IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	)	Civil Action No. 14-cv-269 (CKK)

REPLY TO OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As Plaintiff National Association of Criminal Defense Lawyers ("Plaintiff") recognizes, Defendant United States Department of Justice ("DOJ") has made public its criminal discovery policies and has voluntarily released several documents generally showing how federal prosecutors apply those policies. Thus, this is not a case where an agency is attempting to keep its policies and practices secret. Rather, in this case, Plaintiff, a group of criminal defense attorneys, seeks access to the "Federal Criminal Discovery Blue Book" ("FCD"), which provides legal advice and litigation strategies to prosecutors to help them fulfill their discovery obligations while safeguarding legitimate law enforcement objectives in investigations and prosecutions. The Court should reject Plaintiff's obvious attempt to gain an unfair advantage in litigation by obtaining the adversary's attorney work product.

As a threshold issue, Plaintiff's argument that the FCD is agency "working law" and thus must be disclosed under 5 U.S.C. § 552(a)(2), even if it constitutes attorney work product, is dead wrong. The working law concept is applicable only in cases in which the Government invokes the deliberative process privilege. And it is well settled that if a document is attorney work product, it is exempt from disclosure even if it also constitutes or contains agency working law. Moreover, the FCD is not disclosable as working law in any event because it is litigation advice rather than DOJ policy.

Plaintiff's argument that the FCD is not attorney work product also reflects its misguided view of this privilege. Although the FCD was not created in connection with an active investigation, documents need not relate to a specific investigation, claim, or case to be attorney work product as long as they are created in anticipation of litigation. Because the FCD was triggered by litigation, was created for—and is used in—litigation, and it contains recommended

strategies and advice to protect the Government's interests in litigation, it is attorney work product protected under the Freedom of Information Act's ("FOIA") Exemption 5.

The FCD is also law enforcement sensitive and is exempt from production under FOIA's Exemption 7(E). Plaintiff's argument that the FCD is not protected under Exemption 7(E) is premised on the artificial dichotomy between "discovery" and "law enforcement." Prosecutors do not conduct discovery in a vacuum; they do so only as part of active criminal prosecutions. In fulfilling their disclosure obligations, prosecutors must take steps to safeguard legitimate law enforcement objectives that discovery could compromise, such as protecting witnesses, evidence, privacy, national security, and the integrity of investigations and prosecutions. Properly conducting discovery is also essential to ensure just results and secure valid convictions. Accordingly, the criminal discovery process is directly related to DOJ's law enforcement function. The FCD, besides advising prosecutors on their discovery obligations, contains law enforcement techniques, procedures, and guidelines for investigations and prosecutions. Disclosure of this information would undermine DOJ's ability to carry out its law enforcement function, as it would provide criminal defendants and their counsel with information that they could use not only to gain an unfair advantage in litigation, but also to evade justice and to circumvent the law.

ARGUMENT

I. THE FCD IS NOT REQUIRED TO BE DISCLOSED UNDER 5 U.S.C. § 552(A)(2)

Plaintiff has cross-moved for summary judgment on the basis that the FCD must be disclosed under 5 U.S.C. § 552(a)(2) because it "constitutes adopted agency policy or is secret law that cannot be withheld under a claim of attorney work product privilege." Pl.'s Opp'n at 9.

This argument misapplies the "working law" concept,[1] misconstrues the plain text of FOIA, and ignores binding precedent establishing that attorney work product is exempt from disclosure even if it constitutes or contains agency working law.

A. The Working Law Concept Does Not Apply

The "working law" concept does not apply because the FCD is protected as attorney work product, not as pre-decisional, deliberative material. The term "working law" emerged from the distinction "between [privileged] predecisional communications" and "communications made after the [agency] decision and designed to explain . . . the reasons which did supply the basis for an agency policy actually adopted[,]" which "constitute the 'working law' of the agency" and are thus not protected under Exemption 5. *Sears,* 421 U.S. at 152-53 (citations omitted). The concept, reflected in § 552(a)(2) of FOIA, requires the disclosure of "documents which have 'the force and effect of law.'" *Id.* (citations omitted). Because the "working law" concept was developed "in the course of a discussion of the privilege for predecisional communications" and these communications are distinct from materials protected under other Exemption 5 privileges, it has no bearing here. *See Fed. Open Market Comm. of Fed. Reserve System v. Merrill,* 443 U.S. 340, 360 n.23 (1979) ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on the one hand, and predecisional communications, on the other, does not necessarily exists between final statements of policy and other Exemption 5 privileges.").

Plaintiff's argument that adopted agency policy "cannot be withheld" under the attorney work-product privilege, Pl.'s Opp'n at 9, is also wrong. Although an agency must disclose

[1] The "working law" concept reflects "aversion to 'secret (agency) law.'" *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). Indeed, Plaintiff uses "working law" and "secret law" interchangeably. *See* Mem. In Support of Pl.'s Cross-Mot. for Summ. Judgment and Opp'n to Defs.' Mot. for Summ. Judgment ("Pl.'s Opp'n") at 15 (ECF No. 16-1).

documents covered by § 552(a)(2) such as final opinions rendered in the adjudication of cases and adopted policy statements, FOIA "*expressly states . . . that the disclosure obligation 'does not apply*' to those documents described in the nine enumerated exempted categories listed in § 552(b)[,]" one of which is Exemption 5. *Sears*, 421 U.S. at 137 (emphasis added). Thus, if a document falls under § 552(a)(a) and is also "an inter-agency memorandum within Exemption 5, it would not be disclosable, since the Act 'does not apply' to documents falling within any of the exemptions." *Id.* at 154 n.21. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 185 n.21 (1975) (even if a document is "expressly made disclosable" under § 552(a)(2), "a conclusion that the document[is] within Exemption 5 would be dispositive in the Government's favor, since the Act 'does not apply' to such documents[.]").[2]

