

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION
PROJECT OF THE NATIONAL
LAWYERS GUILD, *et al.*

Plaintiffs,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Defendant.

Civil Action No. 17-2448 (APM)

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Mijente Support Committee and Detention Watch Network move for summary judgment in this Freedom of Information Act (FOIA) case against defendant Immigration and Customs Enforcement (ICE) on the ground that there is no genuine issue of disputed material fact and plaintiffs are entitled to judgment as a matter of law.¹ In support of this motion, the plaintiffs submit the accompanying Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment; Plaintiffs' Response to Defendant's Statement of Material Facts Not in Genuine Dispute and Plaintiffs' Cross-Statement of Undisputed Facts; declaration of Patrick D. Llewellyn; and a proposed order.

¹ Former plaintiff National Immigration Project of the National Lawyers Guild (NIPNLG) voluntarily withdrew from this case by stipulation filed on April 5, 2019 (ECF 20). This cross-motion and the accompanying papers use the original caption because the Court has not ordered the caption to be changed to reflect NIPNLG's voluntary dismissal.

February 12, 2020

Respectfully submitted,

/s/ Nandan M. Joshi

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**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Mijente Support Committee and Detention Watch Network brought this action under the Freedom of Information Act (FOIA) to obtain documents relating to a mass immigration enforcement operation known as “Operation Mega” that was planned by defendant Immigration and Customs Enforcement (ICE). After several months of production, the sole question remaining in this case is whether ICE has satisfied its disclosure obligation with respect to a document entitled “Criminal Street Gangs Investigations Handbook” (the Handbook). *See* ECF 32-2 (Pineiro Decl. Ex. 1). ICE invokes two FOIA exemptions—exemptions 5 and 7(E)—to withhold large portions of the Handbook. Because ICE has failed to satisfy its burden under FOIA for justifying its redactions, the Court should grant plaintiffs’ cross-motion for summary judgment and deny ICE’s motion for summary judgment.

FACTS

Plaintiffs filed this FOIA action against ICE in November 2017 to compel ICE to produce records responsive to FOIA requests seeking records relating to a planned immigration enforcement action known as “Operation Mega” and any related immigration actions. Pursuant to a schedule agreed to by the parties as set forth in a Court order and status reports filed with the Court, ICE throughout 2018 and early 2019 produced records responsive to the plaintiffs’ FOIA request. Pineiro Decl. ¶ 6; ECF 13 (Joint Status Report) (Jan. 8, 2018); Order of Jan. 9, 2018; ECF 14 (Joint Status Report) (Mar. 6, 2018). One of the documents produced was a 12-page “gang membership identification training course,” entitled “HSI: Homeland Security Investigations, Gang Member Identification Training Course.” Pineiro Decl. ¶ 7; Llewellyn Decl. ¶ 2 & Ex. A.

The “gang membership identification training course” consists of a slide deck covering the following topics (as indicated by the page headings): “Gang Member Identification Training—Objectives,” “Gang Definition,” “Identifying Criteria,” “Membership Definitions,” “ICM Codes,” and “Best Practices.” Llewellyn Decl. Ex. A. The final page of the slide deck provides “Contact Information” and the email address of the HSI Contraband and Gang Unit. *Id.* The page also lists two “Sources” for the deck: “Gangs Handbook (DRAFT)” and “OI-M-08-0404, April 8, 2008, OI Director Marcy M. Forman Memorandum ‘TECS-II Subject Record Enhancements for Worksite Enforcement/Community Shield.’” *Id.*; *see* Llewellyn Decl. Ex. B (Forman Memo).

