 6 (emphasis added). Distinct from any litigation purpose, DOJ’s “senior
21 DOJ officials” had the separate purpose of seeking “legal guidance for themselves.” *Id.* This
22 makes plain what is obvious from context: The documents contain a high-level policy guide
23 setting forth the agency’s position on its statutory obligations. *See also* Diakun Decl., Ex. 27.

24 Plaintiffs previously identified several reasons why DOJ would have produced these
25 documents in substantially similar form, regardless of the prospect of litigation. *See* Pl. Br. 20–
26 21. First, DOJ has an obligation, as part of two larger statutory schemes governing intrusive
27 forms of surveillance, to provide notice under certain circumstances to individuals it has
28 surveilled. *See* 50 U.S.C. § 1806(c); 18 U.S.C. § 2518(9). Unless it were to act in a completely
ad hoc manner, the federal government must develop policies regarding the manner in which it

1 executes its official duties—here, surveillance and notice—lawfully and consistently, regardless
2 of whether any criminal defendant would ever seek to challenge notice. DOJ had a need to
3 develop authoritative guidance to implement its notice obligations uniformly across the country,
4 especially after it had failed to provide the notice required by law for years. The memoranda
5 serve the distinct purpose of bringing uniformity to DOJ’s implementation of its statutory
6 obligations. Second, “[t]he circumstances surrounding the[se] document[s]’ preparation”
7 demonstrate that they were prepared in response to a public relations crisis, not in anticipation of
8 litigation. *In re Grand Jury Subpoena*, 357 F.3d at 908. There were “independent purpose[s] for
9 creating [these] document[s],” ones that are “truly separable” from any use in adversarial
10 litigation. *Id.* DOJ has addressed neither of these independent purposes.

11 DOJ elides the broader purposes these documents serve, claiming instead that Plaintiffs
12 would narrow work-product protection to only those issues that are actually contested by
13 defendants in their cases. *See* Gov’t Reply 3. This is not Plaintiffs’ argument. Rather, Plaintiffs
14 point out that notice is rarely litigated because of the inherent secrecy of the surveillance, while
15 emphasizing that DOJ has an independent statutory duty to provide notice. This means that DOJ
16 must develop and apply a consistent policy for providing notice, regardless of whether it initiates
17 a criminal prosecution using FISA or Title III surveillance against any particular person, or any
18 such defendant challenges notice. *See* Pl. Br. 20. In other words, even if there were no litigation
19 over notice, actual or anticipated, DOJ would still need to have a policy for determining when
20 the statute requires notice and when it does not. That is strong evidence the documents serve an
21 overarching policy purpose independent of any litigation purpose DOJ might claim.

22 This analysis is consistent with the Ninth Circuit’s dual-purpose precedent. In *United*
23 *States v. Richey*, 632 F.3d 559 (9th Cir. 2001), the Ninth Circuit found an appraisal report
24 attached to a taxpayer’s return to have had a dual purpose, and concluded that it was not prepared
25 in anticipation of litigation because the report was prepared “as required by law” (to justify the
26 value of a tax deduction claimed): “Had the IRS never sought to examine the Taxpayers’ 2003
27 and 2004 federal income tax returns, the Taxpayers would still have been required to attach the
28 appraisal to their 2002 federal income tax return.” *Id.* at 568. Similarly, DOJ must provide notice

1 “as required by law,” and would therefore need a policy implementing this requirement, whether
2 or not it initiates any particular criminal prosecution using FISA- or Title III-derived
3 information, or anyone ever challenges notice.

4 Moreover, the notice obligation may well apply in non-litigation, non-adversarial
5 contexts. As a result, the government would have had the need for consistent guidelines on
6 notice for these non-litigation, non-adversarial purposes. The FISA statute requires notice to be
7 provided “[w]henver the Government intends” to use “any information obtained or obtained”
8 from FISA surveillance in “any trial, hearing, or other proceeding in or before any court,
9 department, officer, agency, regulatory body, or other authority of the United States.” 50 U.S.C.
10 § 1806(c) (emphasis added). The language of the statute is broad and appears to extend the
11 notice obligation outside the context of strictly adversarial proceedings in the courts or
12 administrative bodies. Indeed, the federal government may be using FISA-derived information to
13 place individuals on the no-fly list, deny visas, or reject license applications that require a
14 security screening.⁶ The process for obtaining a security clearance is typically not adversarial or
15 subject even to administrative, let alone judicial, review. *See, e.g., Dep’t of the Navy v. Egan*,
16 484 U.S. 518 (1988) (Merit System Protection Board lacked authority to review Navy’s denial of
17 security clearance). Perhaps use in a security clearance determination would trigger the statutory
18 notice obligation, or perhaps not. The court need not decide the precise scope of the notice
19 obligation in this case; but DOJ, as the party claiming the privilege, bears the burden of showing
20 that the documents would not have been created in substantially similar form but for the prospect
21 of litigation. *See, e.g., In re Premera Blue Cross Customer Data Security Breach Litig.*, No. CV
22 11-04820 EDL, 2017 WL 4857596, at * 8 (D. Or. Oct. 27, 2017). Given the plain language of
23 the statute, DOJ has failed to demonstrate that the notice obligation extends solely to adversarial
24 settings, and thus it has failed to establish that the memoranda serve exclusively a litigation
25 function.⁷