Indeed, in *Sears* the Supreme Court held that "a memorandum subject to the affirmative disclosure requirement of § 552(a)(2) was nevertheless shielded from disclosure under Exemption 5 because it contained a privileged attorney's work product." *Merrill*, 443 U.S. at 360-61 n.23 (citing *Sears*, 421 U.S. at 160). The D.C. Circuit has recognized this principle, stating that "[i]t is settled that even if a document is a final opinion or is a recommendation which is eventually adopted as the basis for agency action, it retains its exempt status if it falls properly within the work-product privilege." *Iglesias v. CIA*, 525 F. Supp. 547, 559 (D.C. Cir. 1981) (citing *Merrill*, 443 U.S. at 360 n.23; *Exxon Corp. v. FTC*, 476 F. Supp. 713, 726 (D.D.C. 1979) ("[A] document may be exempt as attorney 'work product' under exemption (b)(5) notwithstanding that it is also a 'final opinion', or has been incorporated by reference into a 'final opinion,' within the meaning of § 552(a)(2)(A)") (citing *Sears*, 421 U.S. at 160))). If agency records constitute attorney work product, "they can be withheld, *including any agency*

[2] Because final opinions and statements of policy are, by definition, not predecisional, they can never be protected under the deliberative process privilege. *Merrill*, 443 U.S. at 360 n.23.

working law that they may contain." *Tax Analysts v. IRS*, 391 F. Supp. 2d 122, 128 (D.D.C. 2005) (quoting *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 19 (D.D.C. 2001)).

In light of FOIA's text and binding precedent, it is irrelevant whether the FCD is agency "working law." *Iglesias*, 525 F. Supp. at 559 ("[A]ny argument to the effect that the attorney's opinions in question may have become the basis for final agency action is irrelevant for purposes of the work-product privilege."). Because the FCD is attorney work product, it need not be disclosed under § 552(a)(2).

B. The FCD Is Not Disclosable As Working Law Nor Does It Contain Secret Law

Even assuming that the working law concept is relevant, the FCD is not disclosable as working law. For a document to be agency working law, it must "have the force and effect of law[,]" such as a "final agency action of precedential import" in deciding cases before an agency. *Sears*, 421 U.S. at 153, 157 (citations and quotation marks omitted). *See, e.g., Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617, F.2d 854, 868 (D.C. Cir. 1980) (reasoning underlying "secret law" cases is that an agency must disclose "orders and interpretations which it actually applies in cases before it." (quoting *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971)); *Doe v. U.S. Dep't of Labor*, 451 F. Supp. 2d 156, 175 (D.D.C. 2006) (agency decisions fell within § 552(a)(2) because they formed "a meaningful body of precedent . . . for the benefit of future appellants and their advocates[.]") (vacated pursuant to settlement). As such, the concept properly applies in the context of administrative decision-making, not in the context of law enforcement decisions. *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 396 (S.D.N.Y. 2011) ("[T]he secret law doctrine in FOIA cases generally arises in contexts in which agencies are *rendering decisions* on non-public analyses. I am aware of no precedent for evaluating whether law enforcement *policies* constitute secret law."). In addition,

documents that contain "litigation strategy or settlement advice" for further consideration by other officials who will litigate cases are not disclosable as working law. *Sears*, 421 U.S. 159-60. *See Am. Civil Liberties Union Found. v. DOJ*, No. 12-7412 (WHP), 2014 WL 956303, at *7 (S.D.N.Y. 2014) ("*ACLU*") (DOJ memorandum providing legal guidance and arguments for prosecutors to defend against claims that Government violated the Fourth Amendment are not working law). *See also Judicial Watch, Inc. v. DOJ*, 2014 WL 794220, at *10 (D.D.C. Feb. 28, 2014) (memoranda prepared by "lawyers whose role is to provide legal advice" to other agency officials rather than to be the decision-makers for the agency not working law) (citing *Brinton v. U.S. Dep't of State*, 636 F.2d 600, 602 (D.C. Cir. 1980); *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014)).

The FCD is not working law because it is legal advice and does not establish DOJ policy. *See* Second Declaration of Andrew D. Goldsmith ("Goldsmith Decl. II") ¶¶ 7-8 (attached as Exhibit 1). DOJ policies regarding criminal discovery are set forth in the United States Attorney's Manual ("USAM") §§ 9-5.001 and 9-5.100 and in memoranda issued in January 2010 by then Deputy Attorney General David Ogden. *See id.* ¶¶ 5-7. The FCD, however, "does not establish new rules or policies that prosecutors have an obligation to follow in all investigations and prosecutions." Goldsmith Decl. II ¶ 7. It rather provides legal advice and litigation strategies for prosecutors to meet "their disclosure obligations, as established in rules and precedent, and [to] comply[] with existing DOJ policies, as set forth in in the USAM, the Ogden memoranda, and their office's discovery policy, while at the same time safeguarding legitimate law enforcement concerns and advancing the Government's interests in litigation." *Id.* While the FCD "describes discovery-related rules, precedent, and existing DOJ policies [,]" it does so "to provide 'legal strategies that in-the-field prosecutors may and do employ during the course of

criminal proceedings' and to 'ensure that discovery-related issues do not compromise investigations and prosecutions.'" *Id*. (quoting Declaration of Andrew D. Goldsmith (June 11, 2014) ("Goldsmith Dec. I") ¶¶ 6, 7). As such, the FCD "advises prosecutors on the types of challenges they may encounter in the course of prosecutions and potential responses and approaches to those challenges that they are encouraged to consider." *Id*. ¶ 8. To decide "if and how to apply the recommendations and strategies offered in the book[,]" prosecutors are encouraged to consult with designated discovery coordinators. *Id.* Because the FCD provides legal advice and litigation strategies for prosecutors to consider in consultation with designated discovery coordinators, it does not have "the force and effect of law" and thus it is not "working law." *Sears*, 421 U.S. at 152-53 (citation omitted). *See Anguimate v. U.S. Dep't of Homeland Sec.*, 918 F. Supp. 2d 13, 21 (D.D.C. 2013) (documents not working law because agency did not treat them "as binding, precedential guidance in asylum adjudications"); *Coastal States*, 617 F.2d at 869 (opinions and suggestions "not relied on as precedent" that are "considered further by the decisionmaker" not agency working law).

