

**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)

**DEFENDANTS’ REPLY TO PLAINTIFF’S RESPONSE TO DEFENDANTS’ MARCH
14, 2017 SUPPLEMENTAL DECLARATION**

The supplemental declaration of Associate Deputy Attorney General Andrew Goldsmith satisfies the Government’s segregability obligations arising from the D.C. Circuit’s decision in this case. *See* ECF No. 38-1 (“Supp. Decl.”). The Department of Justice (“DOJ”) has met its burden of identifying all “logically divisible” portions of the Blue Book that “contain[] non-exempt and reasonably segregable statements of the government’s discovery policy.” *See Nat’l Ass’n of Crim. Def. Lawyers (“NACDL”) v. DOJ et al.*, 844 F.3d 246, 257-58 (D.C. Cir. 2016). DOJ has released multiple portions of the Blue Book, including the Chapter referenced by the D.C. Circuit in explaining its decision to remand. And the Supplemental Declaration cogently explains why “the remaining logically divisible portions of the Blue Book contain protected attorney work product and are not reasonably segregable under the standards set forth in the D.C. Circuit’s opinion.” Supp. Decl. ¶ 23.

Although NACDL contends that “there are . . . a number of reasons to doubt” the Supplemental Declaration, ECF No. 39 (“Opp.”) at 1, much of NACDL’s response consists of efforts to relitigate issues the D.C. Circuit already resolved. The remainder of NACDL’s brief likewise supplies no sound basis for questioning the thorough analysis set forth in the Supplemental Declaration. The Government is entitled to summary judgment on this remaining issue.

ARGUMENT

I. MR. GOLDSMITH’S SUPPLEMENTAL DECLARATION SATISFIES THE GOVERNMENT’S SEGREGABILITY OBLIGATIONS

This case returns to the Court in a limited posture. The D.C. Circuit and this Court have both reviewed the Blue Book *in camera* and have both held that it consists of attorney work product that is exempt from disclosure under Exemption 5 of the Freedom of Information Act (“FOIA”). *See NACDL*, 844 F.3d at 257; *NACDL v. DOJ et al.*, 75 F. Supp. 3d 552 (D.D.C. 2014). The D.C. Circuit remanded the case back to this Court for a single purpose. The Court noted DOJ’s representations that the Government has made public its policy governing criminal discovery, that the Blue Book contains discussion of those public policy statements, and that one chapter of the Blue Book is entitled “Department of Justice Policy, Positions, and Guidance.” 844 F.3d at 257. In light of these representations, the D.C. Circuit deemed “it appropriate to assess whether the Blue Book contains non-exempt statements of policy that are reasonably segregable from the protected attorney work product.” *Id.* But the Court made clear that the segregability inquiry was limited. That analysis, it explained, “does not call for parsing the Blue Book ‘line-by-line’ or segregating material ‘dispersed throughout the document’” but only examining whether non-exempt material can be found in “logically divisible sections.” *Id.*

Mr. Goldsmith’s twenty-two page Supplemental Declaration—and the thorough segregability analysis contained in that declaration—demonstrates that no further segregation is possible or required under the standards set forth in the D.C. Circuit’s opinion.¹ Mr. Goldsmith began by explaining that, as DOJ’s National Criminal Discovery Coordinator since 2010, he spearheaded the creation of the Blue Book and that he is “intimately familiar with the Blue Book’s content and purpose, as well as the role played by each of its individual Chapters, sections, and sub-sections.” Supp. Decl. ¶ 14. Mr. Goldsmith went on to note that he “conducted a careful review of the Blue Book to determine. . . whether any ‘logically divisible’ portions of the Blue Book ‘contain[] non-exempt and reasonably segregable statements of the government’s discovery policy,’” *id.* ¶ 8, and that, in conducting this review, he examined each of the Blue Book’s Chapters, sections, and sub-sections (where sub-sections exist), *id.* ¶ 10.