At issue in this motion is the record identified as “Gangs Handbook (DRAFT),” which is a reference to the Handbook. *See* Pineiro Decl. ¶ 9. According to ICE’s Acting FOIA Officer, Fernando Pineiro, the Handbook is a draft document dated April 10, 2017, which ICE finalized on August 13, 2018. *Id.* ¶¶ 9–10 & n.3. ICE produced the Handbook to plaintiffs on November 14, 2019, making several redactions under exemptions 5 and 7(E). ICE subsequently made two

supplemental productions of the Handbook with fewer redactions, with the final production occurring on January 15, 2020, the date on which ICE filed its motion for summary judgment. *Id.* ¶¶ 9–12.

The 48-page Handbook consists of a cover page, a foreword, a table of contents, twelve chapters, and four appendices. Pineiro Decl. Ex. 1. ICE has now disclosed in full the cover page, foreword, chapter titles, Chapter 1, and the definitions of “gang” and “gang member” in Chapter 3. *Id.* ICE continues to withhold all other parts of the Handbook, *i.e.*, the subchapter headings, the other definitions in Chapter 3, the content of all other chapters, and the appendices. *Id.*

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when “there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Court reviews the agency’s claimed exemptions de novo. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

In a FOIA case, the agency has the burden of proving that withheld information comes within one of FOIA’s nine statutory exemptions. 5 U.S.C. § 552(a)(4)(B); *Summers v. Dep’t of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Summary judgment for the agency is appropriate only if the agency’s “affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). The burden on the agency to justify its withholdings “does not shift even when the requester files

a cross-motion for summary judgment because ‘the Government ultimately has the onus of proving that the documents are exempt from disclosure,’ while the ‘burden upon the requester is merely to establish the absence of material factual issues before a summary disposition of the case could permissibly occur.’” *Ctr. for Biological Diversity v. U.S. Env’tl. Prot. Agency*, 279 F. Supp. 3d 121, 137 (D.D.C. 2017) (internal quotation marks and brackets omitted) (quoting *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999)).

ARGUMENT

I. ICE has not carried its burden of showing that the Handbook redactions fall under exemption 5.

A. Under exemption 5, an agency may withhold “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). A document falls within the scope of exemption 5 only if it “satisf[ies] two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). Among the privileges incorporated by exemption 5 is the deliberative process privilege, *Abtew v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015), which is the sole privilege that ICE invokes here.

To qualify for the deliberative process privilege, “an agency’s materials must be both ‘predecisional’ and a part of the ‘deliberative process.’” *Formaldehyde Inst. v. Dep’t of Health & Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989). A document is predecisional “if it precedes, in temporal sequence, the ‘decision’ to which it relates.” *Senate of the Commonwealth of P.R. on Behalf of Judiciary Comm. v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). A “document is deliberative if it is ‘a part of the agency give-and-take—of the deliberative process—

by which the decision itself is made.’” *Abtew*, 808 F.3d at 899 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

Of particular relevance here, a document otherwise falling under exemption 5 “can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). This rule prevents an agency from “develop[ing] a body of ‘secret law’ used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as ‘formal,’ ‘binding,’ or ‘final.’” *Id.* at 867. Therefore, the “designation of the documents ... as ‘drafts’ does not end the inquiry” into whether exemption 5 applies. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982).

B. According to ICE, the April 2017 version of the Handbook is “subject to the deliberative process in its entirety by the nature of it being a draft document,” Pineiro Decl. ¶ 17, of a final handbook dated August 2018. ECF 32 (Def.’s Mem. in Support of Mot. for Summary Judgment (ICE Mem.)) at 6. The undisputed evidence, however, shows that ICE did not wait for the Handbook to be officially finalized before “expressly adopt[ing]” it as policy. *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 11 (D.C. Cir. 2014).