Plaintiff notes that documents can be disclosable as working law even if not binding on agency personnel. Pl.'s Opp'n at 11. But "nominally non-binding" documents have been found to be disclosable as working law when they authoritatively establish "the agency's legal position" and are not otherwise protected by the work product doctrine. *Tax Analysts v. IRS*, 117 F.3d 607, 617-18, 620 (D.C. Cir. 1997). The FCD, rather than establishing DOJ policy, provides legal advice and litigation strategies for federal prosecutors to consider. *See* Goldsmith Decl. II ¶¶ 5-8. Thus, the FCD is not working law and, even if it is, it is protected from disclosure as attorney work product. *Iglesias*, 525 F. Supp. at 559.

Plaintiff alleges that the "policies and arguments" described in the FCD will not be "borne out in the courts" because "[p]rosecutors conduct their *Brady* disclosure analyses in secret." Pl.'s Opp'n at 16-17. All DOJ discovery policies, however, are public, as DOJ established its policy and legal position regarding criminal discovery in the USAM and other public memoranda. *See* Goldsmith Decl. II ¶¶ 5-6. And DOJ policy instructs prosecutors to disclose more information than constitutionally required. *Id*. Indeed, given DOJ's liberal disclosure policy, prosecutors "find themselves in the position of making disclosures to the defense and then arguing that the information is not admissible and not the proper subject of cross-examination." Alexander, Charysse, *Assessing Potential Impeachment Information Relating to Law Enforcement Witnesses: Life After the Candid Conversation*, United States Attorneys' Bulletin, Criminal Discovery, September 2012, at p. 22 (attached as Ex. M to Pl.'s Opp'n). In addition, the Government's discovery-related arguments are routinely "borne out in the courts" in connection with defendants' requests for discovery as well as disputes regarding the scope, timing, and forms of disclosures.

In any event, Plaintiff's recognition that DOJ has published "information that is very similar to the type of information contained in the Blue Book[,]" Pl.'s Opp'n at 12, squarely contradicts its argument that the FCD contains "secret law." According to Plaintiff, the publicly available USAM "like the Blue Book . . . contains sections advising prosecutors on DOJ's policies regarding criminal discovery" and the "'Criminal Discovery' edition of the United States Attorneys' Bulletin[,]" contains "similar advice and guidelines related to criminal discovery." *Id.* at 13. Indeed, as Plaintiff recognizes, DOJ has made public documents containing "practical advice" to prosecutors, identifying "factors prosecutors should consider in making particular decisions," "tips for prosecutors to use during the course of criminal prosecutions," and

discussing the interplay between "discovery demands" and the "safety of victims and witnesses," all of which are topics covered in the FCD. Pl.'s Opp'n at 14 (quotations omitted).[3] Simply put, DOJ is not keeping its discovery policies and practices secret.[4] *See Families for Freedom*, 797 F. Supp. 2d at 396 (agency training memoranda not "secret law" because agency's official position allegedly contained in memoranda was public).

II. THE FCD CONSTITUTES ATTORNEY WORK PRODUCT

A. The Function and Contents of the FCD Make It Attorney Work Product.

A document is attorney work product if "'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *In re: Sealed Case,* 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting *Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987)). This inquiry encompasses the document's function and contents. *See United States v. Deloitte LLP*, 610 F.3d 129, 137-39 (D.C. Cir. 2010).

The FCD's function is to be a litigation manual offering "practical 'how-to' advice . . . . techniques, procedures, and legal strategies that in-the-field prosecutors may and do employ during the course of criminal proceedings." Goldsmith Decl. I ¶¶ 5, 6. It was part of an effort to ensure that the discovery issues that prosecutors inevitably confront in litigation do not

[3] Like private law firms, DOJ makes public some material discussing legal issues. But that does not mean that internal materials prepared by these law firms and DOJ in anticipation of litigation discussing similar issues should be made public. *See* Goldsmith Decl. II ¶ 10 n.1.

[4] Plaintiff alleges that an "epidemic" of *Brady* violations justifies disclosure of the FCD. No such thing exists; discovery violations are extremely rare. *See* Statement of James M. Cole Before the U.S. Senate Committee on the Judiciary, *Ensuring that Federal Prosecutors Meet Discovery Obligations*, at 7 (June 6, 2012), *available at* http://www.justice.gov/ola/testimony/112-2/06-06-12-dag-cole.pdf ("Over the past 10 years, [DOJ] has filed over 800,000 cases . . . In the same period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct . . . [and l]ess than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct.").

compromise DOJ's investigations and prosecutions. *See* Defs.' Mot. for Summ. Judgment ("Defs.' MSJ") at 6-7 (ECF No. 13-1) (citing Gerson Decl. ¶¶ 17-20; Goldsmith Decl. I ¶¶ 5, 7). Because the FCD was triggered by litigation and was created to protect the Government's interests in litigation, it was prepared "because of the prospect of litigation." *Id*.

The FCD was not, as Plaintiff suggests, simply created to convey policies and case interpretations. *See* Pl.'s Opp'n at 24. While the FCD accurately describes case law, rules, and DOJ policies, it does so to provide legal advice, strategies, and tactics that prosecutors can employ in investigations and prosecutions to protect the Government's interests. *See* Defs.' MSJ at 11-12 (citing, *e.g.*, Gerson Decl. ¶ 21 (the FCD "does not simply provide a neutral analysis of the law. Rather, [it] is a litigation manual containing confidential legal analyses and strategies to support the Government's investigations and prosecutions."). *See also* Goldsmith Decl. I ¶ 12 ("The Blue Book does not simply provide legal analysis; it is a comprehensive litigation guide intended to offer strategy and advice to prosecutors in defending against discovery-related challenges by criminal defendants.").[5]

Although Plaintiff analogizes the FCD to the documents in *Shapiro v. DOJ*, 969 F. Supp. 2d 18, 36-37 (D.D.C. 2013), which were "summaries of cases and key issues in certain cases[,]" Pl.'s Opp'n at 20, the FCD is different because it is a comprehensive manual containing advice, risk assessments, and strategies for litigation. As such, unlike in *Shapiro*, disclosure of the FCD would reveal "legal strategy . . . that might have implications for future litigation if revealed to adversaries." 969 F. Supp. 2d at 37. *See* Goldsmith Decl. I ¶ 10 ("If defense counsel were aware

[5] Plaintiff suggests that DOJ's description of the FCD in this case is different from the description of the book that it provided to Congress. Pl.'s Opp'n at 2, 24, 40. But, unlike in this case, DOJ was neither requested nor required to provide a full and detailed description of the contents of the FCD to Congress. DOJ only noted that the FCD was one step to enhance its discovery practices.

of the myriad legal, strategic, and tactical considerations that go into this analysis, they would have unfair – and potentially dangerous – insight into the prosecution's approach to discovery[.]"); Goldsmith Decl. II ¶ 14 ("If the defense knew ahead of time what the likely litigation strategies and tactics the prosecution would employ, it stands to reason that the defense would be more likely to prevail").