26 ⁶ Charlie Savage, *Debate Brews Over Disclosing Warrantless Spying*, N.Y. TIMES (Sept. 30,
27 2014) <https://www.nytimes.com/2014/10/01/us/debate-simmers-over-disclosing-warrantless-spying.html> (attached as Diakun Decl., Ex. 11).

28 ⁷ DOJ Office of Legal Counsel, *Applicability of FISA’s Notification Provision to Security Clearance Adjudications* (June 3, 2011), 6 n.9, <https://fas.org/irp/agency/doj/olc/fisa-clear.pdf>,

1 **B. DOJ Has Not Met Its Burden Of Establishing The Attorney-Client Privilege.**

2 For four independent reasons, DOJ has failed to meet its burden of “prov[ing] the
3 applicability of [the attorney-client] privilege.” *Mead Data Central, Inc. v. U.S. Dept. of Air*
4 *Force*, 566 F.2d 242, 254 (D.C. Cir. 1977). DOJ’s declaration impermissibly “rel[ies] upon
5 conclusory and generalized allegations of exemptions” and fails to set forth “facts sufficient to
6 establish [the claimed] exemption.” *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (internal
7 quotation marks, citations omitted).

8 **1. Defendant has still failed to identify the client agency.**

9 DOJ has still failed to identify the client agency. Although its reply *brief* now states: “the
10 client is of course the Justice Department itself,” Gov’t Reply 17 (citing Kim Decl. ¶ 12), the
11 cited paragraph of the *declaration* states no such thing. *See Ctr. for Biological Diversity v. OMB*,
12 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009) (agency failed to establish attorney-client privilege
13 where facts necessary to establish privilege found only in brief but not declaration). Instead, the
14 declaration states that the “memoranda were sought by *the Government’s decision-makers* and
15 their representatives.” Kim Decl. ¶ 12 (emphasis added). The declaration uses the term “DOJ” or
16 “Department” to refer to the Justice Department (*id.* at ¶ 1), affirmatively implying that “the
17 Government” is an entity distinct from defendant DOJ. The federal government is a large entity
18 with many conceivable decision-makers at many different agencies who may have had an
19 interest in advice related to FISA and Title III surveillance, including decision-makers at the
20 National Security Agency, the Central Intelligence Agency, and the Treasury Department, all of
21 which use FISA information. *See, e.g., [Redacted]*, 2011 WL 10945618 (FISA Ct., Oct. 3, 2011);
22 *Savage, Debate Brews* (attached as Diakun Decl., Ex. 11); Nat’l Sec. Div., Nov 5, 2015 FOIA
23 Response to ACLU (attached as Cagle Decl., Ex. 2).

24 _____
25 (attached as Diakun Decl., Ex. 13) (“Whether the term ‘proceeding’ as used in section 106(c)
26 refers only to an adversarial process is a question we need not decide.”). DOJ argues that the
27 memoranda “would not have been created in a form that included litigation strategy if they were
28 not created in anticipation of legal disputes in legal proceedings.” Gov’t Reply 4. Even assuming
the documents contain some material that could in fact be considered protected “litigation
strategy,” as opposed to strategic policy considerations, that still would not be dispositive: the
dual-purpose test does not require that the document would have been created in *identical* form
without the prospect of adversarial litigation, but only that it would have been created in a
“substantially similar form.” *In re Grand Jury Subpoena*, 357 F.3d at 908.