ICE identified the “Gangs Handbook (DRAFT)” as one of only two sources of material for the slide presentation that was used to train ICE staff on how to identify gang members. *See* Pineiro Decl. at 3 n.2. The other source material, the Forman Memo, consists of a memorandum just over a page in length that focuses on database entry of the “criminal affiliation” and “position” of gang members. Llewellyn Decl. Ex. B. The bulk of the topics discussed in the training—such as objectives, definitions, strategies, and best practices—do not appear in the 2-page Forman Memo but line up with subjects covered in the 48-page Handbook, such as “PURPOSE AND SCOPE,”

“DEFINITIONS,” “RESPONSIBILITIES,” and “INVESTIGATIVE STRATEGIES.” Pinero Decl. Ex. 1. The only reasonable inference is that ICE relied on the April version of the purportedly “draft” Handbook to train its personnel. Nothing in Mr. Pineiro’s declaration refutes that inference. He does not explain, for example, why ICE would refer its personnel to the Handbook if it did not, in fact, embody ICE policy at the time of the training, and he does not contest that ICE used the April Handbook for training purposes.

In these circumstances, ICE cannot invoke the deliberative process privilege to withhold the Handbook under exemption 5. “[T]he protection from FOIA ends abruptly the moment a decision is made” by an agency, and “documents ‘which embody the agency’s effective law and policy’ are also subject to FOIA-mandated production.” *Am. Soc’y of Pension Actuaries v. IRS*, 746 F. Supp. 188, 190 (D.D.C. 1990) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)). By incorporating the Handbook into its “instructions or advice to staff,” the Handbook became “the ‘working law’ of the agency” and represented an “accurate representation of agency policy.” *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 682–83 (D.C. Cir. 1981). And because “[d]ocuments reflecting [an agency’s] formal or informal policy on how it carries out its responsibilities fit comfortably within the working law framework,” *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010), ICE “has failed to meet its burden of demonstrating that Exemption 5 covers the documents in their entirety,” *id.* at 877. By giving the Handbook “operative effect,” ICE has “forfeit[ed] Exemption 5’s protection.” *Abtew*, 808 F.3d at 899.

II. ICE has not carried its burden of showing that its Handbook redactions fall under exemption 7(E).

Exemption 7(E) allows an agency to withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records

or information ... would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Contrary to ICE’s suggestion, ICE Mem. at 10, this Circuit requires agencies seeking to invoke exemption 7(E) to demonstrate that “disclosure could reasonably be expected to risk circumvention of the law.” *See Sack v. U.S. Dep’t of Defense*, 823 F.3d 687, 694 (D.C. Cir. 2016) (“Under Exemption 7(E), the Government must demonstrate (i) that the withheld records or information ‘would disclose techniques and procedures for law enforcement investigations’ and (ii) that their disclosure would reasonably ‘risk circumvention of the law.’”).

When an agency invokes exemption 7(E), it cannot rest on “near-verbatim recitation of the statutory standard,” but “must at least provide *some* explanation of what procedures are involved and how they would be disclosed.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 746 F.3d 1082, 1102 (D.C. Cir. 2014) (*CREW*). “Because only the agency knows the substance of the withheld information, the agency affidavits have immense significance,” and “an affidavit that contains merely a ‘categorical description of redacted materials coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate’” to support the agency’s motion for summary judgment. *PHE, Inc. v. Dep’t of Justice*, 983 F.2d 248, 250 (D.C. Cir. 1993) (quoting *King v. United States Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir.1987)).

ICE has failed to satisfy these standards. Mr. Pineiro’s declaration contains only three statements pertinent to ICE’s invocation of exemption 7(E). First, he asserts that “Exemption 7(E) supports the withholding in full of the Handbook” because the Handbook “was compiled for law enforcement purposes and its release would disclose techniques and/or procedures for law enforcement investigations.” Pineiro Decl. ¶ 23. This statement is nothing more than a “near-

verbatim recitation of the statutory standard” that cannot justify withholding the Handbook. *CREW*, 746 F.3d at 1102.