Contrary to Plaintiff's contention, *see* Pl.'s Opp'n at 23, the FCD is squarely within the "*Delaney/Schiller* framework" because it was created to protect the Government from litigation over discovery issues that could compromise investigations and prosecutions. *See* Defs.' MSJ at 6-7 (citing Gerson Decl. ¶¶ 17-20; Goldsmith Decl. I ¶¶ 5, 7). Indeed, the FCD is akin to the documents in *Delaney* and *Schiller*. The memoranda in *Delaney v. IRS* "advise[d] 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." 826 F.2d 124, 127 (D.C. Cir. 1987). The documents in *Schiller v. NLRB* contained "tips for handling unfair labor practice cases that could affect subsequent EAJA [Equal Access to Justice Act] litigation . . . advice on how to build an EAJA defense and how to litigate EAJA cases" and " provid[ing] instructions on preparing and filing pleadings in EAJA cases, including arguments and authorities[.]" 964 F.2d 1205, 1208 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. U.S. Dep't of Navy*, ---- U.S. ----, 131 S. Ct. 1259 (2011). Likewise, the FCD provides advice and strategies, as well as arguments and authority, to advance the Government's interests in litigation and defend it against claims and tactics of defense counsel. *See* Defs.' MSJ at 9-10. *See also* Gerson Decl. ¶ 21 (the FCD "describes the types of claims defense counsel have raised . . . regarding different discovery issues . . . and the arguments prosecutors can make to response to these claims . . . [to] protect Government investigation and prosecutions. [It] . . . explains the limitations of certain arguments

that prosecutors could make . . . [and] also offers compilations of cases that prosecutors can use to support different arguments."). Thus, the FCD protects DOJ from "the possibility of future litigation." *In re Sealed Case*, 146 F.3d at 885.

Manuals and documents like the FCD have been held to be protected as attorney work product. *See* Defs.' MSJ at 8-9 (citing *Soghoian v. DOJ*, 885 F. Supp. 2d 62, 76 (D.D.C. 2012); *ACLU*, 2014 WL 956303, at *1, *6). Plaintiff contends that the documents in *ACLU* are distinguishable because they "were created to assist government attorneys in *defending* the government's position" regarding its compliance with the Fourth Amendment. Pl.'s Opp'n at 25. That attempted distinction actually shows that the FCD is similar, as the FCD was likewise created to assist prosecutors "*in defending* against discovery-related challenges by criminal defendants." Goldsmith Decl. I ¶ 12 (emphasis added). Plaintiff's attempt to distinguish *Soghoian* on the basis that the FCD does not "help prosecutors gather evidence or structure criminal investigations[,]" Pl.'s Opp'n at 26, also fails. The DOJ manual in *Soghoian* was not held to be work product because it helped prosecutors "gather evidence or structure criminal investigations[,]" but rather because it "contain[ed] legal guidance for attorneys conducting investigations" and "present[ed] the legal strategies of the DOJ attorneys who will be required to litigate on behalf of the government." 885 F. Supp. 2d at 72-73. Because the FCD contains the same type of information, it is attorney work product. *See* Defs.' MSJ at 8-10.[6]

B. The FCD Need Not Relate To An "Active Investigation" To Be Work Product

The attorney work-product privilege "should be interpreted broadly and held largely inviolate" because "[w]ithout a strong work-product privilege, lawyers would keep their thoughts

[6] In any event, the FCD also advises prosecutors on gathering evidence, at it describes "how to obtain electronic and other forms of evidence . . . [and] how to ensure that the Government receives appropriate discovery from the defense[,]" among others. Goldsmith Decl. I ¶ 9.

to themselves, avoid communicating with other lawyers, and hesitate to take notes." *Judicial Watch v. DOJ*, 432 F.3d 366, 369 (D.C. Cir. 2005); *In re Sealed Case*, 146 F.3d at 884. Consistent with the broad interpretation given to this privilege, documents need not relate to a specific investigation, claim, or case to be protected as long as they are prepared in anticipation of litigation. *See* Defs.' MSJ at 13-14 (citing *Schiller*, 964 F.2d at 1208; *Delaney*, 826 F.2d at 126-27; *Soghoian*, 885 F. Supp. 2d at 72). As the D.C. Circuit has explained:

> It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur . . . If lawyers had to wait for specific claims to arise before their writings could enjoy work-product protection, they would not likely risk taking notes about such matters or communicating in writing with colleagues, thus severely limiting their ability to advise clients effectively.

In re Sealed Case, 146 F.3d at 886.

Ignoring these well-established principles, Plaintiff relies on *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) and *Coastal States*, 617 F.2d at 866, to argue that the FCD is not work product because it is not connected to a specific investigation. Pl.'s Opp'n at 19. Plaintiff misconstrues those cases. As the D.C. Circuit has clarified, the "'specific claim' language" in those cases was just an *observation* that "'did not intend to lay down [a] blanket rule'" that a record needs to be connected to a specific claim or case to constitute work product. *In re Sealed Case*, 146 F.3d at 885 (quoting *Delaney*, 826 F.2d at 127) (emphasis added). When the government lawyers act "as legal advisors protecting their agency clients from the possibility of future litigation[,]" rather than as "prosecutors or investigators of suspected wrongdoers," [7] the document need not relate to a specific claim or case to constitute work product as long as it is

[7] It is not even clear that a "specific claim" is required when the document is created in the course of an investigation, as the D.C. Circuit declined to "decide whether the *Coastal States/SafeCard* specific claim test has continued vitality where government lawyers act as prosecutors or investigators of suspected wrongdoers." *In re Sealed Case*, 146 F.3d at 885.

created "in anticipation of litigation." *Id.*[8] *See Soghoian*, 885 F. Supp. 2d at 72 ("[T]he D.C. Circuit has not construed the privilege so narrowly as to protect only work product related to specific cases currently in litigation.") (citations omitted).