Mr. Goldsmith concluded that Chapter One of the Blue Book—which is titled “Department of Justice Policy, Positions, and Guidance” and is the only Chapter discussed by the D.C. Circuit, which reviewed the Blue Book in camera, in explaining its decision to remand—could be disclosed to Plaintiff. Supp. Decl. ¶¶ 16-17. Chapter One, Mr. Goldsmith explained, has three features that are not shared by the other Chapters: (1) “the purpose and content of Chapter One relates to DOJ’s public discovery policy and not, like later chapters, to legal analysis, legal advice, and legal strategy”; (2) Chapter One is self-contained and, unlike later Chapters, does not expressly refer to later Chapters or reveal content from those Chapters; and (3) “unlike the remaining Chapters, Chapter One does not discuss non-public litigation strategy.” *Id.* ¶ 17. Mr. Goldsmith further determined that two sub-sections of Chapter Six summarizing a prior version of DOJ’s *Giglio*

¹ Because the Government did not file a brief with the Supplemental Declaration, we discuss the adequacy of that Declaration at some length herein.

policy could be released, because these sub-sections “are devoted to describing Department of Justice discovery policy and, as a practical matter, do not include any legal analysis, practical advice, or other work product.” *Id.* ¶ 21. The Government also released the Blue Book’s cover page and a portion of the table of contents. *Id.* ¶¶ 18-20.

The Supplemental Declaration goes on to describe why “the remaining logically divisible portions of the Blue Book contain protected attorney work product and are not reasonably segregable under the standards set forth in the D.C. Circuit’s opinion.” Supp. Decl. ¶ 23. Unlike Chapter One—which provides prosecutors with a summary of DOJ discovery policy, primarily by reference to two public documents setting forth that policy—“each remaining Chapter of the Blue Book provides comprehensive legal analysis and advice on criminal discovery practices and legal strategies prosecutors should employ during the course of criminal proceedings” and, with the exception of the two released sub-sections in Chapter Six, “any discussion of policy contained therein is inextricably intertwined with that legal advice and strategy.” *Id.* ¶ 27.

The Supplemental Declaration then addresses each of the remaining eight Chapters. As to each Chapter, the Supplemental Declaration: discusses the specific subject related to criminal discovery practice that the Chapter addresses; provides an overview of the topics covered in the Chapter; and explains the purpose of the Chapter as it relates to DOJ’s criminal prosecutions (e.g., providing legal analysis and advice). *See* Supp. Decl. ¶¶ 29-67. And as to each remaining Chapter except Chapter Six,² the Supplemental Declaration explains that none of the Chapter’s sections or

² Because DOJ has released two sub-sections of Chapter Six, it is treated differently in the Supplemental Declaration. For the remainder of Chapter Six, Mr. Goldsmith explains, *inter alia*, that “[t]he Chapter articulates legal standards, and relevant case law in the context of providing litigation advice to prosecutors,” that “[a]longside or integrated within the standards are specific advice to prosecutors about litigation strategy, pitfalls to avoid, and related practice tips” and that “[a]side from the two released sub-sections, there are no reasonably segregable, logically divisible units of Chapter Six that are not exempt as attorney work product.” Supp. Decl. ¶ 54.

sub-sections are devoted to summarizing DOJ discovery policy, and that any discussion of discovery policy in each Chapter is incidental to—and interwoven with—the Chapter’s advice, guidance, and/or discussion of legal authorities. *See id.* ¶¶ 32, 36, 41, 46, 57, 61, 65.