1 With respect to these memoranda, perhaps DOJ was “the client.” But to invoke the
 2 privilege, DOJ’s declaration “needs to say so.” *Ctr. for Biological Diversity*, 625 F. Supp. 2d at
 3 892 (rejecting claim of attorney-client privilege); *see Elec. Priv. Info. Ctr. v. Dep’t of Justice*,
 4 584 F. Supp. 2d 65, 79-80 (D.D.C. 2008) (“The Bradbury declarations do not indicate what
 5 agency or executive branch entity is the client for purposes of the attorney-client privilege.”).⁸

6 **2. The memos were not kept confidential.**

7 Assuming that DOJ was the “client,” its declaration negates a key element on which it
 8 bears the burden—that the memoranda were kept confidential. *See Mead*, 566 F.2d at 253.

9 Where, as here, the client is an agency, dissemination must be limited to “those members
 10 of the organization who are authorized to speak or act for the organization in relation to the
 11 subject matter of the communication.” *ACLU v. FBI*, 146 F. Supp. 3d 1161, 1168 (N.D. Cal.
 12 2015). DOJ identifies three groups to whom the documents were made available: They were
 13 “addressed” to one group, “circulated to” another, and “accessed only by” a third. Kim Decl.
 14 ¶ 12. Under any of these formulations, the memoranda were not kept confidential. *ACLU v. FBI*,
 15 146 F.Supp. 3d at 1168 (privilege inapplicable given document’s “wide distribution”).

16 First, the Cover Memo, and presumably the Notice Memo for which it was the cover, was
 17 “addressed . . . to ‘all federal prosecutors.’” Kim Decl. ¶ 4. But there are thousands of federal
 18 prosecutors whose responsibilities span a wide range of subject matters—ranging from antitrust
 19 to civil rights and beyond—that may never overlap with the content of these documents. Cagle
 20 Decl., Ex.1. DOJ’s dissemination of these documents to “all federal prosecutors” demonstrates
 21 that no “attempt had been made to limit disclosure of the documents to the agency personnel
 22 responsible for” issues related to FISA and Title III surveillance and notice. *Coastal States*, 617
 23 F.2d at 863-64 (rejecting attorney-client privilege where document circulated beyond agency
 24 staff “who need to know”); *see also id.* at 863 (insufficient to limit “circulation . . . to the
 25 confines of the agency”). DOJ knows how to maintain confidentiality by limiting distribution.

26 ⁸ Elsewhere the declaration states that the memoranda “were written . . . at the request of senior
 27 DOJ officials.” Kim Decl. ¶ 6. But DOJ’s declarant also avers that the memoranda were “sought
 28 by the Government’s decision-makers and their representatives.” Kim Decl. ¶ 12. If the senior
 DOJ officials who requested the memos did so in a representative capacity, then it would be “the
 Government’s decision-makers” at unspecified agencies, and not their DOJ representatives, who
 were the “client(s).”

1 *Cf. ACLU v. DOJ*, No. 12 Civ. 7412(WHP), 2014 WL 956303, at *1 (S.D.N.Y. Mar. 11, 2014)
2 (memo distributed only to criminal and appellate chiefs with instructions to distribute within
3 office “only when relevant to an investigation or case”). It failed to do so here.

4 Second, DOJ states that the documents “were circulated only within the Executive
5 Branch” (Kim Decl. ¶ 12), in a concession that they were circulated outside the purported client
6 agency, DOJ. In recognition of the obvious waiver problem, it asserts a common interest
7 privilege. *See also* Gov’t Reply 18 n.14. But to establish that privilege, DOJ would have to point
8 to “evidence” of “a joint strategy in accordance with some form of agreement—whether written
9 or unwritten”; “a shared desire to see the same outcome in a legal matter is insufficient.” *In re*
10 *Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). Its passing suggestion of a
11 “common interest” among Executive agencies does not suffice. *See In re Grand Jury Subpoena*
12 *Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (generalized “assertion that ‘we all want to
13 obey the law’” insufficient); *Hamilton v. Yavapai Cmty. College Dist.*, No. CV-12-08193-PCT-
14 GMS, 2016 WL 8199307, at *3 (D. Ariz. Nov. 2, 2016) (implicit shared interest in legal matter’s
15 outcome insufficient); *Fox v. Shinseki*, No. C 11-04820 EDL, 2013 WL 11319070, at *4, (N.D.
16 Cal. June 11, 2013) (plaintiff failed to describe common legal issues or specific legal interests).