Neither *Jordan v. DOJ*, 591 F.2d 753 (D.C. Cir. 1978) nor *Judicial Watch, Inc. v. DHS*, 926 F. Supp. 2d 121 (D.D.C. 2013), supports Plaintiff's argument. First, *Jordan* was decided in 1978, years before *Delaney* (1987), *Schiller* (1992), and *In re Sealed Case* (1998). Second, the purpose and contents of the documents at issue in *Jordan* and *Judicial Watch* are distinguishable from the FCD. *See* Defs.' MSJ at 10-11 n.3. The documents in *Jordan* were guidelines for prosecutors to evaluate "whether or not to bring an individual to trial in the first place" and thus were neither "prepared in anticipation of a particular trial" nor "in anticipation of trials in general." 591. F.2d at 757. Similarly, *Judicial Watch* concerned Department of Homeland Security ("DHS") guidelines for attorneys to decide whether they should move to dismiss immigration cases in light of national immigration policy priorities. 926 F. Supp. 2d at 127-28. These guidelines simply "convey[ed] agency policies and instructions" to decide whether to initiate an enforcement proceeding and whether to continue pursuing pending cases. *Id.* at 143. As such, like the documents in *Jordan*, these guidelines related to whether to "bring an individual to trial in the first place." *Jordan*, 591 F.2d at 775.

The FCD is not a set of guidelines to determine whether "to bring an individual to trial in the first place." *Id.* Unlike the documents in *Jordan* and in *Judicial Watch*, the FCD is a litigation manual providing advice to prosecutors on how to make strategic determinations

[8] Plaintiff notes that one court has held the FCD not to be work product. *See* Pl.'s Notice of Supplemental Authority ("Pl.'s Supp.") at 3 (ECF No. 19) (citing *USA v. Pedersen*, 2014 U.S. Lexis 106227 (D. Or. Aug. 6, 2014). That terse decision, which fails to even mention *Delaney*, *Schiller*, or *In re Sealed Case*, is incorrect as it employed the same flawed "specific claim" rationale that the D.C. Circuit has "repeatedly rejected." *In re Sealed Case*, 146 F.3d at 885.

during the course of ongoing criminal investigations and prosecution to defend the Government and to safeguard legitimate law enforcement concerns. *See* Goldsmith Decl. I ¶ 5-7, 9-12; Gerson Decl. ¶ 21. Because this information relates to dealing strategically with adversaries in ongoing and prospective litigation, the FCD is quite distinct from the general guidelines for making the pre-trial and dismissal determinations at issue in *Jordan* and in *Judicial Watch*.[9]

C. The FCD is Distinguishable From Publicly Available Documents.

Plaintiff suggests that the FCD is not protected, either under Exemption 5 or 7(E), because the FCD is "similar" to the Criminal Discovery Issue of the United States Attorneys' Bulletin ("CDI").[10] Pl.'s Opp'n at 26-27; 36-38. As a preliminary matter, even assuming that the CDI is similar to the FCD, release of the CDI does not waive DOJ's right to withhold the FCD. *See, e.g., Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) ("Prior disclosure of similar information does not suffice as a general waiver of a FOIA exemption[.]") (citing *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989) ("[R]elease of certain documents waives FOIA exemptions *only for those documents released*[,]" not for "related" documents).

But, in any event, although both the CDI and the FCD cover issues related to criminal discovery and offer advice to prosecutors, the "purpose and contents [of these two documents]

[9] For similar reasons, the documents at issue in *Am. Immigration Council v. DHS*, 905 F. Supp. 2d 206 (D.D.C. 2012) are distinguishable. The slideshows there were prepared to train agency employees on "routine agency policies" and there was no indication the attorneys who prepared them were "worrying about litigation[.]" *Id.* at 222. In addition, there was no allegation that the memorandum providing DHS's binding interpretation regarding the right of refugees to counsel was influenced or prepared because of litigation. *Id.* The FCD, however, does not simply convey routine agency policies, but contains legal advice, strategies, and recommendations compiled for use in litigation. *See* Defs.' MSJ at 10-12.

[10] Plaintiff refers to this document as "CDB". *See* Pl.'s Opp'n at 13. This document was published in 2012 "to reflect prosecutors' perspectives on discovery-related topics of interest to other prosecutors as well as the public." Goldsmith Decl. II ¶ 10.

are distinguishable." Goldsmith Decl. II ¶¶ 12-13. From the outset, the CDI "was intended to be publicly available" in order to provide the public with information about "prosecutors' perspectives on certain discovery-related topics[.]" *Id.* ¶ 12. Accordingly, authors were instructed not to include "anything that was sensitive." *Id*. ¶ 10. "In contrast, the [FCD] was designed to serve as a confidential litigation manual comprehensively covering the law and practice of a prosecutors' discovery obligations as well as offering legal analysis and strategies to protect the Government's interest in litigation and defend against discovery-related challenges by criminal defendants." *Id*. ¶ 12. "Unlike the CDI, the Blue Book essentially provides a blueprint to the strategies federal prosecutors employ in criminal cases, advising prosecutors on every aspect of the criminal discovery process." *Id*. ¶ 13. The FCD contains "attorney work product and other sensitive law enforcement information," such as "a comprehensive set of strategic considerations and procedures, extensive compilations of cases to support different arguments and contrary authority, the limitations of some of these arguments, specific recommendations to obtain electronic and other kinds of evidence, advice for avoiding discovery disputes and falling into some pitfalls, potential consequences of some practices, circumstances under which sanctions against the Government are likely, and circumstances under which prosecutions should consider taking certain steps, among others." *Id*. ¶ 13. "Disclosure of this information would . . . reveal[] law enforcement procedures and litigation strategies, risks, and vulnerabilities . . . undermin[e] DOJ's ability to counsel its prosecutors . . .[,] limit the ability of prosecutors to safeguard legitimate law enforcement objectives, and . . . increase the risk that criminal defendants escape punishment and circumvent the law." *Id. See id*. ¶ 14. As such, the FCD

"was never intended to be public, and the Department has steadfastly maintained its confidentiality."[11] *Id.* ¶ 12.