Second, ICE’s declarant asserts that, because the Handbook is “devoted to the investigations of criminal street gangs and reflects techniques, procedures and guidelines [sic] the conduct, coordination, tracking, and funding of such investigations,” its disclosure “would risk circumvention of the law by providing a ‘how to manual’ that would allow street gang members to avoid investigation and prosecution and thus circumvent the law.” Pineiro Decl. ¶ 25. This statement merely gives a “categorical description of redacted materials coupled with categorical indication of anticipated consequences of disclosure”—which also is insufficient to satisfy ICE’s burden to justify withholding the Handbook. *PHE*, 983 F.2d at 250 (quoting *King*, 830 F.2d at 224); *see also id.* at 252 (agency’s assertion that disclosure would “provide defendants with ‘a crystal ball view of what they will face from the prosecution’” insufficient to invoke Exemption 7(E)). For instance, ICE has disclosed training slides that describe characteristics that help identify gang members and list various best practices that agents should follow. *See* Llewellyn Decl. Ex. A. ICE has failed to explain why similar information that may be contained in the Handbook must be redacted to prevent disclosure of law-enforcement techniques or circumvention of the law.

Finally, Mr. Pineiro’s declaration contains a brief description of the topics covered by the withheld chapters of the Handbook. Pineiro Decl. ¶ 24. Exemption 7(E) requires, however, a “specific affidavit containing more precise descriptions of the nature of the redacted material and providing reasons why releasing *each withheld section* would create a risk of circumvention of the law.” *PHE*, 983 F.2d at 252 (emphasis added). In *PHE*, for example, the Court found that an agency’s affidavit “provide[d] almost no reason” for withholding “vast sections of its *Obscenity*

Manual” under exemption 7(E), where the affidavit identified only the titles and topics covered by the manual’s withheld chapters. *Id.* at 251–52.

Likewise, ICE, in the Pinero Declaration, does not adequately describe “what procedures are at stake” nor “how disclosure [of the Handbook’s chapters] could reveal such procedures.” *CREW*, 746 F.3d at 1102. That failure is especially striking when it comes to the almost complete redaction of the Table of Contents and Chapters 2 through 5 and 12 (titled Introduction, Definitions, Authorities/References, Responsibilities, and Funding Mechanisms for Gang Investigations), which seem particularly unlikely to contain a description of law-enforcement procedures whose disclosure would risk circumvention of the law. *See PHE*, 983 F.2d at 251–52 (concluding that the affidavit failed to “explain why the agency could not release at least the portions of chapter 1 containing the discussion of search and seizure law and the digest of useful caselaw,” which was “precisely the type of information appropriate for release under the FOIA”). Mr. Pineiro does not even attempt to describe the content of the Handbook’s four appendices, much less justify withholding that content in its entirety under exemption 7(E). Appendix C, in particular, appears to contain nothing more than a list of preexisting documents that the Handbook “supersedes,” *see* Pineiro Decl. Ex. 1, and, thus, is unlikely to fall within the scope of Exemption 7(E).

“A district court may grant summary judgment to the government in a FOIA case only if ‘the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed.’” *PHE*, 983 F.2d at 250 (quoting *King*, 830 F.2d at 217). Because ICE has failed to satisfy that burden here, this Court should conclude that ICE has failed to justify withholding the Handbook under exemption 7(E).

III. ICE has failed to satisfy its heightened burden under the FOIA Improvement Act.

In 2016, Congress enacted the FOIA Improvement Act of 2016, which, among other things, amended FOIA by adding the following provision: “An agency shall ... withhold information under this section only if ... the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or ... disclosure is prohibited by law[.]” Pub. L. No. 114-185, § 2, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)). This requirement applies to all FOIA requests submitted after June 30, 2016 (the enactment date of the FOIA Improvement Act), *id.* § 6, 130 Stat. at 544, and therefore applies to the FOIA requests at issue in this case.