17 Third, DOJ further avers that the documents were “*accessed* only by Government
18 lawyers working on the issues addressed by the memoranda.” Kim Decl. ¶ 12 (emphasis added).
19 But the issue is how widely the memoranda were “*distribut[ed]*,” *ACLU v. FBI*, 146 F. Supp. 3d
20 at 1168. DOJ cannot avoid waiver by suggesting that a widely distributed document was only
21 actually accessed or read by a smaller subset of recipients. In the absence of an established
22 “common interest,” maintaining confidentiality would have required confining distribution to
23 DOJ attorneys “working on the issues addressed by the memoranda.” Kim Decl. ¶ 12. Instead,
24 DOJ waived the privilege by granting access to lawyers elsewhere within the Executive Branch
25 at unspecified “Government” agencies outside the supposed DOJ client.⁹

26
27 ⁹ Although DOJ does not provide the Court with this information, the Treasury Department
28 appears to have received one or more drafts of the Notice Memo. Nat’l Sec. Div., Nov 5, 2015
FOIA Response to ACLU (Nov. 5, 2015) (Treasury Department located 33-page draft DOJ
memorandum related to FISA notice obligations and addressed to “All Federal Prosecutors”)
(attached as Cagle Decl., Ex. 2).

1 **3. Defendants failed to demonstrate that disclosure would reveal**
2 **confidential client information.**

3 Nor has DOJ provided facts to demonstrate that disclosure would reveal confidential
4 client information. The privilege extends to communications from attorney to client only if that
5 communication is “based on and would tend to reveal the client’s confidential communications.”
6 *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977). The government bears the burden of (1)
7 establishing that the client communicated a confidential fact and (2) explaining how disclosure
8 would reveal any such fact. *Maine v. U.S. Dep’t of Interior*, 298 F.3d 60, 71 (1st Cir. 2002). The
9 “confidential information [must] concern[] the Agency [client],” and not some third party.
10 *Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983) (emphasis in original).

11 DOJ has “failed to establish the requisite elements of a client-communicated fact” and
12 failed “to explain how the withheld legal analysis would reveal any such fact if it existed.”
13 *Maine*, 298 F.3d at 71. Its declaration states only that the memoranda are “based in part on
14 confidential information provided by the DOJ attorneys who sought the creation of the
15 memoranda” and were sought “by the Government’s decision-makers and their representatives
16 through confidential, internal discussion.” Kim Decl. ¶ 12. This “offers nothing more than
17 conclusory assertions and blanket affirmations.” *Cuban v. SEC*, 744 F. Supp. 2d 60, 79 (D.D.C.
18 2010); *NRDC v. Dep’t of Defense*, 388 F.Supp.2d 1086, 1104 (C.D. Cal. 2005) (rejecting
19 attorney-client privilege where declaration contained only conclusory legal assertions).

20 Nor has DOJ provided sufficient facts from which the Court could make “a finding that
21 the documents are not based on facts acquired from other persons or sources.” *Brinton v. Dep’t*
22 *of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (district court erred in finding attorney-client
23 privilege where it did not make and record did not support predicate factual findings). A number
24 of Executive Branch agencies, including the NSA and CIA, conduct FISA surveillance or use the
25 fruits of that surveillance in carrying out their activities. *See, e.g., [Redacted]*, 2011 WL
26 10945618 (FISA Ct. Oct. 3, 2011); *Savage, Debate Brews*; (attached as Diakun Decl., Ex. 11);
27 Nat’l Sec. Div., Nov 5, 2015 FOIA Response to ACLU (attached as Cagle Decl., Ex. 2). While
28 DOJ attorneys may have directly “provided” the information, (Kim Decl. ¶ 12), the underlying
 source of any factual information about FISA surveillance and its role in investigations may have

1 derived from these outside agencies, rather than the purported client, DOJ. *Mead*, 566 F.2d at
2 254 n. 27 (privilege not established where “reasonable to infer that at least part of the factual
3 predicate for the opinion” involved third party); *Schlefer*, 702 F.2d at 245 (privilege not
4 established where agency client “transmits the relevant facts” from “outsider[]”).