D. Disclosing the FCD Would Give Criminal Defendants An Unfair Advantage In Litigation And Limit DOJ's Ability to Safeguard Law Enforcement Objectives

Plaintiff suggests that even if disclosing the FCD might "unfairly advantage criminal defendants" in litigation against the Government, the FCD is not attorney work product. Pl.'s Opp'n at 27. But the purpose of the work-product privilege is to prevent "[i]nefficiency, unfairness and sharp practices . . . in the giving of legal advice and in the preparation of cases for trial." *FTC v. Grolier, Inc.*, 462 U.S. 19, 24 (1983) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). This purpose is accomplished by preventing adversaries from getting the "benefit of the agency's legal factual research and reasoning," which if released could allow the adversary "to litigate 'on wits borrowed from the [agency]." *Id*. at 31 (Brennan, J., concurring in part and concurring in the judgment) (quoting *Hickman*, 329 U.S. at 516). Disclosure of the FCD would undoubtedly allow criminal defendants to "gain insight into [DOJ's] general strategic and tactical approach to" dealing with discovery issues in criminal investigations and prosecutions. *Id*. Because preventing such an unfair result, which would hamper DOJ's ability

[11] Plaintiff contends that because DOJ was ordered to provide the FCD to a court and to defense counsel in a criminal case, and defense counsel disclosed some information in the book in open court, the FCD has not "remained confidential." *See* Pl.'s Supp. at 3. A compelled disclosure of a document in a civil or criminal proceeding, however, does not waive the Government's right to protect the document from disclosure under FOIA. *Lewis v. DOJ*, 609 F. Supp. 2d 80, 85 (D.D.C. 2009) ("a constitutionally compelled disclosure to a single party simply does not enter the public domain." (quoting *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999)). Moreover, as Plaintiff recognizes, the Government opposed disclosure of the FCD on privilege grounds, the court ordered production of the FCD—and admitted it into evidence— under seal, and only a few lines of the FCD appear in the transcript. *See* Pl.'s Supp. at 2-3; Exhibits B and E. In addition, while the court offered to close the proceedings to protect attorney-client communications, *id.* at 3, that privilege does not apply to the FCD. Quite simply, the limited disclosures in that case do not constitute a waiver or show that DOJ has not steadfastly maintained the FCD's confidentiality.

to advise its prosecutors and thus fulfill its law enforcement function, is the very purpose of the attorney work-product privilege, the FCD should not be disclosed. *See* Defs.' MSJ at 15-16.

Plaintiff contends that disclosure of the FCD would not discourage DOJ attorneys from creating work product because it does not contain "case-specific litigation strategies[.]" Pl.'s Opp'n at 28. This argument, besides misconstruing the work-product privilege, ignores that DOJ and other agencies, like "litigants who face litigation of a commonly recurring type[,] . . . deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation." *Grolier*, 462 U.S. at 30-31 (Brennan, J., concurring in part and concurring in the judgment). While these cases will involve different parties and facts, "large classes of them may present recurring, parallel factual setting and identical legal and policy considerations." *Id*. As such, DOJ must prepare materials offering legal advice and litigation strategies that can be used in many cases. *See* Gerson Decl. ¶¶ 6-7 (discussing preparation of *OLE Litigation Series*). Disclosing the FCD would have a chilling effect on these communications and severely impair DOJ's ability to counsel its attorneys and prepare for litigation. Goldsmith Decl. I ¶ 13. That the FCD offers legal advice on recurring issues in prosecutions, rather than on a specific case, does not eliminate DOJ's "acute interest in keeping private the manner in which [it] conducts and settle[s] [its] recurring legal disputes." *Grolier*, 462 U.S. at 31 (Brennan, J., concurring in part and concurring in the judgment).

Plaintiff also argues that disclosing the FCD would not provide an unfair advantage to criminal defendants because the book discusses the prosecutors' obligations under *Brady*, which "operate outside of the traditional adversarial system." Pl.'s Opp'n at 28. This argument, besides mischaracterizing the contents of the FCD,[12] ignores that *Brady*'s "purpose is not to

[12] The FCD covers more than a prosecutor's *Brady* obligations. *See* Goldsmith Decl. I ¶ 5.

displace the adversary system" and thus "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]" *United States v. Bagley*, 473 U.S. 667, 675 (1985). The Supreme Court has counseled against overly broad interpretations of *Brady*, such as the one Plaintiff advances in this case, which could "entirely alter the character and balance of our present systems of justice." *Id*. n.7 (quotation omitted). Although a prosecutor's responsibilities "go beyond those of an ordinarily litigant[,] . . . the prosecutor must function as an advocate of the United States." Goldsmith Decl. II ¶ 14. If adversaries "knew ahead of time what the likely litigation strategies and tactics the prosecution would employ . . . [adversaries] would be more likely to prevail" and other legitimate law enforcement interests could be compromised. *Id*.

E. Because The FCD Constitutes Attorney Work Product, There Is No Reasonably Segregable Portion

Despite that it is well-established that FOIA's segregability requirement does not apply to documents protected as attorney work product, Defs.' MSJ at 5, Plaintiff argues that "neutral, objective analyses" and "question and answer guidelines" in the FCD must be released, Pl.'s Opp'n at 29. The FCD does not contain such "neutral" analyses. Gerson Decl. ¶ 21. Although the FCD accurately describes a prosecutor's discovery obligations, including DOJ discovery policies, that information need not be released because the FCD as a whole was created in anticipation of litigation. *See Tax Analysts*, 391 F. Supp. 2d at 128.