This Court’s decision in *Rosenberg v. United States Department of Defense*, 342 F. Supp. 3d 62 (D.D.C. 2018), was among the first to interpret the FOIA Improvement Act’s foreseeable-harm standard. In that case, the Court explained, in the context of an agency’s assertion of exemption 5, that the foreseeable-harm standard requires the agency to “explain how a particular exemption 5 withholding would harm the agency’s deliberative process” for each category of records withheld. *Id.* at 78. The Court concluded that the government does not meet that burden by “perfunctorily stat[ing] that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information” within the agency. *Id.* at 79 (internal quotation marks omitted).

In *Judicial Watch, Inc. v. United States Department of Commerce*, 375 F. Supp. 3d 93 (D.D.C. 2019), another district court, expounding on *Rosenberg*, explained that “the text and purpose of the [FOIA Improvement] Act both support a heightened standard for an agency’s withholding under Exemption 5.” *Id.* at 100. Under that heightened standard, “the technical application of an exemption [is] not sufficient without a showing that disclosure also harmed an

interest the exemption sought to protect in the first place.” *Id.* at 101. Thus, as another court recently stated, the FOIA Improvement Act “‘imposes an independent and meaningful burden on agencies’” that “‘was intended to restrict agencies’ discretion in withholding documents under FOIA.” *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, No. CV 18-2901 (BAH), 2019 WL 7372663, at *9 (D.D.C. Dec. 31, 2019) (quoting *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, No. 17-CV-5928 (JMF), 2019 WL 3338266, at *1 (S.D.N.Y. July 25, 2019)).

Here, ICE makes no attempt to demonstrate that its redactions to the Handbook satisfy the heightened standard of the FOIA Improvement Act. Neither its memorandum in support of summary judgment nor Mr. Pinero’s declaration suggests that disclosure is prohibited by law. And neither mentions, much less addresses, the FOIA Improvement Act’s foreseeable-harm standard. Moreover, neither offer any basis for concluding that ICE has satisfied that standard.

With respect to exemption 5, Mr. Pineiro asserts that disclosure of the Handbook “would discourage the expression of candid opinions and inhibit the free and frank exchange of information” and “result in a chilling effect on intra- and inter-agency communications,” and that “[d]rafts sometimes contain inaccurate or incomplete information.” Pineiro Decl. ¶ 19. But as courts have explained, such “boiler plate language” is insufficient under the FOIA Improvement Act because “[i]f the mere possibility that disclosure discourages a frank and open dialogue was enough for the exemption to apply, then Exemption 5 would apply whenever the deliberative process privilege was invoked regardless of whether disclosure of the information would harm an interest protected by the exemption.” *Judicial Watch, Inc.*, 375 F. Supp. 3d at 100–01; *see also Rosenberg*, 342 F. Supp. at 79 (holding that an agency’s perfunctory concern about free exchange of information was insufficient to satisfy FOIA Improvement Act); *Ctr. for Investigative*

Reporting, 2019 WL 7372663, at *9 (concluding that general statement about public confusion does not satisfy the FOIA Improvement Act).

ICE's showing is equally deficient in demonstrating any foreseeable harm to the interests protected by exemption 7(E). Mr. Pineiro states that release of the Handbook would "provide a 'how to manual' that would allow street gang members to avoid investigation and prosecution and thus circumvent the law." Pineiro Decl. ¶ 25. But "[t]o satisfy the 'foreseeable harm' standard," ICE must explain how a "particular" withholding would result in harm for "each category" of information withheld, *i.e.*, it "must do more than perfunctorily state that disclosure of all the withheld information—regardless of category or substance" would pose a foreseeable harm to the interests protected by Exemption 7(E). *Rosenberg*, 342 F. Supp. 3d at 78, 79; *see also Judicial Watch*, 375 F. Supp. 3d at 100 (requiring the agency to explain the "link between the specified harm and the specific information contained in the material withheld" (quoting H.R. Rep. No. 114-391, at 9 (2016))). ICE has not attempted to satisfy this statutory requirement.