Finally, the Supplemental Declaration addresses the remainder of the Blue Book—the introduction and overview, table of contents, and index. The introduction and overview “does not contain statements of policy” but instead “includes a summary of the Blue Book and the matters discussed in each of the Chapters” as well as “the role of the Blue Book in the broader context of resources prosecutors should consult—and issues they should keep in mind—in conducting federal criminal prosecutions.” Supp. Decl. ¶ 69. The non-released portions of the table of contents—which lists the approximately 240 combined sections and subsections of Chapters Two-Nine—“would provide an extraordinarily detailed roadmap of the Blue Book, including but not limited to an itemization of the many issues and considerations the Department believes prosecutors should address at each stage of the discovery process.” *Id.* ¶ 68. A similar rationale applies to the index.³

The Blue Book has already been reviewed *in camera* and determined to have been prepared in anticipation of litigation. The Government’s detailed submission is more than sufficient to demonstrate that no further segregation of this work product document is required.

II. NACDL’S CONTRARY ARGUMENTS ARE UNPERSUASIVE

Notwithstanding DOJ’s detailed submission and the limited scope of the D.C. Circuit’s remand, NACDL speculates that “there is reason to believe that a substantially larger set of subsections must be released.” Opp. at 8. In support of this assertion, NACDL argues that: (1)

³ The Supplemental Declaration explains that the index “not only includes all or virtually all of the section and sub-section titles, but also explains how particular sections/sub-sections relate to dozens of alphabetized topics that are discussed in the bodies of those sections/sub-sections.” Supp. Decl. ¶ 68. “Releasing this material would provide such a detailed composition of the Blue Book that doing so would itself reveal attorney work product.” *Id.*

the Blue Book contains “neutral” or “descriptive” content that must be released; (2) the Blue Book may itself create policy that is not exempt from disclosure; (3) not all of the Blue Book’s legal analysis and advice is protected work product; and (4) the Court should accord little weight to the Supplemental Declaration because, according to NACDL, the Government has in the past described the Blue Book in inconsistent ways. None of these arguments have merit.

A. NACDL’s Arguments Concerning “Neutral” or “Descriptive” Content are Foreclosed by the D.C. Circuit’s Decision

NACDL begins its argument by offering an extended discussion of what it sees as the contours of the work product doctrine, *Opp.* at 4-7, at the conclusion of which it urges the Court to “differentiate strategic content designed to help DOJ defeat criminal defendants from neutral, descriptive content that educates prosecutors about their disclosure obligations,” *id.* at 7. As an initial matter, the D.C. Circuit has already concluded that the Blue Book consists of exempt attorney work product after rejecting NACDL’s numerous arguments to the contrary. The Court remanded for the sole purpose of determining whether the Blue Book contains “non-exempt and reasonably segregable statements of the government’s discovery policy” found in “logically divisible sections.” 844 F.3d at 257-58. This is a limited inquiry that clearly does not justify NACDL’s attempt to relitigate the scope of the work product doctrine more generally.

Moreover, NACDL’s request—that the Court “differentiate strategic content designed to help DOJ defeat criminal defendants from neutral, descriptive content that educates prosecutors about their disclosure obligations,” *Opp.* at 7—is specifically foreclosed by the D.C. Circuit’s decision, since the panel considered and rejected this exact argument. Noting NACDL’s argument that the Blue Book could not be withheld insofar as it consists of “neutral recitation of legal rules or case law . . . as opposed to a description of a lawyer’s litigation strategy or theory of the case,” the D.C. Circuit reasoned that “the latter category more fairly describes the Blue Book than does

the former.” 844 F.3d at 256. In any event, the Court noted, “disclosure of the publicly-available information a lawyer has decided to include in a litigation guide—such as citations of (or specific quotations from) particular judicial decisions and other legal sources—would tend to reveal the lawyer’s thoughts about which authorities are important and for which purposes.” *Id.* The D.C. Circuit’s directly on point analysis of this already-litigated issue precludes NACDL’s contrary arguments here.

This argument is inconsistent with the D.C. Circuit’s decision in other ways as well. For one, the D.C. Circuit remanded this case for segregation only of non-exempt statements of the Government’s *discovery policy*, not all content that could be characterized as “neutral” or “descriptive.” And even were such an inquiry possible, identifying and isolating all content that could be characterized as neutral or descriptive would almost certainly require a line-by-line review, which the D.C. Circuit took pains to emphasize that it was not requiring. *See p. 2, supra.* The Court should reject NACDL’s attempt to resurrect an issue that this Court and the D.C. Circuit already decided.