5 **4. Defendant has not established that the memos involve legal rather
6 than policy advice.**

7 As Plaintiffs previously observed, the factual context, including DOJ’s representation to a
8 court that a prior version of these documents contained “policy advice,” demonstrates that the
9 authors of these documents were acting in a policy rather than legal capacity. But even setting
10 aside that prior representation, DOJ has failed to meet its burden on this issue. Although DOJ’s
11 declaration offers the conclusory legal assertion that the memoranda “contain legal advice,” it
12 also acknowledges that they set forth “the authoring attorneys’ views on ... how the Government
13 should comply with FISA’s notice provision, along with related strategic considerations.” Kim
14 Decl. ¶ 12. Here, FISA on its face broadly requires the government to provide notice of affected
15 individuals “[w]henver [it] intends to enter into evidence or otherwise use or disclose [FISA-
16 derived information] ... in any ... proceeding.” 50 U.S.C. § 1806(c) (emphasis added). There is
17 no controlling Supreme Court opinion interpreting the scope of this notice obligation. Indeed, for
18 many years, DOJ applied “a narrow understanding of what ‘derived from’ means” to avoid
19 giving notice.¹⁰ Guidance on “how the Government should comply with [this] notice provision,
20 along with related strategic considerations” (Kim Decl. ¶ 12) raise, in significant part, the *policy*
21 question of whether the government should construe its notice obligations broadly or narrowly.
22 *See* Charlie Savage, *Power Wars* 586–93 (2015) (describing policy debate among DOJ, FBI,
23 NSA, and other officials over when to provide notice) (attached as Cagle Decl., Ex. 3). In
24 addition, DOJ acknowledges that the authors were “senior DOJ attorneys.” Kim Decl. ¶ 6. There
25 are senior DOJ attorneys whose role is to “serve as the primary policy advisor to the Attorney
26 General.”¹¹ Particularly given the subject matter of these memoranda, and the seniority of their
27 authors, DOJ’s conclusory assertion that they contained legal advice is insufficient to meet its

28 ¹⁰ *See* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct 16,
2013) (attached as Diakun Decl., Ex. 17).

¹¹ *See* Office of Legal Policy, “Mission,” <https://www.justice.gov/olp> (attached as Cagle Decl.,
Ex. 4).

1 burden of demonstrating that the authors were acting in a legal rather than policy capacity. “The
 2 attorney-client privilege should be narrowly construed especially where important constitutional
 3 interests and a public entity which is accountable to the citizenry are involved. Thus, the burden
 4 to prove that primary purpose was legal ... advice is on the [government agency].” *See North*
 5 *Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1128 (N.D. Cal. 2003)).¹²

6 **C. The Memoranda Contain DOJ’s Effective Law and Policy.**

7 **1. The memoranda are quintessential “working law.”**

8 DOJ’s characterization of the working law doctrine is unduly narrow and incorrect for
 9 three related reasons. First, DOJ ignores that these memoranda have the central attributes of
 10 “authoritative” working law; second, DOJ mischaracterizes “working law” as something only
 11 courts can create, which, if correct, would eliminate the doctrine altogether; and finally, DOJ
 12 overlooks the fact that working law can be authoritative even if it serves as a “starting point” for
 13 government attorneys applying that law in individual cases.

14 First, the Notice and Cover Memos are DOJ’s authoritative working law because they are
 15 final memoranda that possess the vital attributes of agency “law and policy.” DOJ produced
 16 them following a recognition by top government officials that DOJ’s narrow and undisclosed
 17 interpretation of its statutory notice obligations “could not be justified legally.”¹³ A senior DOJ
 18 official promised Congress and the public that DOJ would explain its policy shift to federal
 19 prosecutors across the country. Pl. Br. 11. Senior officials within DOJ then authored these
 20 memoranda and distributed them to subordinates—“all federal prosecutors”—for the purpose of
 21 ensuring nationwide compliance with notice obligations. Kim Decl. ¶ 4; *see Coastal States*, 617
 22 F.2d at 859, 867–70 (memoranda authored by regional counsel responsible for interpreting
 23 pertinent regulations); *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978) (guidelines were
 24 “directed at [author’s] subordinates”); *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997)

25 ¹² Defendants urge a broad view of “legal advice,” but *United States v. Bauer*, 132 F.3d 504 (9th
 26 Cir. 1997), and *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996), involve the distinguishable
 27 context of private attorneys advising private litigants. No “public entity...accountable to the
 28 citizenry [was] involved.” *North Pacifica*, 274 F. Supp.2d at 1128. In *Families for Freedom v.*
CBP, 837 F. Supp. 2d 287 (S.D.N.Y 2011), the issue of whether the documents involved legal
 advice was not contested or decided.

¹³ *See Charlie Savage, Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16,
 2013), <https://nyti.ms/2tZDU3H> (attached as Diakun Decl., Ex. 17).