IV. ICE has not released all segregable non-exempt material.

The "focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 733–34 (D.C. Cir. 2008) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir.1977)). Accordingly, "even when FOIA exemptions apply, 'any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt,'" unless the non-exempt portions "are inextricably intertwined with exempt portions." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (citations and brackets omitted). As explained above, ICE failed to meet its burden of demonstrating that exemptions 5 and 7(E) apply

to the Handbook and did not satisfy the heightened standard of the FOIA Improvement Act. Even if, however, the Court concludes that those exemptions apply to some of the material in the Handbook, ICE has failed to disclose all reasonably segregable material.

ICE's segregability showing in this case is remarkably similar to the one that the D.C. Circuit rejected in *Stolt-Nielsen Transportation Group*. In that case, the court explained that, "before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." 534 F.3d at 734 (quoting *Sussman*, 494 F.3d at 1116). After examining the record before the district court, the D.C. Circuit concluded that "the government's only justification for withholding the [documents sought] in the face of the redaction of identifying information [was] a conclusory affidavit by a Division official declaring that a Division paralegal had 'reviewed each page line-by-line to assure himself that he was withholding from disclosure only information exempt pursuant to the Act.'" *Id.* The court rejected that justification, holding that the agency's "conclusion on a matter of law is not sufficient support for a court to conclude that the self-serving conclusion is the correct one." *Id.*

Likewise here, ICE offers only a conclusory statement that the agency conducted a "line-by-line review" of the Handbook and that "[a]ll information not exempted from disclosure pursuant to the FOIA exemption specified above were [sic] correctly segregated and non-exempt portions were released." Pineiro Decl. ¶¶ 27–28. In other words, ICE does not contend (much less demonstrate) that non-exempt portions of the Handbook were "inextricably intertwined" with exempt material. *Sussman*, 494 F.3d at 1117 (quoting *Mead Data Cent.*, 566 F.2d at 260). Rather, ICE argues that each "line" of the redacted chapters and appendices of the Handbook contains material that is covered by Exemptions 5 or 7(E). That is a remarkable claim given the breadth of the redactions, yet ICE has not "show[n] with 'reasonable specificity' why the documents cannot

be further segregated.” *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578–79 (D.C. Cir. 1996). This Court, therefore, lacks a basis in the record for making the “specific findings of segregability” required under the FOIA. *Sussman*, 494 F.3d at 1116.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs’ motion for summary judgment and deny ICE’s motion for summary judgment.

February 12, 2020

Respectfully submitted,

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**PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF FACTS
TO WHICH THERE IS NO MATERIAL DISPUTE AND
PLAINTIFFS' CROSS-STATEMENT OF UNDISPUTED FACTS**

Defendant's Statements and Plaintiffs' Responses

1. This is an action under the Freedom of Information Act ("FOIA") involving twenty-four FOIA requests submitted in September 2017 to Defendant U.S. Immigration and Customs Enforcement ("ICE" or the "Defendant") concerning "Operation Mega or related operations." (Compl. ¶ 12).

PLAINTIFFS' RESPONSE: Undisputed.

2. In a Joint Status Report dated November 19, 2019 (ECF No. 29), the parties reported that only one issue remained in dispute between the parties that required resolution by the Court on summary judgment motions. (ECF No. 29 ¶ 3).

PLAINTIFFS' RESPONSE: Undisputed.

3. That issue concerns Defendant's withholdings in one document produced by Defendant on November 14, 2019, namely, a draft document entitled Homeland Security

Investigations Criminal Street Gangs Investigations Handbook (the “Handbook”). (ECF No. 29 ¶ 3; Pineiro Decl. ¶¶ 9-10).

PLAINTIFFS’ RESPONSE: Disputed as a matter of law that the document is properly considered a “draft” for purposes of the deliberative process privilege. *See* Pls. Mem. at 4–6. Disputed that the issue concerns withholdings in a document produced by defendant on November 14, 2019; the issue remaining in dispute involves the withholdings of the Handbook as produced by Defendant on January 15, 2020. Pineiro Decl. ¶ 12 and Ex. 1.