B. The Blue Book Does Not Create Policy that is Subject to Disclosure

NACDL next speculates that the Blue Book could itself create policy and “[i]f that is the case, then any statements describing those policies would be subject to disclosure under the D.C. Circuit’s opinion.” *Opp.* at 9. This argument likewise lacks merit.

Initially, where an agency record constitutes attorney work product (as the Blue Book does), the Government does not agree with NACDL’s apparent argument that a *confidential* policy related to how attorneys should conduct litigation that is described in that record would be subject to disclosure (particularly if the policy were designed to help the Government prevail in Court or for a similar purpose). The D.C. Circuit’s opinion—which remanded for a segregability

determination after noting that the Blue Book contains discussion of the Government’s *public* policy statements, *see* 844 F.3d at 257-58—certainly does not support any such assumption. And as the Government has previously explained in this case, the “working law” concept does not apply to documents protected as work product. *See* ECF No. 20 at 3-5.

The Court, however, need not address this issue because the Government has explained that the Blue Book does *not* create Government discovery policy. As Mr. Goldsmith previously noted, the Blue Book “does not establish new rules or policies that prosecutors have an obligation to follow in all investigations and prosecutions.” ECF No. 20-1 (Goldsmith Decl. II) ¶ 7. 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 Blue Book, by contrast, 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.* ¶ 7; *accord* Supp. Decl. ¶¶ 24-27. NACDL’s conjecture on this point accordingly fails.

Relatedly, NACDL contends “that if a subsection of the Blue Book directs a prosecutor to consider two or more factors in determining how to proceed, or if it directs a prosecutor to take an action only in limited circumstances,” such a directive must be disclosed. *Opp.* at 9. But even if this were correct,⁴ again, the Blue Book “does not establish new rules or policies that prosecutors

⁴ As noted above, the Government does not agree that a confidential policy related to how attorneys should conduct litigation that is described in a work product document would be subject to disclosure. And NACDL does not cite any support for its apparent argument that work product cannot include anything that could be characterized as a “directive.”

have an obligation to follow in all investigations and prosecutions.” Goldsmith Decl. II ¶ 7. And although NACDL cites to several statements from the Supplemental Declaration, none of those passages supports NACDL’s apparent hypothesis that the corresponding portions of the Blue Book contain discovery policy directives. Rather, a complete examination of these passages makes clear that they describe legal analysis, practical guidance, and related work product.⁵ And to the extent NACDL is arguing that the Blue Book’s legal analysis and practical guidance on issues related to criminal discovery is itself a “policy” subject to disclosure, that is clearly not the law nor what the D.C. Circuit had in mind.

C. The Blue Book’s Legal Analysis and Advice is Protected Work Product

Noting the Supplemental Declaration’s various representations that the Blue Book consists of legal analysis and advice, NACDL next asserts that “DOJ appears to incorrectly presume that all legal ‘analysis’ and ‘advice’ categorically warrants work-product protection.” Opp. at 10. But once again, NACDL is seeking to relitigate issues decided by the D.C. Circuit, as the Court concluded that the Blue Book’s analysis and advice was work product, *see* 844 F.3d at 252, and remanded solely to consider whether the Blue Book contains any segregable, non-exempt statements of discovery policy, *id.* at 257.