Plaintiff's observation that in *ACLU* DOJ "segregated and disclosed" portions of work product memoranda that were "neutral analysis of law," Pl.'s Opp'n at 29, is irrelevant. In this case, DOJ determined that "attempting to segregate factual material [from the FCD] would risk disclosing protected information, as privileged material is intertwined with factual material throughout the book." Gerson Decl. ¶ 23. *See* Goldsmith Decl. I ¶ 9. And, of course, a prior

discretionary disclosure does not waive DOJ's ability to protect "similar" information here. *Ctr. for Int'l Envtl. Law*, 505 F. Supp. 2d at 158.

Finally, Plaintiff misconstrues *Schiller*. *See* Pl.'s Opp'n at 29. The D.C. Circuit in that case did not hold that the segregability requirement applies to documents protected as attorney work product; it rather concluded that the district court had erred in "approv[ing] the withholding . . . without entering a finding on segregability or the lack thereof[.]" 964 F.2d at 1210. Indeed, the D.C. Circuit has clarified that *Schiller* did not say "that a document that is clearly covered by the work product doctrine may be segregable" and it has held that when documents "are attorney work product, the[ir] entire contents – i.e., facts, law, opinions, and analysis – are exempt from disclosure under FOIA." *Judicial Watch*, 432 F.3d at 371-72.

III. THE FCD IS PROTECTED UNDER EXEMPTION 7(E)

Exemption 7(E) protects documents: (1) compiled for law enforcement purposes, and (2) containing either "techniques and procedures," or guidelines the disclosure of which "could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The FCD meets these requirements. *See* Defs.' MSJ at 17-25.

A. The FCD Was Compiled For Law Enforcement Purposes.

A document is compiled for law enforcement purposes as long as there is a rational nexus between it and the agency's law enforcement purpose. There is a rational nexus between the FCD and DOJ's law enforcement purpose because the FCD was created to advise prosecutors on the discovery issues that they would confront in prosecutions. *See* Defs.' MSJ at 18-19.

Plaintiff argues that the FCD was not compiled for law enforcement purposes because it deals with "discovery" rather than "actual law enforcement." Pl.'s Opp'n at 32. This artificial

dichotomy is not valid.[13] Criminal discovery does not take place in a vacuum; it only occurs in active prosecutions. In fulfilling their disclosure obligations, prosecutors must consider several countervailing law enforcement concerns, such as protecting victims and witnesses, protecting the integrity of ongoing investigations, and protecting national security. *See* Goldsmith Decl. I ¶ 8. In doing so, prosecutors work closely with other law enforcement officials. *Id*. ¶ 7. In addition, adequately making disclosures is not only a legal obligation, but also essential to ensure that discovery-related issues do not compromise investigations and prosecutions. *Id*. As such, the FCD "functions as a critical law enforcement tool." *Id*.

As a law enforcement agency, DOJ's determination that a document is compiled for law enforcement purposes is entitled to deference. *See* Defs.' MSJ at 17-18. Given this deference and that the FCD clearly "bears on [DOJ's] law enforcement activities[,]" *Am. Immigration Council*, 2014 WL 1118353, at *4, the FCD was compiled for law enforcement purposes.

B. The FCD Contains Sensitive Law Enforcement Information.

Exemption 7(E) broadly protects "'[i]nformation that relates to law enforcement techniques, policies, and procedures[.]'" *Gilman v. DHS*, 2014 WL 984309, at *11 (D.D.C. March 14, 2014) (quotation omitted). The FCD contains such information, as it describes the steps that prosecutors take to protect witnesses and evidence, to handle statements of defendants and witnesses, to determine the scope, manner, and timing of disclosures, and for obtaining

[13] Plaintiff defines "discovery" as the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation." Pl.'s Opp'n at 32 (quoting Black's Law Dictionary 212 (3d pocket ed. 2006) (quotation marks omitted). Disclosure in criminal cases is not so broad. Notably, for exculpatory evidence, *Brady* "requires disclosures only of evidence that is both favorable . . . and 'material either to guilt or to punishment.'" *Bagley*, 473 U.S. at 674. Prosecutors are not required "to share all useful information with the defendant." *United States v. Ruiz*, 536 U.S. 622, 630 (2002). While DOJ prosecutors provide more information than constitutionally required, they need not disclose all information that "relates to the litigation," but rather exculpatory and impeachment information. *See* Goldsmith Decl. II ¶ 5. And they must do so regardless of "a party's request." *See* USAM § 9-5.001(B) and (C).

electronic and other forms of evidence, including appropriate discovery from defendants, among others. *See* Defs.' MSJ at 20-21 (citing Goldsmith Decl. I ¶¶ 6, 9, 14; Gerson Decl. ¶ 24).

While Plaintiff says that the D.C. Circuit has "affirmed" that the "'risk circumvention of the law' requirement" applies to techniques and procedures, Pl.'s Opp'n at 33 (citing *Pub. Emps. For Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 202-03 (D.C. Cir. 2014)), the D.C. Circuit has not decided this issue, *see Citizens for Responsibility and Ethics in Wash.* ("*CREW*") *v. DOJ*, No. 12-5223, 2014 WL 1284811, at *14 n.8 (D.C. Cir. 2014) ("We note some disagreement whether the 'risk of circumvention' requirement applies to records containing 'techniques and procedures' or only to records containing 'guidelines.' We need not pursue that issue . . ."") (citing *Pub. Emps*., 740 F.3d at 204 n.4)). "[B]asic rules of grammar and punctuation" and the statutory history show that techniques and procedures are categorically protected. *Elec. Frontier Found. v. DHS*, No. C 12-5580 (PJH), 2014 WL 1320234, at *3 (N.D. Cal. March 31, 2014). *See* Defs.'s MSJ at 21 n.7.

