

Congress “neither requested nor required [DOJ] to provide a full and detailed description” of the Blue Book; (2) DOJ’s attempt, partly through a brand new declaration, to distinguish the Blue Book from other publicly available criminal discovery documents; and (3) DOJ’s failure to provide a proper response to the majority of Plaintiff’s Statement of Material Facts.

1. **DOJ’s New Description of the Blue Book in Contrast to its Statements to Congress**

In its Complaint, NACDL set forth the descriptions of the Blue Book that DOJ provided during Congressional hearings over proposed discovery reforms in the wake of the prosecutorial abuses in the Stevens case. (Dkt. 1, ¶¶24-28). DOJ chose not to include any argument or set forth its position regarding its representations to Congress in its Summary Judgment motion (Dkt. No. 13-1), and therefore NACDL did not know DOJ’s position on that issue (raised in NACDL’s complaint) and could not address it in NACDL’s own Opposition. In NACDL’s cross-motion for summary judgment, however, NACDL raised affirmative arguments regarding DOJ’s representations to Congress, its inconsistent descriptions of the Blue Book in this litigation, and the implications of those discrepancies. (Dkt. Nos. 20-1, 20-2). Now, in its Opposition/Reply brief, DOJ for the first time addresses what it told Congress. DOJ acknowledges, but does not dispute, NACDL’s position that the description of the Blue Book given to Congress differs from the description DOJ is advancing in this case. (Dkt. 20, fn 5). The discrepancy, DOJ now claims, is a result of no one in Congress asking for a “full and detailed” description of the Blue Book. (Dkt. 20, fn 5). DOJ’s argument on this issue is either exclusively in opposition to NACDL’s Cross Motion for Summary Judgment (necessitating a reply), or is a new argument raised for the first time in DOJ’s Reply Brief (necessitating a surreply). The substance and nature of the Blue Book’s contents are, of course, directly relevant to the parties’ arguments in this case regarding whether the Blue Book must be disclosed. NACDL requests leave to file a reply and/or surreply to explain how this admitted discrepancy

between DOJ's descriptions of the Blue Book call for disclosure of the Blue Book or at a minimum an *in camera* review.

2. DOJ's New Attempt to Distinguish the Blue Book from Other DOJ Statements Regarding Criminal Discovery

As NACDL explained in its Motion for Summary Judgment, "DOJ's treatment of similar documents also shows that the Blue Book is a statement of policy and interpretation that should be public." (Dkt. 15,16 at 12). In opposition, and thus, for the first time in its briefing, DOJ offers an explanation of why the Blue Book is purportedly different from two affirmatively disclosed criminal discovery documents NACDL discussed in its Summary Judgment brief. And, while DOJ correctly notes that agency working law can be withheld from production under the work-product privilege, that argument pre-supposes that the Blue Book qualifies as attorney work-product, which it does not. (*See* Dkt. 20 §I). Indeed, the breadth of the attorney-work product privilege that DOJ advances in this case would result in a near limitless ability for a law enforcement agency like DOJ to preclude disclosure under FOIA. In any event, DOJ's treatment of these other criminal discovery documents illustrates why the Blue Book is not work-product and cannot be withheld by DOJ. And, as noted in NACDL's Supplemental Authority, the United States District Court for the District of Oregon has found the Blue Book to not qualify as work-product.

Because DOJ's position on this issue first arose in response to NACDL's cross-motion for summary judgment, NACDL should be permitted to file a reply in support of its motion to explain how DOJ's attempt to distinguish the Blue Book from the other publicly available criminal discovery documents fails, and to explain how the Oregon District Court decision affects this case.

3. **DOJ Completely Failed to Respond to NACDL's Statement of Material Facts**

As required by Local Rule 7(h) and this Court's Order Establishing Procedures, NACDL provided a statement of material facts in numbered paragraphs. DOJ was required to respond "to each paragraph with a correspondingly numbered paragraph, indicating whether that paragraph is admitted or denied." (Dkt. 4 at 6). DOJ failed to do so. Instead, DOJ responded to NACDL's 39 separately numbered paragraphs with but two bullet points. For 35 of NACDL's paragraphs, DOJ responded with a self-serving conclusion—and no explanation—that the statements were "not material to resolving this case...and [DOJ] need not respond to these allegations." NACDL requests an opportunity to explain in a reply brief how these statements, which should now be deemed admitted per Local Rule 7(h), call for the disclosure of the Blue Book or its *in camera* review.

For the foregoing reasons, NACDL requests leave to file a Reply in support of its Cross Motion For Summary Judgment and/or a Surreply to Defendant's Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed with the Court via the CM/ECF system. The foregoing was served this 11th day of September, 2014, on the following filing users by the CM/ECF system:

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