1 (memos circulated from Chief Counsel to field offices had purpose of creating “coherent,
2 consistent interpretations of . . . laws nationwide”). Notably, DOJ’s declaration does not claim
3 that federal prosecutors are free to disregard the interpretation of DOJ’s statutory duties that is
4 set forth in the memoranda. These memoranda function as DOJ’s internal law and policy on
5 matters of notice under FISA and Title III; if, somehow, they do not, then the earlier assurances
6 of senior DOJ officials that the agency would promulgate new guidance ring hollow.

7 Second, DOJ claims that these memoranda cannot be authoritative for purposes of
8 working law because the issues they concern “will ultimately be decided by the Court.” Gov’t
9 Reply 12-13 (internal quotation marks, citations omitted). But that is wrong both legally and
10 factually. While courts surely have the final word on legal disputes brought before them, *see*
11 *Marbury v. Madison*, 1 Cranch 137, 178 (1803), FOIA was enacted precisely because agencies
12 regularly make and apply their own “effective law and policy,” much of which remains hidden
13 from both the public and the courts. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).
14 That is why FOIA affirmatively requires disclosure of agencies’ working law and adopted
15 policies. *See* 5 U.S.C. § 552(a); *Assembly of State of Cal. v. Dep’t of Commerce*, 968 F.2d 916,
16 920 (9th Cir. 1992) (“working law” doctrine “insures that the agency does not operate on the
17 basis of ‘secret law’”). Accordingly, courts evaluate whether a document functions as an
18 agency’s internal law or policy irrespective of whether a court might at some point examine
19 those agency interpretations. *See Coastal States*, 617 F.2d at 860 (legal memoranda were
20 working law because auditors relying on them were effectively bound by their interpretation of
21 the law). Moreover, as a factual matter, courts are highly unlikely to rule on the scope of DOJ’s
22 notice obligations, precisely because the secrecy of this surveillance leaves individuals unable to
23 raise informed challenges in the first place. *See* Section II-A-1, *supra*.¹⁴

24 ¹⁴ Cases cited by DOJ are distinguishable because they addressed issues far more likely to be the
25 subject of court adjudication—either in the context of surveillance applications or suppression
26 motions. *See ACLU v. DOJ*, 70 F. Supp. 3d 1018, 1028 (N.D. Cal. 2014) (DOJ policies on type
27 of court authorization required to obtain location tracking orders); *ACLU v. DOJ*, No. 12 Civ.
28 7412(WHP), 2014 WL 956303, at *7 (S.D.N.Y. 2014) (memos describing arguments prosecutors
should make in light of recent Supreme Court decision when defendants challenged evidence
obtained with GPS tracking). The same cannot be said here—where the legal interpretations in
the memoranda bear directly on whether defendants will be told about surveillance. No court

1 Third, the government erroneously argues that these memoranda are not working law
 2 because they do not “provide comprehensive guidance,” are simply a “starting point” for
 3 government attorneys, and have “no legal effect.” Gov’t Reply 13; Kim Decl. ¶ 7. But a
 4 document need not determine every question in every case to be authoritative or controlling. *See*
 5 Pl. Br. 11. The working law analysis is not concerned with whether a document provides
 6 comprehensive guidance, but whether it contains an “established policy on which the agency
 7 relies in discharging its [legal] responsibilities” on the issues it does address. *Coastal States*, 617
 8 F.2d at 870. Government prosecutors rely on these memoranda in determining whether notice is
 9 required in individual cases. Kim. Decl. ¶¶ 5-7. The fact that these memoranda serve as the
 10 common starting point for a broad swath of cases (*id.* ¶¶ 6-7) only underscores their authoritative
 11 nature. Finally, DOJ is wrong to claim that the memoranda have “no legal effect.” They have
 12 already had obvious legal effect: the policies they contain have required DOJ to provide notice of
 13 surveillance in cases where it was systematically depriving individuals of notice before. *See, e.g.,*
 14 Govt. Filing in *Hasbajrami v. United States* (attached as Diakun Decl., Ex. 19).