In any event, disclosure of the FCD would create a reasonably expected risk of circumvention of the law. *See* Defs.' MSJ at 21-25. While Plaintiff contends DOJ has not proven that disclosure of the FCD risks producing "bad outcomes," Pl.'s Opp'n at 34-35, DOJ need only explain why disclosure "might increase the risk 'that a law will be violated or that past violators will escape legal consequences.'" *Pub. Emps.*, 740 F.3d at 205 (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)). This requirement "'sets a relatively low bar for the agency to justify withholding.'" *Gilman*, 2014 WL 984309, at *10-13 (citation omitted).

The requirement is met here. *See* Defs.' MSJ at 24-25. For example, disclosing "legal and investigative" techniques used by "investigators and Assistant United States Attorneys in conducting their criminal investigations . . . could provide criminals the information necessary to

evade or thwart detection[.]" *Soghoian*, 885 F. Supp. 2d at 75. In addition, disclosing the steps and strategies prosecutors employ to protect victims and witnesses, and to safeguard other legitimate law enforcement concerns, necessarily undermines those procedures, as individuals might use this information to defeat legitimate law enforcement efforts to protect witnesses. *See* Defs. MSJ at 23; Goldsmith Decl. II ¶ 14. Similarly, disclosing information in the FCD about how prosecutors obtain electronic and other forms of evidence and discovery from defendants might provide defendants information they could use to hide or destroy evidence. *Soghoian*, 885 F. Supp. 2d at 74-75. And disclosing candid assessments about argument and tactics prosecutors may employ to counter defense counsel strategies, as well as the limitations these arguments and tactics, might help defense counsel exploit "litigation hazards" and vulnerabilities of DOJ. *See Mayer Brown*, 562 F.3d at 1193-94; Goldsmith Decl. II ¶ 14.

DOJ has also sufficiently explained why, if defendants obtain discovery prematurely[14] or beyond that to which they are entitled, this might create a risk of circumvention of the law. Providing criminal defendants information on "the myriad legal, strategic, and tactical considerations" that go into the analysis of "delay[ing] or limit[ing] disclosure[s]" to protect legitimate law enforcement concerns might allow them to defeat these efforts and intimidate witnesses or retaliate against them, or hide or destroy evidence, and thus violate the law and escape punishment. Goldsmith Decl. I ¶¶ 9-11; Goldsmith Dec. II ¶14.

Contrary to Plaintiff's suggestion, DOJ is not "play[ing] games" by balancing a defendant's right to exculpatory information against other equally important law enforcement concerns in conducting discovery. *See* Pl.'s Opp'n at 36. As the Supreme Court and the D.C.

[14] Plaintiff is wrong that there cannot be a "premature disclosure of exculpatory evidence[.]" Pl.'s Opp'n at 35. Disclosure should only afford defendants sufficient time to make effective use of the information at trial, and there might be circumstances requiring prosecutors not to provide some information early. *See* USAM § 9-5.001(D).

Circuit have recognized, law enforcement concerns are properly taken into account in determining the manner, timing, and scope of disclosures. *Ruiz*, 536 U.S. at 632 (2002) ("[T]he careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both Congress and the Federal Rules Committees that such concerns [not disrupting investigation and protecting witnesses from serious harm] are valid."); *United States v. Celis*, 608 F.3d 818, 832 n.7 (D.C. Cir. 2010) ("'[P]retrial disclosure of a witness' identity or statement should not be made if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other person, or lead to efforts to obstruct justice[.]'") (citing USAM).

C. The FCD Is Not Reasonably Segregable Under Exemption 7(E).

Because the FCD "as a whole consists of law enforcement guidelines, and many of the law enforcement techniques, procedures, and guidelines described are interspersed within the legal analysis throughout the book, no part of the book can be segregated for disclosure under Exemption 7(E)." Gerson Decl. ¶ 35. "[D]isclosure of even general [law enforcement] guidance might reveal investigative techniques and considerations that could assist criminals in developing their own techniques for evading detection." *Soghoian*, 885 F. Supp. 2d at 75 (citation and quotation marks omitted). Thus, releasing any information about these investigatory and prosecutorial guidelines risks compromising their effectiveness and law enforcement objectives. *See Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) ("It is self-evident that information revealing security clearance procedures could render those procedures vulnerable and weaken their effectiveness[.]"). *See also* Golsmith Decl. I. ¶¶ 10-14; Goldmsith Decl. II ¶ 14.

Plaintiff notes that a "simple discussion of search and seizure law . . . and a digest of useful caselaw" was held to be segregable from a DOJ manual. Pl.'s Opp'n at 38 (citing *PHE v.*

DOJ, 983 F.2d 248, 251-52 (D.C. Cir. 1993)). Plaintiff again ignores that the FCD does not contain a neutral analysis of the law; it rather interweaves case law discussion within analysis and strategies for litigation to achieve law enforcement objectives. Gerson Decl. ¶ 21; Goldsmith Decl. I ¶ 12.

IV. AN *IN CAMERA* INSPECTION IS NOT NECESSARY

In camera inspections in FOIA cases are generally disfavored and "appropriate in only the exceptional case." *Elec. Privacy Info Ctr. v. DHS*, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) (citations omitted). An *in camera* inspection is not warranted when the agency's affidavits are sufficiently detailed and permit meaningful review. *Thompson v. EOUSA*, 587 F. Supp. 2d 202, 207 n.1 (D.D.C. 2008) (citing *Spirko v. USPS*, 147 F.3d 992, 997 (D.C. Cir. 1998)). Agency declarations are "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims." *CREW v. DOJ*, 949 F. Supp. 2d 225, 231 (D.D.C. 2013).

In this case, because Defendants have submitted a *Vaughn* Index and three declarations describing in sufficient detail why the FDC is protected from disclosure, an *in camera* inspection is not necessary. If, however, the Court concludes that the *Vaughn* Index or the declarations are insufficient, Defendants request the opportunity to submit revised documents. *See Elec. Priv. Info. Ctr.*, 384 F. Supp. 2d at 120 (ordering revised *Vaughn* Index). Alternatively, Defendants do not object to the Court's evaluation *in camera* of the FCD.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter summary judgment in their favor and deny Plaintiff's Cross-Motion for Summary Judgment.

Dated: September 2, 2014

Respectfully submitted,

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