⁵ *See* Supp. Decl. ¶ 30 (noting that the Introduction and first subsection of Chapter Two cite Department of Justice policies, “but in the context of identifying several factors that may affect the scope of the prosecution’s discovery obligations,” while further explaining, *inter alia*, that the Chapter discusses the factors prosecutors should consider in determining the scope of their search for discoverable information, and that “[p]articular cases are cited to illustrate how the rules work and are applied in practice”); *id.* ¶¶ 56-57 (explaining, *inter alia*, that Chapter Seven discusses the legal framework for obtaining a protective order and procedural options for doing so, as well as various strategic considerations, while further noting that “[t]he sources of legal authority discussed throughout the Chapter are the sources principally governing protective orders and *ex Parte/in Camera* submissions, namely Federal Rules of Criminal Procedure, specific statutes, and the case law,” not DOJ discovery policy).

Even if the D.C. Circuit had not resolved this issue, NACDL's argument is meritless. NACDL contends that "work-product analysis considers the content and purpose of the material" and that "a policy manual" like the USAM "may include analysis or advice and still be a policy manual that does not trigger the work-product privilege." Opp. at 11. Perhaps so, but the Blue Book is *not* a policy manual. Unlike the USAM mentioned by NACDL—which "was intended to establish DOJ policy regarding a range of issues, including federal criminal discovery," Supp. Decl. ¶ 26—the Blue Book "has a different function," *id.* ¶ 27, namely, "to provide advice regarding the law and practice of federal prosecutors' discovery disclosure obligations and to serve as a litigation manual to be used by all DOJ prosecutors and paralegals" in their cases, *id.* ¶ 24. And the D.C. Circuit has already held that the Blue Book was prepared in anticipation of litigation and thus consists of work product. *See* p. 2, *supra*.

Contrary to NACDL's argument, legal analysis and advice *in a document prepared in anticipation of litigation* is—definitionally—work product. *See, e.g., In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998) (finding work-product privilege applicable to "lawyer-prepared documents containing tips and advice for litigating cases" (describing *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992))). In any event, the Government does not merely invoke "buzzwords [as a] substitute for critical analysis of the Blue Book." Opp. at 12. As noted above, for each of the eight remaining Chapters, the Supplemental Declaration discusses the specific subject addressed by that Chapter (which is *not* DOJ discovery policy), provides an overview of the Chapter's topics, and explains the purpose of the Chapter as it relates to DOJ's criminal prosecutions. Supp. Decl. ¶¶ 29-67; pp. 4-5, *supra*. That is clearly sufficient to demonstrate that the Blue Book's legal analysis, advice, practical guidance, and related material is work product, not non-exempt statements of the Government's discovery policy.

D. NACDL’s Allegations of Inconsistency are Irrelevant but, in any Event, Without Merit

Finally, NACDL contends that the Court should accord little weight to the Supplemental Declaration because, NACDL asserts, “DOJ’s current characterization of the Blue Book is in direct conflict with its prior testimony before Congress, in which it described the Book as a quintessential government policy manual.” Opp. at 1; *see also id.* at 2 (arguing that “DOJ’s description of the Blue Book has changed again and again”); *id.* at 13 (contending that “at every turn DOJ has described the Blue Book in self-serving and contradictory ways”). NACDL’s claims of inconsistency—based primarily on congressional testimony that is now five years old—are irrelevant to the segregability issue remaining before the Court. In any event, NACDL’s attempt to manufacture inconsistency falls flat.

NACDL points to written 2012 congressional testimony—from then-Deputy Attorney General (“DAG”) James Cole—that the Blue Book “comprehensively covers the law, policy, and practice of prosecutors’ disclosure obligations.” Opp. at 2 (quoting ECF No. 16-2, Exh. H at 4). NACDL offers little in the way of argument as to why this isolated quote is inconsistent with the Government’s representations in this case. And it is not: as to the law and practice aspect of this quote, the Blue Book *does* cover the law and practice of prosecutors’ disclosure obligations. It “was designed to provide advice regarding the law and practice of federal prosecutors’ discovery disclosure obligations and to serve as a litigation manual to be used by all DOJ prosecutors and paralegals” in their cases. Supp. Decl. ¶ 24 (quotation marks omitted). And as to policy, DOJ also does not deny that the Blue Book contains discussion of DOJ discovery policies and has never claimed otherwise—indeed, its representations on this topic are what *caused* the D.C. Circuit to remand this case, *see* 844 F.3d at 257—and the Supplemental Declaration explains that the

Government has released all segregable statements of the Government's discovery policy located in logically divisible sections. *See* Supp. Decl. ¶ 28.