4. Defendant had made redactions on the Handbook based on Exemptions 5 and 7(E) of FOIA, and produced a redacted copy of the Handbook to Plaintiff on November 14, 2019. (Pineiro Decl. ¶¶ 9-10).

PLAINTIFFS’ RESPONSE: Undisputed as to the facts stated. Plaintiffs dispute as a matter of law Defendant’s invocation of exemptions 5 and 7(E). *See* Pls. Mem. at 4–9.

5. Upon further review, ICE released a copy of the Handbook with fewer redactions on November 25, 2019, and, based on further review, released another copy of the Handbook with even fewer redactions on January 15, 2020. (Pineiro Decl. ¶¶ 11-12 and Ex. 1).

PLAINTIFFS’ RESPONSE: Undisputed.

6. The remaining withholdings on the Handbook as released on January 15, 2020, were made under Exemption 5 and 7(E) of FOIA. (Pineiro ¶ 12).

PLAINTIFFS’ RESPONSE: Undisputed as to the facts stated. Plaintiffs dispute as a matter of law Defendant’s invocation of exemptions 5 and 7(E). *See* Pls. Mem. at 4–9.

7. The Handbook is a draft document and precedes the final version of the Handbook by over one year. (Pineiro Decl. ¶¶ 9, 13-15 and Ex. 1).

PLAINTIFFS’ RESPONSE: Plaintiffs dispute that the Handbook is a draft document for

purposes of exemption 5. *See* Pls. Mem. at 4–6; Llewellyn Decl. Exs. A & B. Plaintiffs do not dispute that ICE issued a version of the Handbook in August 2018.

8. The Handbook was compiled for a law enforcement purpose. (Pineiro Decl. ¶¶ 20–21).

PLAINTIFFS’ RESPONSE: Undisputed.

9. The Handbook contains techniques and procedures for law enforcement investigations, and also reflects guidelines for law enforcement investigations. (Pineiro Decl. ¶¶ 23–24).

PLAINTIFFS’ RESPONSE: Disputed. The cited declaration provides an insufficient basis to conclude that the Handbook contains such techniques, procedures, or guidelines. *See* Pls. Mem. at 6–9.

10. Disclosure of the redacted contents of the Handbook would risk circumvention of the law. (Pineiro Decl. ¶ 25).

PLAINTIFFS’ RESPONSE: Disputed. The cited declaration provides an insufficient basis to conclude that disclosure of the redacted contents of the Handbook would risk circumvention of the law. *See* Pls. Mem. at 6–9.

11. All reasonably segregable, non-exempt information in the Handbook has been released to Plaintiff. (Pineiro Decl. ¶¶ 11–12, 26–28, and Ex. 1).

PLAINTIFFS’ RESPONSE: Disputed. The cited declaration provides an insufficient basis to conclude that Defendant has released all reasonably segregable, non-exempt information in the Handbook to Plaintiffs. *See* Pls. Mem. at 6–9.

Plaintiffs' Cross-Statement of Undisputed Facts

12. On September 12, 2017, plaintiffs Mijente Support Committee and Detention Watch Network (collectively, Plaintiffs), along with other requesters, filed 20 FOIA requests to various ICE field offices seeking a disclosure of records concerning “Operation Mega or related operations.” (Compl. ¶ 10; Answer ¶ 10; Pineiro Decl. ¶ 5).

13. On September 13, 2017, Plaintiffs, along with other requesters, filed two FOIA requests with two additional ICE field offices seeking the same information as requested in the September 12, 2017, FOIA requests, except with respect to certain requests specifically related to the two additional field offices. (Compl. ¶ 11; Answer ¶ 11; Pineiro Decl. ¶ 5).