15 **2. DOJ has adopted the policy contained in these memoranda.**

16 DOJ’s public statements—together with the Cover Memo, which describes the Notice
 17 Memo and instructs prosecutors around the country how to use it—establish that these
 18 memoranda have been adopted by DOJ. Pl. Br. 12–14. To avoid this conclusion, DOJ seeks to
 19 limit the “adoption” doctrine to one narrow scenario: where officials have made the most specific
 20 public pronouncements embracing a document. Gov’t Reply 14-15. But neither FOIA nor the
 21 Supreme Court regard adoption so dimly. FOIA itself contemplates scenarios where an agency
 22 has internally “adopted” a policy or legal interpretation—and it affirmatively requires public
 23 disclosure. 5 U.S.C. § 552(a)(1)(D) & (2)(B) (requiring disclosure of “statements of policy and
 24 interpretations which have been adopted by the agency”). The Supreme Court has done the same.
 25 *Sears*, 421 U.S. at 161.¹⁵ The disclosure of internally adopted policies is a crucial element of
 26 _____
 27 reviews or approves DOJ’s decision to withhold notice, and the affected individuals have no
 28 knowledge of that decision either, leaving them ill-equipped to challenge DOJ’s legal
 interpretation in court.

¹⁵ It would be a mistake—and a misreading of *Sears*—to regard adoption as turning solely on
 public statements, as the government claims. Gov’t Reply 14-15. *Sears* did not involve any

1 FOIA's drive to eliminate secret agency law, because almost by definition the public is unaware
 2 of the law agencies apply in secret. When officials go out and *publicly* point to a policy to defend
 3 their actions that is simply good evidence of what has occurred behind closed doors. *See*
 4 *Brennan Ctr. v. DOJ*, 697 F.3d 184, 204-05 (2d Cir. 2012). It is especially valuable evidence in
 5 FOIA cases, where the government holds all the information, *cf. Wiener v. FBI*, 943 F.2d 972,
 6 977 (9th Cir. 1991), and plaintiffs are often denied any opportunity for discovery.

7 Here, there is evidence of both internal and public adoption. Not only does the Cover
 8 Memo show that the Notice Memo has been formally adopted by DOJ, Pl. Br. 13–14, but DOJ
 9 officials repeatedly invoked the policy change described in these memoranda to publicly defend
 10 their actions before Congress and the courts, *id.* at 13 n.23. In order to forestall criticism that
 11 DOJ had misled the Supreme Court, officials testified to Congress that DOJ had carefully
 12 reviewed its prior notice policy, had made a new “determination” about when its statutory duty
 13 applied, and pledged to convey a uniform policy to line prosecutors nationwide.¹⁶ DOJ
 14 emphasizes that these public statements predate the issuance of these memoranda, (Gov't Reply
 15 14), but DOJ again omits and ignores crucial factual context. DOJ originally drafted the Notice
 16 Memo as early as 2013, at the same time it began implementing its new notice policy and months
 17 *before* officials publicly touted that change in testimony to Congress. The fact that officials did
 18 not actually go about issuing a final version until later is not a defense. What matters is that the
 19 Notice Memo contains the policy change that officials publicly described when pressed to defend
 20 the agency's actions. *See N.Y. Times Co. v. DOJ*, 138 F. Supp. 3d 462, 474 (S.D.N.Y. 2015).

21 **3. Documents that embody an agency's effective law and policy may not**
 22 **be withheld under the attorney-client or work-product privileges.**

23 Because the memoranda constitute DOJ's effective law and policy, they must be
 24 disclosed even if one of the Exemption 5 privileges applies. The D.C. Circuit has expressly held
 25 that the working law doctrine overcomes the attorney-client privilege. *Tax Analysts*, 117 F.3d at

26 public reliance, yet the Supreme Court found that the agency had internally adopted certain
 27 documents by incorporating them into Appeals and Advice memoranda that represented the
 28 agency's “final opinion.” 421 U.S. at 161.

¹⁶ *Hearing*, supra note 3 (attached as Diakun Decl., Ex. 21); Additional Prehearing Questions for
 John Carlin Upon His Nomination to be Assistant Attorney General for National Security
 Department of Justice, 1, 9-10 (attached as Cagle Decl., Ex. 5).

1 619 (“Exemption 5 and the attorney-client privilege may not be used to protect . . . agency law
2 from disclosure to the public.”). And although the D.C. Circuit has held, without significant
3 analysis, that the working law doctrine does not overcome the work product privilege, *see id.* at
4 620, the Ninth Circuit has not addressed the issue.¹⁷ This Court should conclude that it does. *See*
5 *N.Y. Times Co.*, 138 F. Supp. at 474-75 (adoption doctrine overcomes assertions of both work-
6 product privilege and attorney-client privilege).