Moreover, DAG Cole's broader testimony reinforces DOJ's position in this case. Prior to the quote NACDL cites as well as on page five of that testimony, DAG Cole extensively discusses the USAM and the three Ogden memos—making clear that these public documents comprise DOJ's discovery policy—and he characterizes the Blue Book, by contrast, as one of ten steps to, among other things, “provide[] prosecutors with key discovery tools such as online manuals and checklists.” ECF No. 16-2, Exh. H at 3-5. Finally, to the extent the quote NACDL highlights suggests that the Blue Book might serve some additional purposes, such as education and training of prosecutors, the D.C. Circuit has already held that “any educational or training function the Blue Book might serve would not negate the document's adversarial use in (and its preparation in anticipation of) litigation.” 844 F.3d at 255.

The remainder of NACDL's argument on this point is likewise insubstantial. The second Congressional testimony quote that NACDL cites—a vague reference to prosecutors and agents having “a full appreciation of their responsibilities,” Opp. at 2 (quoting ECF No. 16-2, Exh. H at 1)—is also not inconsistent with anything DOJ has said in this case and, in any event, does not even relate specifically to the Blue Book. And although NACDL criticizes DOJ's assertion that the Blue Book is work product, the D.C. Circuit resolved that issue. *Compare* Opp. at 3 (disparagingly asserting that “the Blue Book became a compilation of strategic advice designed to help prosecutors outwit criminal defendants in court”), *with* 844 F.3d at 255 (holding that “the Blue Book was designed to help federal prosecutors prevail in court on behalf of the government”).

Finally, NACDL's assertion that DOJ “pivoted once again” following the D.C. Circuit's decision, Opp. at 4, is baseless. During prior proceedings in this case, DOJ took the position that,

because the Blue Book was protected as attorney work product, the segregability requirement did not apply. *See* ECF No. 20 at 19 (arguing that “it is well-established that FOIA’s segregability requirement does not apply to documents protected as attorney work product”); *id.* at 20 (asserting that “when documents ‘are attorney work product, the[ir] entire contents – i.e., facts, law, opinions, and analysis – are exempt from disclosure under FOIA’” (quoting *Judicial Watch v. DOJ*, 432 F.3d 366, 371-72 (D.C. Cir. 2005))). After the D.C. Circuit issued its opinion—for the first time imposing a limited segregability inquiry for “voluminous” work product records—the Government identified the “logically divisible” portions of the Blue Book containing non-exempt and reasonably segregable statements of the Government’s discovery policy, as directed by the D.C. Circuit. NACDL’s argument based on inconsistency is simply without merit.

III. THE NON-RELEASED PORTIONS OF THE BLUE BOOK ARE ALSO EXEMPT FROM DISCLOSURE UNDER EXEMPTION 7(E)

The D.C. Circuit instructed that “[i]f the district court concludes that the Blue Book contains non-exempt and reasonably segregable statements of the government’s discovery policy, the court could then consider whether Exemption 7(E) of FOIA would protect any of that material from disclosure.” 844 F.3d at 257-58. Should the Court conclude that any additional portions of the Blue Book cannot be withheld under Exemption 5, the Government respectfully refers the Court to its prior submissions in this case, which explain the Exemption 7(E) implications of releasing additional content from the Blue Book. *See* Supp. Decl. ¶ 74. In light of the foregoing, however, the Government respectfully submits that such an additional inquiry is unnecessary.

CONCLUSION

The Government respectfully requests that the Court grant the Government summary judgment on the issue of segregability, and dismiss all of Plaintiff’s remaining claims.

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Respectfully submitted,

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