14. On September 14, 2017, Plaintiffs, along with other requesters, filed two FOIA requests to two additional ICE field offices seeking the same information as requested in the September 12 and 13, 2017, FOIA requests, except with respect to certain requests specifically related to the two additional field offices. (Compl. ¶ 12; Answer ¶ 12; Pineiro Decl. ¶ 5).

15. In the course of this lawsuit, ICE produced a redacted version of the document identified as the “gang membership identification training course.” (Llewellyn Decl. ¶ 2).

16. The document identified as the “gang membership identification training course” consists of a slide deck covering the following topics (as indicated by the page headings): “Gang Member Identification Training—Objectives,” “Gang Definition,” “Identifying Criteria,” “Membership Definitions,” “ICM Codes,” and “Best Practices.” (Llewellyn Decl. Ex. A).

17. The final page of the slide deck lists two “Sources”: “Gangs Handbook (DRAFT)” and “OI-M-08-0404, April 8, 2008, OI Director Marcy M. Forman Memorandum ‘TECS-II Subject Record Enhancements for Worksite Enforcement/Community Shield’” (“Forman Memo”). (Llewellyn Decl. Ex. A).

18. The Forman Memo is a two-page document that addresses database entry of the “criminal affiliation” and “position” of gang members. (Llewellyn Decl. Ex. B).

19. The document identified as “Gangs Handbook (DRAFT)” refers to a document entitled “Criminal Street Gangs Investigations Handbook” and dated April 10, 2017 (the “Handbook”). (Pineiro Decl. ¶ 9).

20. The Handbook is 48 pages in length and consists of a cover page, a foreword, a table of contents, twelve chapters, and four appendices. (Pineiro Decl. Ex. 1).

21. The chapters of the Handbook are: “PURPOSE AND SCOPE,” “INTRODUCTION,” “DEFINITIONS,” “AUTHORITIES/REFERENCES,” “RESPONSIBILITIES,” “INVESTIGATIVE STRATEGIES,” “DISRUPTION STRATEGIES,” “CRIMINAL LAWS AND INVESTIGATIVE TECHNIQUES,” “REPORTING,” “COORDINATION WITH FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT PARTNERS,” “FOREIGN INVESTIGATIONS,” and “FUNDING MECHANISMS FOR GANG INVESTIGATIONS.” (Pineiro Decl. Ex. 1).

22. ICE relied on the April 10, 2017 version of the Handbook to develop and implement a training program for its personnel. (Llewellyn Decl. Ex. A; Pineiro Decl. ¶¶ 7 & n.2, 11, and Ex. 1).

23. ICE obtained most of the information for its “gang membership identification training course” from the April 10, 2017 version of the Handbook. (Llewellyn Decl. Exs. A and B; Pineiro Decl. Ex. 1).

24. Through its training program, ICE communicated to its personnel that the April 10, 2017 version of the Handbook reflected ICE’s policies on the matters contained therein. (Llewellyn Decl. Ex. A; Pineiro Decl. Ex. 1)

25. ICE has withheld the following portions of the Handbook: the subchapter headings, the body of all chapters except Chapter 1 and the definitions of “gang” and “gang member” in Chapter 3, and the appendices. (Pineiro Decl. Ex. 1).

26. ICE has failed to explain adequately why information that may be contained in the Handbook must be redacted to prevent disclosure of law-enforcement techniques or circumvention of the law. (Pineiro Decl. ¶¶ 23–25).

27. ICE has not identified the subjects covered by the Handbook’s appendices. (*See generally* Pineiro Decl.)

28. ICE has not submitted evidence that describes foreseeable harm that would result from disclosure of the redacted portions of the Handbook. (*See generally* Pineiro Decl.).

29. ICE conducted a line-by-line review of the Handbook to identify to information exempt from disclosure. (Pineiro Decl. ¶ 27).

30. ICE has not provided adequate evidence that it considered whether non-exempt information was inextricably intertwined with exempt information contained in the Handbook. (*See generally* Pineiro Decl.).

February 12, 2020

Respectfully submitted,

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