7 FOIA’s core statutory purpose is to prevent agencies from developing and applying a
8 body of secret law. The Act does this by “requir[ing] the disclosure of documents which have
9 ‘the force and effect of law.’” *Sears*, 421 U.S. at 153. This concern about secret law is
10 particularly acute for interpretations of statutes or regulations that are authoritative and will not
11 be developed further in the “the course of litigation” or in front of regulatory bodies or the
12 courts. *Id.* at 160. When an agency relies on an overarching policy or legal interpretation in
13 carrying out its public duties, it may not shield that law and policy behind a cloak of privilege.
14 For this reason, *Sears* required the disclosure of final opinions directing the dismissal of charges
15 over an assertion of work product. *Id.* at 157-58. In the same way, the authoritative positions in
16 these memoranda are unlikely to see the light of day regardless of whether the government
17 provides notice in an individual case. Because these memoranda are the Executive Branch’s
18 authoritative statement of the law, FOIA and the principles underlying *Sears* requires their
19 disclosure over an assertion of work product or attorney-client privilege.

20 Defendant relies on a footnote of dicta from *Federal Open Market Committee of the*
21 *Federal Reserve System v. Merrill*, 443 U.S. 340 (1979). But the Court in *Merrill* considered the
22 narrow question of whether Exemption 5 incorporated a qualified privilege for confidential
23 commercial information that would allow the government to delay the release of records set for
24 eventual publication in the Federal Register. *Id.* at 349, 360; *see* 5 U.S.C. § 552(a)(1)(D). The
25 government did not assert the work product privilege and there was thus no occasion to consider
26 it. *Id.* at 353. Indeed, both the *Merrill* footnote and DOJ ignore the fact that in *Sears* the Court

27 ¹⁷ The subset of documents withheld as privileged in *Tax Analysts* were far more case-specific
28 than the general policy memoranda at issue here. *See* 117 F.3d at 609 (documents created in
response to requests for “legal guidance, usually with reference to the situation of a specific
taxpayer”).

1 ordered the disclosure of working law over a claim of work-product privilege. *Sears*, 421 U.S. at
2 157-58. Finally, unlike *Merrill* where the documents were slated for eventual publication, the
3 memoranda here will continue to operate as secret law unless disclosed through FOIA.

4 **D. The Court Should Order Disclosure Or Conduct An *In Camera* Review.**

5 Where, as here, the agency has failed to meet its burden, it is appropriate for the Court to
6 order disclosure. *See, e.g., Feshbach v. SEC*, 5 F. Supp. 2d 774, 788 (N.D. Cal. 1997). In the
7 alternative, the Court should review the two documents *in camera*. *See* Pl. Br. 25.

8 DOJ's suggestion that it should instead be given the chance to file a further declaration
9 cannot be justified. DOJ pointedly declined to provide such a declaration with its reply, and
10 further delay would prejudice Plaintiffs. *See* H.R. Rep. No. 93-876 (1974) (delay in complying
11 with FOIA requests may be "tantamount to denial"), *reprinted in* 1974 U.S.C.C.A.N. 6267,
12 6271; *cf. also Maine*, 298 F.3d at 72-73 (rejecting agency's contention that district court should
13 have granted it "opportunity to submit additional affidavits" instead of ordering disclosure). If,
14 however, the Court orders DOJ to submit a further declaration, it should direct DOJ to
15 specifically, and fully, address the following factual issues:

16 Regarding claims of privilege: (1) the identity of DOJ's client; (2) the identity of all
17 individuals and agencies to whom the memoranda were circulated; (3) the factual basis for any
18 purported common interest; (4) the factual information conveyed by the client and its underlying
19 source; (5) how disclosure would tend to reveal this information; (6) non-conclusory information
20 regarding the memoranda's discussion of policy, as opposed to legal, advice.

21 Regarding use of these memoranda as DOJ's effective law and policy: (1) any and all
22 instructions, in the documents or otherwise, about how line prosecutors are to use them; (2)
23 whether line prosecutors are permitted to disregard the legal interpretations the memoranda
24 contain, and in what circumstances; (3) whether the memoranda contain, in whole or in part, any
25 objective, neutral discussion of the government's notice obligations; and (4) whether the
26 memoranda have been distributed to other agencies, such as the Treasury Department, which use
27 FISA or Title III information in other types of activities or proceedings.

28 The Court should deny Defendants' and grant Plaintiffs' motion.

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Respectfully submitted,

Dated: November 3, 2017

By: /s/ Linda Lye

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